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Servicer’s Duty to Respond Upon Receipt of Borrower’s Notice of Error Concerning its Management of a Loan

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Introduction

The Consumer Financial Protection Bureau (“CFPB”) makes sure that borrowers “are treated fairly by banks, lenders, and other financial institutions.”¹ The Department of Housing and Urban Development implemented Regulation X in 1975, which incorporated the Real Estate Settlement Procedures Act (“RESPA”) and designated the CFPB with rule-making authority to ensure compliance under this Act.² This congressional response “to [the] perceived abuses in real estate settlement process” attempted to “protect consumers from unnecessarily high settlement charges resulting from those abuses.”³

A qualified written request (“QWR”) is written correspondence from the borrower to servicer, including the identity, name, and account of the borrower, which either (1) states the reasons why a borrower believes the account is in error (“Notice of Error”) or (2) provides detail

to the servicer regarding information related to the servicing of the mortgage loan sought by the borrower (“Request for Information”). Under RESPA, Congress obligates servicers with a particular duty to respond to a QWR to ensure a borrower’s concerns are met. This regulation can be a powerful tool for borrowers, especially those on the brink of foreclosure. For example, if a borrower sends a Notice of Error based on loss-mitigation errors, then the issue must be resolved before a foreclosure sale can proceed.

This memorandum examines what constitutes a Notice of Error and whether a service provider timely and properly acknowledges, investigates, and complies with a borrower’s QWR under RESPA. Part I examines the responsibilities of a borrower to correctly issue a QWR. Part II focuses on the responsibilities of a servicer in receipt of a QWR. Part III discusses exceptions which do not trigger a servicer’s duty to respond.

Discussion

I. Borrower’s Responsibilities

A. Scope of Notice of Errors

One QWR that invokes a servicer’s duty to respond is when a borrower asserts that the servicer has erred, otherwise known as a Notice of Error. Not every written statement where a borrower raises an objection, however, will amount to a Notice of Error. In addition to a number of specified covered errors, the statute’s scope also covers “any other error relating to the

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4 See Real Estate Settlement Procedures Act (Regulation X) 12 C.F.R. § 1024.31 (2021).
7 See 12 C.F.R. § 1024.35(a) (2016) (requiring the QWR include “the name of the borrower, information that enables the servicer to identify the borrower’s mortgage account, and the error the borrower believes has occurred”).
servicing of a borrower’s mortgage loan,” which, on its face, lacks clarity in determining what exactly falls within this catch-all provision.9

Originally, review of CFPB comments prompted a narrow reading of this catch-all provision.10 Such commentary, as found in the official interpretation of RESPA, weighed input from industry groups and consumer groups against the CFPB’s goals.11 After careful consideration, the Bureau “believe[d] that the appeals process set forth in § 1024.41(h) provide[d] an effective procedural means for borrowers to address issues relating to a servicer’s evaluation of a borrower for a loan modification program.”12 Because of this already existing applicable statute, the Bureau declined to add evaluation of loss mitigation appeals as a covered category in RESPA and likewise precluded coverage within the catch-all provision.13

However, this approach was recently overruled and such narrow interpretation was foreclosed within the Second Circuit. Currently, RESPA is interpreted broadly to include “any error that has some connection with or pertains to loan servicing.”14 The statute’s broad language and use of the words “any” and “relating to” prompts the catch-all provision to extend beyond errors found solely “in” the servicing of loans.15

B. Notice of Delivery

9 12 C.F.R. § 1024.35(b)(11).
10 See Sutton v. CitiMortgage, Inc., 228 F.Supp.3d 254, 272–73 (S.D.N.Y. 2017) (holding that where other statutes provide guidance for particular issues, such as loan mitigation application appeals, RESPA shall not apply because it would undermine these other statutes).
12 Id.
13 See Sutton, 228 F.Supp.3d at 272–73.
14 See Naimoli v. Ocwen Loan Servicing, LLC, 22 F.4d 376, 383 (2d. Cir. 2022) (finding that an error in loss mitigation application falls within RESPA coverage).
15 Id. at 384.
To initiate a Notice of Error, a borrower must follow the strict requirement of delivering its request to a designated address provided by the servicer.\textsuperscript{16} If a loan servicer provides a borrower with a specific address to receive correspondence, a servicer’s duty to respond is not triggered until receipt of the QWR at that address.\textsuperscript{17}

Analysis under the \textit{Chevron} two question test establishes that a servicer may not waive this delivery requirement.\textsuperscript{18} First, a court must determine whether a statute has a clear meaning per congressional intent or whether it is ambiguous.\textsuperscript{19} If silent or ambiguous regarding the specific issue at hand, the second question requires asking “whether the [proposed] answer is based on a permissible construction of the statute” that is not “arbitrary, capricious, or manifestly contrary to the statute.”\textsuperscript{20} In looking at the text of the statute, the Court acknowledged that RESPA does not define “receipt,” and legislative history provided little guidance.\textsuperscript{21} As for the second question, permitting a servicer to “designate an exclusive address where such requests can be handled does not undermine” RESPA’s goal of giving consumers “greater and more timely information.”\textsuperscript{22}

A servicer’s delivery requirements are not applicable until the servicer informs the debtor of its intended address.\textsuperscript{23} It is critical that a servicer use strict language, clearly directing the borrower to send requests to a sole address authorized to receive Notices of Errors.\textsuperscript{24} This

\begin{itemize}
\item \textsuperscript{16} 12 C.F.R. § 1024.35(c).
\item \textsuperscript{17} Basora v. JPMorgan Chase Bank, 202 F.Supp.3d 1328, 1331 (S.D. Fla. 2016) (finding that the CFPB’s regulations have been updated from a “permissive requirement to one that [is] mandatory”).
\item \textsuperscript{19} \textit{Id}.
\item \textsuperscript{20} \textit{Id}.
\item \textsuperscript{21} Berneike v. CitiMortgage, Inc., 708 F.3d 1141, 1148 (10th Cir. 2013).
\item \textsuperscript{22} \textit{Id}. at 1149. (holding that a servicer may not waive a borrower’s delivery requirement by responding to a QWR sent to the wrong address, and that such communication by a borrower fails to trigger a servicer’s response requirements).
\item \textsuperscript{23} 12 C.F.R. § 1024.35(c) (requiring a servicer also post the designated address on their website).
\item \textsuperscript{24} \textit{See Basora}, 202 F.Supp.3d at 1331.
\end{itemize}
condition insists that the servicer’s designation of an address be conveyed to the borrower as mandatory to assert a Notice of Error, as opposed to bearing permissive qualities. Thus, a mere invitation to use a designated address, rather than asserting the designated address as a command is insufficient.

II. Servicer’s Requirements

Upon receipt of a borrower’s Notice of Error, a servicer has several duties to respond. First, a “servicer shall provide to the borrower a written response acknowledging” its receipt of the Notice of Error within five days. Afterwards, the servicer must either (1) correct the error or (2) conduct a reasonable investigation to determine that no error has occurred. The “mere procedural completion of some investigation” is not satisfactory.

A servicer must then respond with their determinations and appropriate supporting documentation “no later than seven days (excluding legal public holidays, Saturdays, and Sundays)” from receipt of the Notice of Error. In a foreclosure context, a servicer is granted up to thirty days to respond. However, if the borrower’s Notice of Error was received within seven or fewer days from the scheduled foreclosure sale, the servicer’s response requirement is

25 Id.
26 See Blanton v. Roundpoint Morg. Servicing Corp., No. 15 C 3156, 2016 WL 3653577, at *7 (N.D. Ill. July 7, 2016) (finding that language such as “please write to” was permissive and “insufficient to notify the borrower that notices of error ‘must’ be sent to the designated address”); See also Basora, 202 F.Supp.3d at 1331 (finding that where a servicer requests that QWR’s be mailed to their “exclusive address” for receipt and handling of requests, such language is clearly indicative of the only address authorized to receive Notices of Errors).
27 12 C.F.R. § 1024.35(d).
28 12 C.F.R. § 1024.35(e)(1)(i)(A).
relinquished. In evaluating required response time, each “day” is construed to mean “calendar day.”

Upon deciding that no error has occurred, the servicer must provide some explanation to be in compliance with RESPA. To be sufficient, the response must also notify the borrower that they may request additional documents the servicer relied upon in reaching its determination.

III. Exceptions

RESPA acknowledges that there are certain instances that relieve a servicer of complying with their typical substantive response and timing duties. For example, if a servicer receives the Notice of Error more than one year after obtaining possession of the mortgage loan, then the servicer is no longer obligated to comply with the response requirements. Additionally, response obligations cease where a servicer receives a duplicative Notice of Error to which they have already responded.

Further, RESPA will not require servicers to respond when the servicer “reasonably determine[s]” that a request is overbroad or unduly burdensome. A Notice of Error is overbroad if the servicer cannot reasonably identify the specific error being asserted to the borrower’s account. Thus, any blanket request for an “unreasonable volume of documents” is

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33 Id. (disagreeing with the plaintiffs contention that “computation of days by 24 hour periods is the proper way to determine days because a foreclosure sale occurs at a specific time of day on the schedules [ ] date”).
34 Lage v. Ocwen Loan Servicing, LLC, 145 F.Supp.3d 1172, 1191 (S.D. Fla. 2015) (finding boilerplate, nonresponsive language constitutes failure to comply with the regulation).
36 See In re Llanos, 609 B.R. 228, 233 (Bankr. C.D. Cal. 2019) (asserting that the pertinent date for tolling a statute of limitations is from when loan servicing is received by or transferred to the servicer).
38 12 C.F.R. § 1024.35(g).
39 Id.
overbroad and unduly burdensome and fails to trigger a servicer’s typical duty to investigate.\textsuperscript{40} Alternatively, if the servicer can ascertain a “valid assertion of an error in a notice of error that is otherwise overbroad,” the servicer must comply with the typical response requirements with respect to that specific error and advise the borrower as to the overbreadth of the remainder of the notice.\textsuperscript{41}

**Conclusion**

Through RESPA, the CFPB ensures that when a borrower sufficiently meets Notice of Error requirements, a servicer will timely and diligently respond to the borrower’s concerns. RESPA fairly provides servicers a chance to correct any legitimate error and apprise the borrower of its work in doing so. If thorough investigation reveals that there is no error, a servicer may alternatively defend their position by likewise apprising the borrower of its review with supporting documents. Where a servicer fails to satisfy its statutory duty to respond to a Notice of Error, the CFPB permits a borrower to state a claim against a servicer and plead damages accordingly.

\textsuperscript{41} 12 C.F.R. § 1024.35(g).