

What does RESPA Have to do with Consumer Bankruptcy Cases?

I have trained over 350 attorneys at my Bankruptcy Boot Camps and to my surprise less than 10 percent know what I mean when I refer to a "QWR." This is shocking in that a reasonable QWR can provide the attorney for the Chapter 13 debtor with some of the very best discovery outside of a contested case or Adversary Proceeding. The QWR can be used to find out how the servicer for the securitized trust is applying the debtor's money and the disbursements by the Chapter 13 Trustee. It can also be used to identify all of the "ancillary fees" and "collateral charges" that mortgage servicers are so fond of unilaterally adding to the debtor's mortgage account.

The provisions of RESPA which deal with mortgage servicing are generally found in either 12 U.S.C. § 2605 or § 2609. Section 2605, known as the "Servicer Act," requires servicers to respond to borrower requests for information and correction of account errors. The "Servicer Act" provisions are where you find the authority for a Qualified Written Request or QWR. The Servicer Act provisions in § 2605 are significant because borrowers are given the right to sue for violations based on the express private right of action found in § 2605(f).

But what is a QWR? As noted, the statute provides that it can be used to secure information about the note or to assert a dispute about the factual basis for any dispute about the status of the payments on the notes or any alleged default. Whenever I speak at a seminar involving attorneys who represent mortgage servicers, the largest number of complaints I receive involve the "excessive" and in some cases "outrageous" use of a QWR. I have seen QWRs that will ask a servicer more than 150 questions about a debtor's loan. This number is beyond the intended scope of the statute and quite frankly is beyond the scope of most of the discovery rules of the Federal Rules of Bankruptcy Procedure and the local rules of the bankruptcy courts. Such numbers are excessive and should be objected to by the servicer.

But, what are legitimate subjects for a QWR where there is a dispute about the receipt and/or application of payments? In my bankruptcy practice, I have only 10 questions in my standard QWR. I am requesting the Servicers (in a letter mailed to the designated QWR address by the Servicer) to produce the following:

1. A complete life of loan transactional history;
2. The Transaction Codes for the software platform;
3. The Code definitions in plain English;
4. The Key Loan Transaction history, bankruptcy work form, or any summary of all of the accounts in an XLS spreadsheet format;
5. The MERS Milestone Reports and the Edgar website address for the Pooling and Servicing Agreement;
6. The name, address and telephone number of the current holder and owner of the mortgage note;
7. Copies of all collection notes and communication filed;
8. An itemized statement of the amount needed to reinstate the loan;
9. All communications with any non-lawyer third-party provider; and
10. All of the P-309 screen shots of all of the accounts (principal, interest, escrow, late charges, legal fees, property inspection fees, property preservation fees, broker price opinion fees, statutory expense fees, miscellaneous fees, corporate advance fees, trustee suspense accounts, debtor suspense accounts) associated with the loan.

Very few Servicers still try to make the argument that RESPA is preempted by the Bankruptcy Code. Without going into all of the cases, the simple answer to this argument can be found in Section 1322(e). This Section states that that amount necessary to cure a default shall be determined in accordance with the "underlying agreement and applicable nonbankruptcy law." Since non-bankruptcy law includes RESPA, it is clear that RESPA compliance is required for all Servicers of loans involved in Chapter 13 cases.