

## **SEVENTH CIRCUIT FINDS POSSIBLE TILA VIOLATION WHEN MORTGAGE SERVICER FAILS TO CREDIT ACCOUNT ON THE DAY OF ELECTRONIC PAYMENT AUTHORIZATION**

Mortgage servicers may face liability under Truth in Lending Act (TILA) if they fail to credit consumer accounts once an electronic authorization for a mortgage payment is entered. The Seventh Circuit Court of Appeals in *Fridman v. NYCB Mortgage Co. LLC*, Appeal No. 14-2220, reversed a grant of summary judgment in favor of a mortgagor servicer and allowed a purported class action to continue alleging that the servicer improperly charged late fees related to some electronic payments. This ruling appears consistent with the position taken by The Consumer Financial Protection Bureau (CFPB) which requires mortgage servicers to credit electronic authorizations the day they are made and not the day the electronic payment is processed or received by the servicer.

### **TILA Requirements**

Generally, TILA requires a mortgage servicer to credit payments “as of the date of receipt” of payment. 15 U.S.C. § 1639f(a). Notably, this requirement does not apply “when a delay in crediting does not result in any charge to the consumer or in the reporting of negative information to a consumer reporting agency[.]” *Id.* The provision which implements TILA’s basic requirement, known as Regulation Z, states: “[n]o servicer shall fail to credit a periodic payment to the consumer’s loan account as of the date of receipt [. . .].” 12 C.F.R. § 1026.36(c)(1)(i). The interpretation of these requirements, and specifically what constitutes the “date of receipt,” is the subject of the holding in *Fridman*.

NYCB services Fridman’s mortgage, which requires payment on the first day of each month. However, there is a 15-day grace period before Fridman is required to pay any late fee. In December 2012, Fridman utilized NYCB’s website to authorize NYCB to transfer funds electronically from her Bank of America checking account. Fridman completed this electronic authorization on or about December 14, 2012, 14 days later than payment was required but still within the 15-day grace period. Pursuant to NYCB policy, Fridman’s account was credited two business days later on Tuesday, December 18, 2012 (this policy is stated on NYCB’s electronic-authorization webpage). Utilizing the December 18, 2012, date as the “date of receipt,” NYCB charged Fridman a late fee of \$88.54. Notably, this was also the date that Fridman’s Bank of America checking account was debited. Fridman filed a lawsuit alleging a violation of TILA’s civil liability provision, 15 U.S.C. § 1640.

In overturning the district court's grant of summary judgment in favor of NYCB, the Seventh Circuit relied upon the language of Regulation Z and the official interpretations of Regulation Z provided by the CFPB and the Federal Reserve Board Staff Commentary. The CFPB's official interpretation defines "date of receipt" to mean "the date that the payment instrument or other means of payment reaches the mortgage servicer." Official Interpretations, 12 C.F.R. pt. 1026, Supp. I, pt. 3, at § 1026.36(c)(1)(i). While neither Regulation Z nor the Official Interpretations defines the term "payment instrument or other means of payment," the Seventh Circuit found that the addition of the "other means" language indicates that the term should be defined broadly. Accordingly, the Seventh Circuit held that electronic authorizations "easily fit within" the definition of "payment instrument or other means of payment." As a result, the Seventh Circuit reversed the district court's grant of summary judgment in favor of NYCB and remanded the case. In so holding, the Seventh Circuit noted that the interpretation it adopted promotes one of the purposes of TILA: "to protect consumers against unwarranted delay by mortgage servicers."

However, the opinion of the Seventh Circuit was not unanimous. Judge Easterbrook dissented stating that the critical term from TILA, "payment," is undefined by both TILA and the implementing regulation. Characterizing the electronic authorization as a "payment instruction," Judge Easterbrook delineated between electronic payment instructions and more traditional payment instruments such as checks. The dissent also relied upon language contained in the Official Interpretations related to "preauthorized" payments being "received when the mortgage servicer receives the third-party payor's check or other transfer medium[.]" Relying on this language, the dissent states that Fridman's "payment instruction" is a "preauthorized" payment and that the payment was received once the money itself was transferred on December 18, 2012.

## **Implications**

As a result of this ruling, mortgage servicers should review internal systems and policies to treat the authorization of an electronic payment (on a servicer's own system or website) as the payment date for TILA purposes. A mortgage servicer's policy, even if disclosed to the borrowers, of waiting even one business day to credit the borrower's mortgage account with a payment may expose the servicer to liability under TILA assuming the servicer is assessing late fees or reporting negative credit information to a credit reporting agency.