

CFPB Flags Risks Associated With Reinitiating Collections on Aged Mortgage Loans

May 2, 2023

On April 26, 2023, the Consumer Financial Protection Bureau (CFPB) issued an advisory opinion warning collection agencies and mortgage servicers against suing or threatening to sue to recover time-barred debt. The advisory opinion clarifies that a covered entity that brings – or threatens to bring – a state court foreclosure action to collect on a time-barred mortgage may violate the Fair Debt Collection Practices Act (FDCPA) and Regulation F. The CFPB also clarified that collecting on time-barred debt is prohibited, even if the entity does not know the debt is time-barred.

‘Zombie’ mortgages

At a field hearing in Brooklyn, New York, announcing the advisory opinion, CFPB Director Rohit Chopra indicated an increase in consumer complaints related to attempts to collect on mortgage debt that consumers believed was already discharged, modified or forgiven. Chopra’s comments and the advisory opinion both focus on second-lien home loans made prior to the 2008 financial crisis.

During the hearing, Chopra indicated that many borrowers who previously obtained a “piggyback” loan – a second-lien mortgage that satisfied down payment requirements – had obtained a workout to resume payment on the first lien, while the second lien remained delinquent. Chopra suggested that lenders holding the second-lien loans were unlikely to recover any value if they attempted to foreclose on the home (being behind the full mortgage in seniority), and they thus offloaded these piggyback loans from their books. The CFPB asserts that consumers often received no notice regarding the sale of their loan and could go years without receiving periodic statements.

After 15 years of price appreciation, however, the CFPB reports increasing numbers of collection agencies are now attempting to collect on this long-dormant debt.

Time-barred debt

The CFPB is concerned that some entities may be threatening to foreclose on properties whose mortgages have become time-barred (i.e., those for which the state’s applicable statute of limitations would preclude judicial foreclosure actions). The advisory opinion affirms:

- The FDCPA and its implementing Regulation F prohibit a debt collector (as defined by state law) from suing or threatening to sue to collect a time-barred debt.
- This prohibition applies even if the debt collector neither knows nor should know that the debt is time-barred.

The CFPB also reiterated that Regulation F’s prohibition on suits, and threats of suit, on time-barred debt is subject to a strict liability standard, meaning debt collectors would be held liable for violations even if they neither knew nor should have known that a debt was time-barred.

What’s next

This is yet another space where it is important to understand your consumers and the rules of the road. The CFPB’s field hearing and accompanying advisory opinion suggest it is closely analyzing consumer complaints and may pay particular attention to institutional processes for verifying that these outstanding second-lien loans remain collectible. At the same time, states and plaintiffs’ attorneys also are likely to be reviewing these issues, and companies should understand what – if any – applicable state law limitations may apply to their processes.

Companies should understand their risk and exposure, taking proper steps to mitigate that risk as appropriate.

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