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RESPA and TILA's Impact on Chapter 13

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I. INTRODUCTION

The Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010 (Dodd-Frank) established the Consumer Financial Protection Bureau (CFPB), which was empowered under Dodd-Frank to issue implementing regulations (as well as its “official interpretations” of such regulations) with respect to the Real Estate Settlement Procedures Act of 1974¹ (RESPA) and the Truth in Lending Act of 1968² (TILA). Dodd-Frank also consolidated authority to administer RESPA and TILA with the CFPB.³

Dodd-Frank was a direct product of the financial crisis of 2007-2008, and its provisions regarding TILA and RESPA reflect Congress’s determination that the then-existing regulatory scheme for the mortgage servicing industry was ineffective. Accordingly, pursuant to Dodd-Frank, the CFPB has issued modified and substantially more thorough/extensive versions of Regulations X and Z (compared to the old HUD and FRB-promulgated Regs.). These post-Dodd-Frank amendments to Regulations X (RESPA) and Z (TILA) officially went into effect on January 10, 2014.

Ok, we get it. RESPA and TILA seem complicated and technical, and bankruptcy is already hard enough. Indeed, for many (and probably most) consumer bankruptcy practitioners, RESPA and TILA probably seem like arcane, convoluted statutes that appear to be practically impenetrable due to their obscurity, complexity, and density. Likewise, RESPA and TILA, through Regs X and Z, separately and yet simultaneously address a variety of distinct, yet inherently interrelated aspects of mortgage servicing. Unfortunately, while it might make a lot of sense to integrate the parts of RESPA and TILA (including Regs X and Z) that regulate mortgage loan servicing into a single law, these are not the laws we have, at least not presently. Instead, RESPA and TILA remain two totally separate, yet very much parallel statutory and regulatory schemes that are best understood and “enjoyed” *together*.

So: Sorry. They’re complicated. Get over it: For lawyers representing mortgage servicer creditors, as well as those who represent consumer debtors, especially in the consumer bankruptcy environment, RESPA and TILA’s unfortunate complexity and disjunctive

¹ 12 U.S.C. 2601 *et seq.* as implemented by Regulation X, 12 C.F.R. Part 1024.

² 15 U.S.C. 1601 *et seq.* as implemented by Regulation Z, 12 C.F.R. Part 1026

³ Prior to Dodd-Frank, the Department of Housing and Urban Development (HUD) promulgated Regulation X, which implements RESPA, and Regulation Z, TILA’s implementing regulation, was issued by the Board of Governors of the Federal Reserve System (aka the Federal Reserve Board or FRB).

organizational structure is no justification for remaining ignorant of the rights, remedies, and responsibilities these laws establish. The good news for newbies, perhaps, is that everyone currently learning about RESPA and TILA's mortgage servicing provisions after Dodd-Frank is essentially on a level playing field, since the CFPB's major revisions of Regs X and Z only became effective on January 10, 2014. Indeed, the case law interpreting these new regulations is still very actively developing and evolving.⁴

What can the new RESPA and TILA do for you and your bankruptcy clients?

The new RESPA and new TILA provisions in Dodd-Frank lay out a substantial array of new obligations for mortgage servicers, many of which are privately enforceable by the borrower and authorize actual damages and attorneys' fees. Statutory damages are also available in cases where the borrower can establish a pattern or practice of a servicer's non-compliance with these duties. So: debtors' counsel, take note: *It pays to know how to use RESPA and TILA!*

Practically speaking, RESPA and TILA grant borrowers (and their counsel) (a) a mechanism for obtaining information from servicers regarding the servicing of the borrower's loan (this is a broadly-defined concept in new RESPA), (b) a process for requiring mortgage servicers to address, correct, and/or explain identified errors, (c) access to more understandable mortgage billing statements⁵, (d) more advance notice of payment changes than the Bankruptcy Code and Rules require, and (e) a mechanism for getting a prompt payoff statement. RESPA and TILA also specifically authorize borrowers to pursue private causes of action against servicers who fail to honor these obligations.

The following chart provides a bullet-point summary of the new RESPA and TILA servicing provisions that are likely to be useful and/or relevant to consumer bankruptcy practitioners, many of which are discussed in more detail elsewhere in this paper:

⁴ As of the writing of this article, a relatively small number of Circuit Court opinions have considered and interpreted RESPA and TILA under the post-Dodd-Frank amendments to Regulations X and Z: *See, e.g. Renfro v. Nationstar Mortgage LLC*, __ F.3d __, 2016 WL 2754461 (11th Cir. May 12, 2016) *per curiam* (Reversing district court dismissal of RESPA "notice of error" claims for actual and statutory damages based on sufficiency of specific damages allegations in complaint); *Nunez v. J.P. Morgan Chase Bank, N.A.*, __ Fed. Appx. __, 2016 WL 1612832 (11th Cir. April 22, 2016) (Reversing dismissal of RESPA claims, emphasizing that allegations in complaint are to be construed in plaintiff's favor and no inferences should be drawn in favor of Defendant); *Campbell v. Nationstar Mortgage*, 611 F. App'x 288, 296-97 (6th Cir. 2015), *cert. denied*, 136 S. Ct. 272, 193 L. Ed. 2d 137 (2015) (discussing effective date of Reg. X amendments as indicator that the amendment to Reg. X did not have retroactive effect.);

⁵ Note that servicers are currently excepted from this requirement while the borrower is in an active bankruptcy. Discussions are ongoing at the CFPB regarding whether to eliminate this exception.

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