THE NATIONAL MORTGAGE SETTLEMENT: WHERE ARE WE NOW?
(2016 Amendments to the 2013 CFPB Mortgage Servicing Rules
Effective October 19, 2017)

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Prior to the year 2012, homeowners in this country were facing a national foreclosure crisis and consumer financial distress was at an all-time high. However, on March 12, 2012, touted as a landmark agreement, the $25 billion National Mortgage Settlement brought together 49 state attorneys general, the Department of Justice, and the Department of Housing and Urban Development (HUD) into one Consent Judgment addressing these grave concerns. ¹ This settlement was lauded to forever change the landscape of homeowner rights in our country. Particularly interesting was one aspect of the Consent Judgment that provided for detailed new servicing standards that were designed to provide better protections for homeowners. As announced in the March 12, 2012, Press Release (12-306) from the Department of Justice:

The new servicing standards make mortgagors a last resort by requiring servicers to evaluate homeowners for other loss mitigation options first. Servicers will be restricted from foreclosing while the homeowner is being considered for a loan modification. The new standards also include procedures and timelines for reviewing loan modification applications and give homeowners the right to appeal denials. Servicers will also be required to create a single point of contact for borrowers seeking information about their loans and maintain adequate staff to handle calls.²

The National Mortgage Settlement was just the first step on what was to become a long journey for regulators in their efforts to implement needed reforms in the mortgage servicing industry. In January of 2013, the Consumer Financial Protection Bureau (CFPB)³ promulgated new mortgage servicing rules (2013 Rules), consistent with the servicing standards outlined in the

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³ The Consumer Financial Protection Bureau was established by Title X of the Dodd-Frank Wall Street Reform and Consumer Protection Act, 12 U.S.C. § 5491 et seq.
National Mortgage Settlement. These 2013 Rules provided much needed guidance to mortgage servicers and borrowers concerning their rights and obligations under the regulations governing their relationship.

The 2013 Rules covered, among other things, force-placed insurance, notice policies and procedures, early intervention, and loss mitigation requirements under Regulation X servicing provisions, as well as prompt crediting and periodic statement requirements under Regulation Z’s provisions. While quite responsive to the need for defining the relationship between borrower and servicer, the 2013 Rules did not fully address all the concerns and issues that existed between service providers and borrowers.4

Thus, in August of 2016, the CFPB, in an effort to clarify, revise and amend certain provisions of the 2013 Rules, offered several amendments (2016 Amendments). The 2016 Amendments included, but were not limited to, addressing proper compliance regarding certain servicing requirements when a person is a potential or confirmed successor in interest, is a debtor in bankruptcy, or sends a cease communication under the Fair Debt Collection Practices Act. The 2016 Amendments also made technical corrections to several provisions of Regulation X and Z as well as updates to the loss mitigation requirements. The 2016 Amendments became effective October 19, 2017.5

**PERSPECTIVES FROM A NEW CONSUMER PROTECTION ATTORNEY**

In 2016, I began my tenure as a consumer protection attorney. One of my first assignments during the second week of employment was to mediate an impending foreclosure sale. A consumer filed an official complaint with the Attorney General’s (AG) Office of the State of Mississippi seeking assistance pursuant to Mississippi Code Annotated Section 75-24-15 (2).6 Mississippi law provides that any individual who is contemplating private action under the Mississippi Consumer Protection Act must first make a reasonable attempt to resolve any claim through an informal dispute settlement program approved by the Attorney General. The consumer filed the complaint on November 29th seeking assistance related to a foreclosure sale that was set for December 1st.

It was at this time that I was personally introduced to the 2012 National Mortgage Settlement’s practical application and its influence in the day-to-day operations of the AG’s office some 4 years later. The AG’s office had established a protocol which was to be followed in the event a consumer filed a complaint against a mortgage service provider. A designated point of

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5 Amendments to the 2013 Mortgage Rules under the Real Estate Settlement Procedures Act (Regulation X) and the Truth in Lending Act (Regulation Z), 81 Fed. Reg. 72,160-01 (2016).
6 Section 75-24-1, et. seq., commonly referred to as the Mississippi Consumer Protection Act, provides, in part, that the Attorney General may institute a civil enforcement action in the name of the State against an alleged violator. The statute further provides that the Attorney General may seek a temporary or permanent injunction for unfair and deceptive practices. The individual consumer under Section 75-24-15(2) may seek a private right of action.
contact within the servicer’s company, complete with address, telephone number and email information was maintained in our office. This tool proved to be very useful. The particular facts of this case were that the consumer was in the midst of the loan modification process and was awaiting final approval. Instead of receiving a response relative to the status of the loan modification, a foreclosure sale was set. In addition, the consumer had questions regarding the application of past payments to her account. All of the account information that had been previously provided by the servicer was incomplete and inaccurate according to the consumer’s own records. After presenting the servicer with these facts, the foreclosure sale was cancelled within 24 hours. Both mortgage servicer and consumer, a year later, are continuing to work together with loss mitigation alternatives and the consumer continues to own her home.

Mississippi law required the individual consumer in this matter to exhaust her administrative remedies by first filing an official complaint with the AG’s office. Although my role was that of mediator between the consumer and the servicer, and required voluntary participation by the servicer, I recognize in light of the 2013 Rules the critical importance of the AG’s role with putting a servicer on notice of potential rules violations that could result in liability.

Recently, I received a call from a newly hired foreclosure prevention counselor. There was frustration in the attorney’s voice regarding the problems that some of her clients were having with mortgage servicers. She spoke of clients being transferred from one servicer to another in the middle of the loan modification process, servicers failing to provide loss mitigation options to her clients prior to instituting foreclosure proceedings, and thirdly, servicers employing dual-tracking where the loan modification process and foreclosure sale are sought simultaneously. In the dual-tracking scenario, it was especially troubling that bankruptcy, unfortunately, was the most viable option available to save her clients’ homes.

The role of a legal services attorney and other consumer advocates in a foreclosure situation is quite different than that of an attorney with the AG’s office; yet on many levels, they are very much the same. A common denominator with both entities is the homeowner’s relationship and interaction with the mortgage servicer and that servicer’s adherence to fair dealings and legal compliance in their relationship with the AG’s consumer counsel or the legal services client.

**EFFECTIVE OCTOBER 19, 2017- THE 2016 AMENDMENTS TO THE 2013 MORTGAGE SERVICING-RULES**

After January of 2014, which was the effective date of implementation of the 2013 Rules, the CFPB received both industry and consumer suggestions regarding the impact of the 2013 Rules. Attentive to these concerns, the CFPB has now offered the 2016 Amendments to incorporate those suggestions as well to provide certain homeowner protections for borrowers, and further protections for persons who acquire an interest in the homeowner’s property. Thus, on
October 19, 2017, the CFPB’s 2016 Amendments to the 2013 Rules became effective. While each of the amendments are significant, the following highlighted revisions provide effective tools for the consumer advocate directly related to the loss mitigation provisions. When facing a possible foreclosure, these new amendments can definitely provide a much needed reprieve to a distressed homeowner, if not fully adhered to by the mortgage servicer:

(1) Revision to 12 C.F.R. § 1024.41(c)(2)(iii) permits servicers to offer a “short-term payment forbearance program or a short-term repayment plan to a borrower based upon an evaluation of an incomplete loss mitigation application.” This revised section prohibits the servicer from initiating foreclosure judgment/conducting a sale if borrower is performing pursuant to a short-term offer.

(2) Revision to 12 C.F.R. § 1024.41 adding (c)(3), Notice of Complete Application, requires servicers to notify borrowers within five business days when loss mitigation applications are complete. This notice must include the date the servicer received the completed application, a statement that the servicer expects to complete its evaluation within 30 days of the date it received the complete application, and a notice that the borrower is entitled to certain foreclosure protections.

(3) Revision to 12 C.F.R. § 1024.41, Loss Mitigation Procedures, adding (c)(4), Information Not in the Borrower’s Control Requiring Reasonable Diligence. If the servicer requires documents or information not in the borrower’s control to determine loss mitigation options, if any, servicer must exercise diligence in obtaining such documents or information.

(4) Revision to the Official Interpretation, RESPA, 12 C.F.R. § 1024.41(g), Prohibition on Foreclosure Sale “Dual Tracking” Interaction with Foreclosure Counsel. If a servicer has received a complete loss mitigation application, the servicer must instruct foreclosure counsel promptly not to make a dispositive motion for foreclosure judgment or order of sale where such a dispositive motion is pending, to avoid a ruling on the motion or issuance of an order of sale, and where a sale is scheduled, to prevent conduct of a foreclosure sale, unless one of the conditions in Section 1024.41 (g) (1) through (3) is met. A servicer is not relieved of its obligations because foreclosure counsel’s actions or inaction caused a violation.

(5) Revision to 12 C.F.R. § 1024.41 (i), Duplicative Requests. A servicer must meet the loss mitigation requirements more than once in the life of a loan.

(6) New 12 C.F.R. § 1024.41 (k) Servicing Transfers — Moved from Official Commentary to Regulation. A new servicer must comply with loss mitigation requirements within the same timeframes that applied to the prior servicer but provides limited extensions under certain circumstances.

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7 See Amendments to the 2013 Mortgage Rules under the Real Estate Settlement Procedures Act (Regulation X) and the Truth in Lending Act (Regulation Z), 81 Fed. Reg. 72,160-01 (2016).
CONCLUSION

Making “foreclosure a last resort” should continue to be the goal of the consumer protection attorney and other consumer advocates, as well as the mortgage servicer. It is anticipated that the CFPB’s continual review of RESPA and TILA will positively impact the greater good of homeownership. For many consumers, homeownership is the cornerstone of the American dream. Although much has been done to protect consumers in their struggle to achieve and maintain homeownership, we must remain vigilant in our efforts to ensure that this dream is protected, honored and not easily denied.

Each month, the Center for Consumer Protection will provide an article written by an assistant attorney general. If you would like to provide an article, please email Blake Bee at bbee@naag.org.