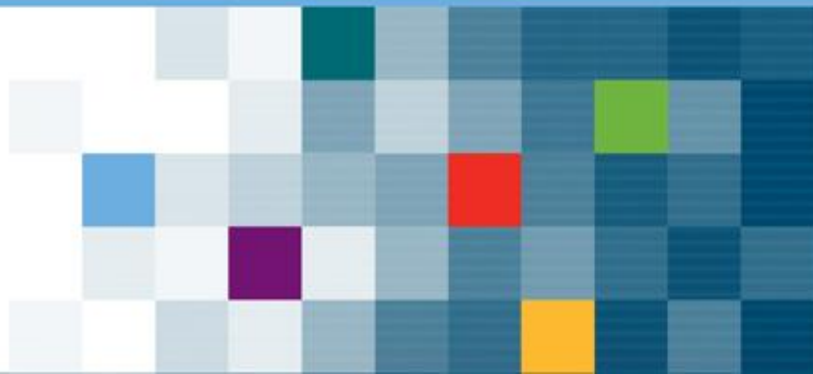


# Mastering Foreclosure Law and MERS

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# Settlement Workout Options

- Deed in Lieu of Foreclosure.
- Cash for Keys/Agreed Foreclosure.
- Short Sale.
- Short Payoff.
- Loan Modification.

# HAMP (Home Affordable Modification Program)

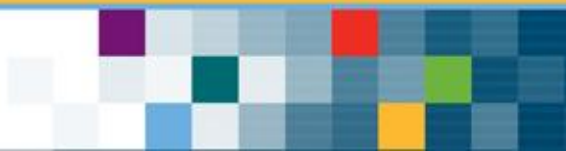
- What is HAMP?
  - As part of the Emergency Economic Stabilization Act of 2008 (which created TARP), the federal government enacted the Making Home Affordable Plan, which includes HAMP and HARP.
  - HAMP mods began in the Spring of 2009.
  - The Trial Period Plan (TPP) requires three monthly payments.

# HAMP Litigation to Stop Foreclosure

- Borrowers allege Lender cannot foreclose because:
  - Lender did not evaluate Borrower for a HAMP modification as required;
  - Lender promised Borrower a HAMP modification;
  - Borrower made TPP payments and is entitled to a permanent loan modification.

# HAMP Litigation to Stop Foreclosure

- Lenders argue:
  - No private cause of action for Borrower to enforce obligations under HAMP.



# HAMP Litigation to Stop Foreclosure

- Borrowers are using state law claims to enforce HAMP:
  - Breach of contract.
  - Promissory Estoppel.
  - Fraud.
  - State consumer protection act violation.
- *Wigod v. Wells Fargo Bank N.A.*, No. 11-1423 (7<sup>th</sup> Cir. March 2012)
  - Issue was whether Borrower asserted state law claims against Servicer for refusing to modify her loan pursuant to HAMP.
  - Borrower could assert state law claims.

# CFPB Mortgage Servicing Rules

- Amend TILA and RESPA.
- January 10, 2014 Effective Date.
- Early Intervention for Delinquent Borrowers.
- 120-Day Rule.
- A number of practical issues:
  - What does it mean to be “delinquent”?
  - Compliance with FDCPA and mortgage servicing rules.
  - Loss mitigation review - how many times and how often?
  - Impact of litigation on loss mitigation review.

# Loss Mitigation Procedures – 12 CFR § 1024.41

- Only applicable to loans secured by principal residence.
- Five days to notify Borrower of receipt of loss mitigation packet and what additional information is needed.
- If application is received 37 days prior to foreclosure, review must be completed within 30 days.
- If application is received 90 days prior to foreclosure, Borrower is entitled to appeal any loss mitigation determination.



# Loss Mitigation Procedures – 12 CFR § 1024.41

- No foreclosure action unless the loan is more than 120 days delinquent.
- Servicer cannot start the process if Borrower has submitted a *complete* application unless:
  - Borrower is notified that no loss mitigation options are available and all appeals are exhausted;
  - Borrower rejects all loss mitigation options; or
  - Borrower fails to comply with the loss mitigation requirements.
- Servicer cannot move for judgment if Borrower submits a *complete* application unless:
  - Borrower is notified that no loss mitigation options are available and all appeals are exhausted;
  - Borrower rejects all loss mitigation options; or
  - Borrower fails to comply with the loss mitigation requirements.



# TILA Right to Rescind

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# TILA

- 15 U.S.C. § 1635(a) – Borrower “shall have the right to rescind . . . by notifying the creditor, in accordance with the regulations of the Board, of his intention to do so.”
- Rescission Process
  - Allegations in Pleadings.
  - What happens first?

# Circuit Split on TILA Right to Rescind

When must Borrower bring a rescission claim?

- Borrower files complaint for rescission within three years (Bright Line Rule) -
  - *Lumpkin v. Deutsche Bank Nat'l Trust Co.*, 2013 U.S. App. Lexis 16576 (6th Cir. 2013).
  - *Keiran v. Home Capital*, 720 F.3d 721 (8th Cir. 2013).
  - *McOmie-Gray v. Bank of Am. Home Loans*, 667 F.3d 1325 (9th Cir. 2012).
  - *Rosenfield v. HSBC Bank, USA*, 681 F.3d 1172 (10th Cir. 2012).

# TILA Rescission Claims

When must Borrower bring a rescission claim?

- Borrower only must “exercise” rescission right within three years (letter?) -
  - *Sherzer v. Homestar Mortgage Servs.*, 707 F.3d 255 (3d Cir. 2013).
  - *Gilbert v. Residential Funding LLC*, 678 F.3d 271 (4th Cir. 2012)
  - CFPB Position – Amicus Briefs

# TILA Right to Rescind

- *Jesinoski v. Countrywide Home Loans, Inc.*, 729 F.3d 1092 (8th Cir. 2013) -
  - » Eighth Circuit held action barred because complaint seeking rescission not filed within three years.
  - » Supreme Court granted certiorari to resolve the circuit split on April 28, 2014.

# TILA Right to Rescind

- Supreme Court holds that Borrower must send notice to the creditor within three years to exercise rescission right.
- *Jesinoski v. Countrywide Home Loans, Inc.*, 135 S. Ct. 790 (U.S. 2015).
- What now?
  - If Lender gets a notice within three years, should Lender file suit?
  - What about tender requirements?

# RESPA REQUEST FOR INFORMATION

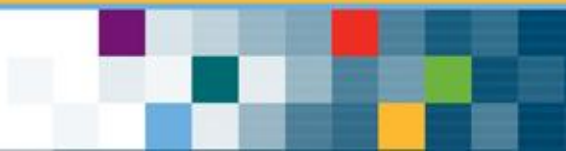
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# Borrowers' Request for Information

- RESPA Qualified Written Request.
- RESPA Servicing Rules:
  - Notice of Error and Error Resolution Procedures 1024.35.
  - Requests for Information 1024.36.



# Common Borrower Claims – RESPA – Qualified Written Requests

**12 U.S.C. § 2605(e)(1)(B)** - Written correspondence, other than notice on a payment coupon or other payment medium supplied by Servicer, that -

- (i) includes, or otherwise enables Servicer to identify, name and account of Borrower; and
- (ii) includes a statement of the reasons for the belief of Borrower, to the extent applicable, that the account is in error, or provides sufficient detail to Servicer regarding other information sought by Borrower.

# Common Borrower Claims – RESPA – Qualified Written Requests

- **Notice of receipt of inquiry** -  
20 business days (as of January 10, 2014 -  
five days).
- **Action with respect to inquiry** -  
60 business days (as of January 10, 2014 -  
thirty days).
- **Damages**
  - Actual damages;
  - \$1,000 for individual actions (as of January 10, 2014 -  
\$2,000);
  - \$500,000 for class actions (as of January 10, 2014 -  
\$1,000,000).

# RESPA –Servicing Rules

## Notice of Error

- **Notice of Error** – Includes QWRs.
- **“Error”** – Failure to:
  - Accept or apply payments.
  - Credit a payment to Borrower’s account as of the date of receipt.
  - Timely pay taxes, insurance premiums, or other charges.
  - Provide an accurate payoff balance (within seven days).
  - Provide accurate loss mitigation options to Borrower.
  - Transfer accurately and timely information relating to the servicing of Borrower’s mortgage loan to a transferee servicer.

# RESPA –Servicing Rules

## Notice of Error

- **“Error” (continued)**
  - Improper imposition of a fee or charge.
  - Moving forward with foreclosure in violation of the new loss mitigation rules.
  - Any other error relating to servicing of a mortgage loan.
    - Does not include errors during origination, underwriting, sale or securitization.

# RESPA – Servicing Rules

## Requests for Information

- **Requests for Information**
  - Requests information “with respect to the borrower’s mortgage loan.”
  - Not requests for payoff balance.
- **Generally similar timeframes as QWR**
  - 5 days – acknowledgment of receipt.
  - 30 days – investigation and response (unless a request for owner or assignee of the loan which is ten days).
    - Can be extended 15 days in most circumstances.

# RESPA – Servicing Rules

## Requests for Information

- Investigation and response requirements
  - Provide Borrower with requested information in writing;  
OR
  - Conduct a *reasonable search* for the requested information and notify Borrower that information not available and basis for determination.
- Requirements not applicable
  - Duplicative information.
  - Confidential, proprietary, or privileged information.
  - Irrelevant information – not related to mortgage loan account.
  - Overbroad or unduly burdensome.
  - Untimely.

# RESPA - Request for Information - Damages

- Actual damages.
- Statutory damages up to \$2,000 for individual actions or \$2,000 per class member not to exceed the lesser of \$1,000,000 or one percent of Servicer's net worth.
- Attorney's fees and costs.
- Three-year statute of limitations.
- CFPB and state attorney generals can also enforce.



# Dodd-Frank Amendment to RESPA – 12 U.S.C. § 2605(k) - A servicer shall not:

- (k)(1)(C) – fail to take timely action to respond to Borrower’s requests to correct errors relating to allocation of payments, final balances for purposes of paying off loan, or avoiding foreclosure, or other standard Servicer duties.
- (k)(1)(D) – fail to respond within ten business days to request from Borrower to provide identity, address, and other relevant contact information about owner or assignee of loan.
- (k)(1)(E) – fail to comply with any other obligation found by CFPB, by regulation, to be appropriate to carry out consumer protection purposes of this Chapter.
- **Implementing Regulation X**
  - **Section 1024.35 – Error Resolution Procedures**
  - **Section 1024.36 – Requests for Information**

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