



Recent Ninth Circuit decision emphasizes importance of remaining vigilant – and current – in connection with consumer finance regulation compliance

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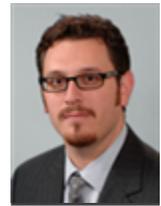
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OVERVIEW

In the wake of the mortgage crisis, loan servicers are receiving increasing numbers of borrower inquiries made pursuant to a variety of federal statutes, including the Truth in Lending Act ("TILA") and the Real Estate Settlement Procedures Act ("RESPA"). A recent Ninth Circuit decision – *Gale v. First Franklin Loan Servs.*, 2012 U.S. App. LEXIS 18545 (9th Cir. 2012) – emphasizes that loan servicers must remain vigilant and stay current on their statutory obligations.



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SUMMARY OF CASE

In *Gale*, the plaintiff brought suit against his loan servicer pursuant to Section 1641(f)(2) of TILA – as it existed in 2008 when the suit was commenced – on the grounds that his servicer had failed to provide the name and address of the true owner of his loan or holder of his promissory note, along with the original note and an explanation of his servicer's relationship to the owner of his loan. The plaintiff maintained that Section 1641(f)(2) of TILA, which provided in pertinent part that "[u]pon written request ... the servicer shall provide ... the name, address, and telephone number of the owner of the obligation, or the master servicer of the obligation[.]" required his servicer to provide the requested information and that its failure to do so gave rise to a cause of action for a TILA violation.



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The Ninth Circuit disagreed, finding that the plaintiff's position required reading the relevant TILA section totally out of context, stating that "[Plaintiff] places emphasis on the final sentence of § 1641(f)(2), but the context of the sentence within [the] subsection ... and within § 1641 as a whole, indicates that liability for failing to respond attaches only to those servicers who are **also assignees** of the loan." (emphasis original). The court went further, emphasizing that only loan servicers who were **actual** assignees – as opposed to **administrative** assignees – bore any liability in connection with failing to respond to a request made under Section 1641(f)(2). In arriving at this conclusion, the court referred to the legislative record (H.R. Rep. No. 104-193) which stated that "[t]his provision clarifies that the loan servicer ... is not an 'assignee' under the TILA unless the servicer is [also] the owner of the loan obligation." The Ninth Circuit concluded from this that "Congress did not intend that all servicers who owned loans would be

liable as assignees ... [and that] servicers who are only nominal assignees (that is, when a servicer is assigned ownership of the loan solely for 'administrative convenience') would not be liable on the same basis as actual owners of the loan." The court declined to accept the plaintiff's argument that the term "creditor" in Section 1640(a) of TILA broadened liability to all creditors, including original creditors.

The *Gale* decision does not relieve loan servicers of their responsibilities to respond to borrower inquiries, however, including inquiries substantially similar to those made by the plaintiff in the case. Rather, the Ninth Circuit closed its analysis of TILA by observing that "[t]he servicer is often the only entity that the consumer is in contact with after the loan issues – unless the servicer is forthcoming, the homeowner may not know with whom to negotiate." It emphasized that, therefore, "Congress [has since] recognized the importance of" information such as that requested by the plaintiff, and directed the reader to Section 1463 of the Dodd-Frank Wall Street Reform Act, which amended RESPA "to require **all servicers** to respond to requests for information[.]" (emphasis added). Indeed, RESPA, 12 U.S.C. § 2605(k)(1)(D), now requires all servicers of a federally related mortgage to "respond within 10 business days to a request from a borrower to provide the identity, address, and other relevant contact information about the owner or assignee of the loan." Failure to comply with RESPA may lead to liability for actual and statutory damages.

LESSONS

At least two lessons can be drawn from the Ninth Circuit's decision in *Gale*. First, lenders and loan servicers are subject to multiple regulatory obligations, which may or may not impose the same obligations and limitations. Thus, the mere fact that certain conduct is not required or prohibited by one statute does not mean that it is not addressed by another. Second, consumer finance laws are an area of significant focus for the current legislature (and enforcement agencies) and thus are developing rapidly at this time. It is therefore critical that lenders and loan servicers remain abreast of developments in this rapidly changing area of the law.

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