

**FLORIDA FEDERAL COURT DISMISSES CLAIMS DUE TO
BORROWER’S FAILURE TO PROVIDE SERVICER NOTICE AND
AN OPPORTUNITY TO CURE**

The United States District Court for the Southern District of Florida dismissed a borrower’s claims under the Real Estate Settlement Procedures Act (“RESPA”) and the Fair Debt Collection Practices Act (the “FDCPA”) because the borrower failed to give the loan servicer an opportunity to cure its alleged violations as required under the mortgage. See Kurzban v. Specialized Loan Servicing, LLC, No. 17-CV-20713, 2018 WL 1570370(S.D. Fla. Mar. 30, 2018). The borrower obtained a loan in 2005 and executed a note and mortgage to the lender. Among other things, the mortgage stated:

Neither Borrower nor Lender may commence, join, or be joined to any judicial action (as either an individual litigant or the member of a class) that arises from the other party’s actions pursuant to this Security Instrument or that alleges that the other party has breached any provision of, or any duty owed by reason of, this Security Instrument, until such Borrower or Lender has notified the other party (with such notice given in compliance with the requirements of Section 15) of such alleged breach and afforded the other party hereto a reasonable period after the giving of such notice to take corrective action.

In 2016, the loan servicer sent the borrower a notice of intention to foreclose and commenced a foreclosure action. The borrower responded by sending the servicer a loss mitigation application. The borrower then brought this action in which he alleged that (i) the loan servicer had violated RESPA by failing to timely acknowledge receipt of the loss mitigation application; (ii) the servicer had violated the FDCPA by sending a letter attempting to collect time-barred debts; and (iii) the servicer had violated RESPA by failing to properly respond to a Qualified Written Request. The servicer moved to dismiss, arguing the borrower had failed to comply with the notice and cure provision.

The Court agreed and dismissed the action. First, it rejected the borrower’s claim that the mortgage provision did not apply because this was not an action “pursuant to” the mortgage, holding instead that “Count I arises out of Plaintiff’s attempts to modify the Mortgage to avoid foreclosure. Count II

arises out of Defendant's notice to Plaintiff that the Mortgage is in default and Count III arises out of alleged errors in the default amounts." Second, the Court denied the borrower's claim that the mortgage provision was between the borrower and the lender and did not apply to a lawsuit against the servicer, finding that "[c]ourts in this district consistently hold that a notice-and-cure provision in a mortgage applies to actions against a servicer." As such, the Court dismissed the action.