Compliance Chrestomathy

Notes from the Compliance Cutting Room Floor

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Monday, August 6, 2018

Will the real borrower please stand up?

A large servicing client called me about feeling she is a sitting duck when it comes to servicing litigation, most especially in the loss mitigation area. The caller, the company's Chief Compliance Officer, referenced the "loss mitigation option" and felt that there is a tremendous burden placed on the servicer to implement the applicable guidelines.

The conversation went something like this.

Me: I feel for you, but this rule was not designed to assuage your inconvenience.

She: Maybe so, but I think there should be an Article III procedure to strengthen these litigation attacks, so that it is more of a two-way street.

Me: Well, under RESPA, only a borrower may bring a civil action and only a borrower would have Article III standing.

She: Wait, what?

Me. That's correct. In fact, in this instance there has been litigation to determine who is entitled to the loss mitigation protections, and that is given Article III requirements being judicially applied.

[Long Pause.]

She: We are going to have to take yet another close, hard look at our procedures!

First, let's get the "Article III" terminology out of the way. It is pretty much well settled now that there are constitutional requisites under Article III for the existence of standing; that is, the party seeking to sue must personally have suffered some actual or threatened injury that can fairly be traced to the challenged action of the defendant and that the injury is likely

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to be redressed by a favorable decision. For the most part, there must be a causal connection between the injury and the conduct complained.

My client's concern stemmed from the CFPB's January 2013 Mortgage Servicing Rule, which amended Regulation X (the implementing regulation of the Real Estate Settlement Procedures Act, RESPA), at 12 CFR § 1024.41, that set forth rules governing applications for loss mitigation options. A "loss mitigation option" is an alternative to foreclosure offered by the owner or assignee of a mortgage loan made available through the servicer to the borrower. In general, these loss mitigation rules do not apply to small servicers or servicers of reverse mortgages. The requirements only apply to loans secured by principal residences.

The rule requires servicers to evaluate borrowers for loss mitigation options pursuant to guidelines established by the owner or assignee of a borrower's loan.

Here's where it gets dicey: another provision of Regulation X, namely 12 CFR § 1024.38, requires servicers to adopt policies and procedures to:

(1) identify all loss mitigation options for which borrowers may be eligible; and

(2) properly evaluate a borrower who submits an application for all loss mitigation options for which the borrower may be eligible.

Taking a look again at Section 1024.41, we see it includes procedural protections with respect to the process of obtaining an evaluation for loss mitigation options, as well as restrictions on the foreclosure process while a borrower is being evaluated for a loss mitigation option. Borrowers have a private right of action to enforce the Section 1024.41 requirements, but they do not have a private right of action to enforce the requirements of Section 1024.38 or the terms of an agreement between a servicer and an owner or assignee of a mortgage loan with respect to the evaluation of borrowers for loss mitigation options.

Thus, servicers must implement the loss mitigation programs established by owners or assignees of mortgage loans, and borrowers are entitled to receive certain protections regarding the process (but not the substance) of those evaluations.

Let's take a peak at the litigation I had in mind in my colloquy with the servicer.

A federal district court in Florida recently examined the issue of who is entitled to enforce these loss mitigation protections. The case is Ocampo v. Carrington Mortgage Services.[i]

In June 2007, Ocampo bought a home and financed it with a $650,000 note and mortgage in favor of Suntrust Mortgage. Nine months later, he transferred his ownership interest in the property to Sanchez by a recorded quitclaim deed.

By September 2008, the note and mortgage were in default. In 2013, Ocampo filed a petition for bankruptcy, listing the property as an asset of the estate. The Bankruptcy Court granted him a discharge of personal indebtedness on the note.

At his request, the Bankruptcy Court then referred Ocampo and Suntrust to mortgage modification mediation. After the mediation process began, Carrington Mortgage Services became the loan servicer and denied the modification. In May 2017, Ocampo sued Carrington, alleging that it had violated RESPA's loss mitigation provisions.

But the court dismissed the action for lack of subject matter jurisdiction. Now Article III enters the picture, as the court held that Ocampo did not have Article III standing to bring his RESPA claims, because when he initiated the loan modification proceedings he had no ownership interest in the property or any obligation under the note. Recall, he had transferred ownership to Sanchez. As a result, he could not have obtained the modification he was seeking. Were the Court to hold otherwise, any individual could initiate loan modification proceedings with a mortgage loan servicer, "perhaps for their neighbor or family member, in the hopes that the loan servicer would commit a procedural violation…."

What's more, even if Ocampo could establish a concrete injury, he could not establish a causal link between Carrington's action and his harm, because he had initiated the loan modification proceedings and effectively caused his own harm. And even if he had Article III standing, Ocampo did not have statutory standing because he no longer qualified as a "borrower" under RESPA; to wit, only a "borrower" may bring a civil claim under RESPA.

This is how I see it.

The civil liability provision of RESPA § 6, at 12 USC § 2605(f), specifies that "[w]hoever fails to comply with any provision of this section shall be liable to the **borrower** for each such failure…." [my emphasis]. Surprisingly, though, in this context suffused with definitions, neither RESPA nor Regulation X defines the fundamental term "borrower." Go figure!

In any event, the court's conclusion may be justified on the basis of the Article III standing analysis, however the court and presumably the attorneys involved in arguing the case may have skipped over an important issue that might affect this analysis (viz., at least in any similar case that may arise after January 10, 2014 involving alleged violations of Regulation X's loss mitigation provisions).

Regulation X, 12 CFR § 1024.30(d), Comment 30(d)-4, specifies that "[e]ven after a servicer's confirmation of a successor in interest, the servicer is still required to comply with all applicable requirements of this subpart [that is §§ 1024.30-.41] with respect to the transferor borrower."

In point of fact, Regulation X does use the undefined term "transferor borrower" throughout its various references to successors in interest and their rights as borrowers. Regulation X, 12 CFR § 1024.30(d), specifies that a confirmed successor in interest is a "borrower" for various purposes of the mortgage servicing sections (i.e., Subpart C). Also, Section 1024.31 defines "confirmed successor in interest" to mean a "successor in interest once a servicer has confirmed the successor's identity and ownership interest in a property that secures a mortgage loan subject to [RESPA]."

Assuming that the provisions of the Servicing Rule apply to the situation, it probably would be fair to assume that Sanchez was a "confirmed successor in interest" and that Ocampo was Sanchez's "transferor borrower." That said, the Servicing Rule took effect on January 14, 2014, so its applicability to Ocampo may be in question.

A full Article III standing analysis should have addressed Regulation X's application of its protections to transferor borrowers and whether a transferor borrower could satisfy the standing requirements.

But that's another story!

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[i] Ocampo v. Carrington Mortgage Services, 2017 U.S. Dist. (S.D. Fla. Dec. 27, 2017)

at August 06, 2018

Labels: CFPB, Consumer Financial Protection Bureau, Mortgage Servicing Rule, Regulation X, RESPA, Servicing

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