

Latest Developments Under TILA and RESPA

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WISCONSIN BANKING LAW UPDATE
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Qualified Mortgage Rule After 6 Months

- Regulations Took Effect January 10, 2014.
- Too Early for Judicial Decisions Interpreting Whether Lenders Properly Evaluated Borrowers' Ability to Pay.
- Calls for Reform of 3% Rule Regarding Points and Fees.

Qualified Mortgage: Points and Fees

- Points and Fees May Not Exceed 3% of the Loan for Loans >\$100,000.
- Points and Fees Include . . .
 - Fees Paid to Affiliated Title Companies.
 - Insurance and Taxes Held in Escrow.

Emerging Problem

- Inclusion of Title Fees and/or Homeowner's Insurance Premiums is Resulting in Loans Failing to Qualify as Qualified Mortgages.
- Predominately Impacts Low to Moderate Income Borrowers.

Potential Solution

- If Passed the Mortgage Choice Act of 2013 Would Exclude:
 - Title Insurance Charges.
 - Escrowed Insurance Premiums.
- Current Status:
 - Passed House of Representatives on June 9, 2014 on a voice vote (H.R. 3211).
 - Waiting for Senate to take up the Bill (S. 1577).

Alternative: Non-Qualified Mortgage

- No Liability if Lenders Made a Reasonable, Good Faith Determination that the Consumer has an Ability to Repay the Residential Mortgage.
- During Underwriting it is Important that Reliable Third Party Records are Used to Evaluate the Eight Factors Outlined by the CFPB.

Alternative: Non-Qualified Mortgage

- Lenders Have Potential Liability for. . .
 - Actual Damages.
 - Statutory Damages up to \$4,000.
 - An Amount Equal to Past Finance Charges and Fees.
 - Borrower's Court Costs.
 - Borrower's Attorney's Fees.

New Payoff Statement Requirements

- Federal Regulations: 12 CFR 1026.36.
 - Must Respond with a Payoff Statement within Seven Days of Receipt of Written Request from Borrower or Borrower's Agent.
 - Applies to Transactions Secured by Any Dwelling (Not just Principal Dwelling).
 - Must Respond if You are Creditor, Assignee, or Servicer.

Limitations of New Federal Regulations

- If Written Request is from Borrower's Agent, Seven Day Period Can Start when Agent is Verified.
- Payoff to be Furnished in 'Reasonable Time' if Loan is in Bankruptcy, Foreclosure, or is a Reverse Mortgage.
- May Require Specific Address for Written Request.
- New Law does Not Preempt State Law.

Federal Penalties

- Actual Damages.
- Statutory Damages Including:
 - Up to 2X the Amount of Any Finance Charge Paid in Connection with the Transaction.
 - Between \$400 - \$4,000 if Credit Transaction is Secured by Real Property but is Not an Open-Ended Transaction.
- Borrower's Attorney's Fees and Costs.

Bona Fide Error Defense

No Liability where Violation Occurred Due to a Bona Fide Error Notwithstanding the Maintenance of Procedures Reasonably Adapted to Prevent such an Error.

Wisconsin Mortgage Satisfaction Act

- Wis. Stat. Sec. 708.15.
- Seven Day Period to provide Payoff Statement upon Receipt of Written Request from Borrower or Agent.
- All Secured Creditors Must Comply.
- May Require Specific Address for Receipt of Written Requests.

Important Differences from Federal Law

- Applies to Residential and Non-Residential Mortgage Loans.
 - Payoff Statements for Non-Residential May be Provided in a “Reasonable Time.”
- No Automatic Delay if the Loan is in Bankruptcy, Foreclosure, or is a Reverse Mortgage.
- No Extra Time to Verify Borrower’s Agent.

Wisconsin Penalties

- \$500 plus any Actual Damages for Failing to Provide Timely Payoff Statement.
- Attorney’s Fees and Costs if the Penalty and Damages are Not Paid within 30 Days of Receipt of a Demand for Payment of Penalty.

Safe Harbor for Mortgage Satisfaction Act

- Mortgage Creditors May be Sheltered from Liability for Penalties Where They Can Demonstrate a Good Faith Attempt to Comply with the Regulations.
 - Reasonable Procedures for Compliance.
 - Followed Procedures in Good Faith.
 - Lack of Compliance was due to Circumstances Beyond Creditor's Control.

Force Place Insurance Rules

- Purpose of Rules is to “protect borrowers from the unwarranted force-placement of insurance when a servicer does not have a reasonable basis to impose the charge on a borrower.” 78 Fed. Reg. 10,712 (February 14, 2013).
- Scope of the Rules:
 - Federally related Mortgage Loans.
 - Open-End Lines of Credit.

Definitions

- Force Place Insurance: “Hazard insurance obtained by a servicer on behalf of the owner or assignee of a mortgage loan that insures the property securing such loan.” 12 C.F.R. § 1024.37(a)(1).
- Hazard Insurance: “Insurance on the property securing a mortgage loan that protects the property against loss caused by fire, wind, flood, earthquake, theft, falling objects, freezing, and other similar hazards for which the owner or assignee of such loan requires insurance. 12 C.F.R. § 1024.31 (Corrected to Exclude Flood Insurance).

Requirements

Lender Must have a Reasonable Basis to Believe that a Consumer has Failed to Maintain the Required Hazard Insurance.

Requirements

First Notice:

- 45 Days Before Charging Consumer.
- First Class Mail is Sufficient.

Second Notice (Reminder Notice):

- 30 Days After the First Notice.
- Must wait 15 Days After Mailing Before Charging Consumer.

Renewal Notice:

- 45 Days before Charging the Consumer.

Content of Notices

- Model Forms are Available. (Ex. Bankers Online)
- Must Advise Consumer in First and Second Notices that Force Place Insurance May Cost Significantly More and May Not Provide as Much Coverage as Hazard Insurance.
- Must Disclose Annual Premium of the Force Place Insurance in the Second Notice (Could be Estimate).
- Must Advise of Upcoming Renewal of Force Place Insurance in Renewal Notice.

What if Consumer Responds?

If Consumer provides Evidence of Hazard Insurance Coverage within Window of Time:

- Must Cancel any Force Place Insurance.
- Must Refund any Premium Charges for Overlapping Coverage Period.

Evidence of Hazard Insurance includes . . .

- Declarations Page from Conforming Policy.
- Insurance Certificate.
- Lender can Seek to Confirm Coverage with Insurer.

Special Circumstances

If Hazard Insurance is Escrowed, Lender Must Continue to Maintain the Escrowed Insurance and Not Obtain Force Place Insurance.

Applies Even if Escrow has Insufficient Funds and Lender Will Need to Advance Funds.

Lender can Obtain and Charge for Force Place Insurance Where There is a Reasonable Basis to Believe that the Insurer Cancelled Policy for Reasons Unrelated to Non-Payment or the Property is Vacant.

Small Servicer Exception

If Lender is a “Small Servicer”, Force Place Insurance may be Obtained Even Though Borrower has Escrowed Hazard Insurance if . . .

- Loan Obligation is 30+ Days Overdue AND
- Cost of Force Place Insurance Charged to Consumer is Less than the Amount the Lender would need to Disburse from the Escrow Account for the Hazard Insurance Premium.

Who is a Small Servicer?

Lender and its Affiliates who Service 5,000 or Fewer Mortgage Loans AND are the Creditor or Assignee for All of the Serviced Loans.

Clarifications:

- Mortgage Loans: Closed-End Consumer Credit Transactions Secured by a Dwelling.
- Lender is the Creditor or Assignee if Loans are Acquired by Merger or Acquisition.
- Mortgage Loans Serviced for Others Negates Small Servicer Designation.

Force Place Insurance in the News

- Force Place Insurance Charges Must be “Bona Fide and Reasonable” 12 U.S.C. § 2605(m).
- Charge Must be for a “service actually performed that bears a reasonable relationship to the servicer’s cost of providing the service, and is not otherwise prohibited by applicable law” 12 C.F.R. § 1024.37(h)(2).
- Federal Housing Financing Agency Inspector General is Considering Whether to Pursue Insurers and Lenders as to the Amount Charged to Fannie and Freddie for Force Place Insurance.

Questions?

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