

Congress Should Amend the Fair Debt Collection Practices Act to Allow Residential Loan Servicers to Contact Borrowers Free of “Miranda” to Prevent Default and Foreclosure

MBA RECOMMENDS

Congress should exempt mortgage servicers from the Fair Debt Collection Practices Act's requirements for Miranda disclosures in order to ensure servicers can more easily communicate with borrowers to prevent foreclosure.

From 2003 through 2006, home prices increased at a pace that far exceeded inflation. During that time, many mortgages were written with adjustable interest rates and/or negative amortization features due to consumer demand for more affordable payments. In 2007, the “real estate bubble” burst, resulting in record borrower defaults.

THE PROBLEM

While servicers have executed a record number of repayment plans and loan modifications to assist borrowers experiencing financial difficulties, servicers are hampered in their efforts to help financially troubled borrowers because of the Fair Debt Collection Practices Act (FDCPA). The FDCPA regulates the practices of independent debt collectors. While creditors collecting their own debts are exempt from the FDCPA, creditors that acquire delinquent loans are not exempt and treated as debt collectors. Given that few borrowers pay their mortgages on the due date (the note's definition of “default”), almost all purchased servicing falls within the parameters of FDCPA.

In addition to its substantive anti-abuse protections, the FDCPA requires a debt collector to notify the borrower in the first written communication and each subsequent communication (even if the loan is brought current) that it is attempting to collect a debt and that any information obtained will be used for that purpose (the so-called “Miranda” warning). These disclosures create unique difficulties for mortgage servicers because they chill the borrower's willingness to discuss his or her financial condition which is a prerequisite to obtaining a home retention and work out alternative to foreclosure.

THE SOLUTION

MBA urges Congress to consider an exemption from the FDCPA's Miranda requirements for mortgage servicers. The Miranda provision is designed to prevent debt collectors from concealing their true identity when they attempt to obtain information from a consumer. Mortgage servicers are not true debt collectors despite their treatment under FDCPA. Moreover, mortgage servicers do not conceal their identity. The mortgage servicer is the party responsible for receiving the borrower's monthly mortgage payments during the life of the loan. Distinguished from a debt collector, who collects only the delinquency if a borrower gets behind on his or her mortgage payments, the mortgage servicer is expected to contact the borrower to assist the borrower in catching up. This process is the same whether or not the servicing responsibilities are transferred to a new servicer. Indeed, in a servicing transfer context, the FDCPA's Miranda notices may convey the misleading impression that the loan has been referred to a traditional, independent debt collector, when in fact all that has happened is that the servicing rights have been transferred from one servicer to another — often as part of a merger or servicing portfolio acquisition.

PROPOSED FDCPA AMENDMENT

MBA proposes an amendment that is narrowly crafted to address the problems created when the FDCPA's Miranda provision is applied to mortgage loan servicers. The amendment would apply only to first lien residential mortgage loans that are acquired by bona fide loan servicers, not professional

debt collectors. It would exempt them only from the notice requirements of the FDCPA's Miranda provision.

All other consumer protections under FDCPA would continue to apply. MBA suggests the following amendment be placed into FDCPA after §817. Current §818 should be re-designated as §819: A mortgage servicer who, whether by assignment, sale or transfer, becomes the person responsible for servicing

mortgage loans secured by first liens that include loans that were in default at the time such person became responsible for the servicing of such mortgage loans shall be exempt from the FDCPA Miranda requirements in connection with the collection of any debt arising from such a defaulted related mortgage loan.



1331 L Street, NW
Washington, DC 20005
www.mortgagebankers.org