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ABOUT THE AUTHOR

Caren Enloe leads Smith Debnam' s consumer financial services litigation and compliance group. In her practice, she defends consumer financial service providers and members of the collection industry in state and federal court, as well as in regulatory matters involving a variety of consumer protection laws. Caren also advises fintech companies, law firms, and collection agencies regarding an array of consumer finance issues. An active writer and speaker, Caren currently serves as chair of the Debt Collection Practices and Bankruptcy subcommittee for the American Bar Association's Consumer Financial Services Committee. She is also a member of the Defense Bar for the National Creditors Bar Association, the North Carolina State Chair for ACA International's Member Attorney Program and a member of the Bank Counsel Committee of the North Carolina Bankers Association. Most recently, she was elected to the Governing Committee for the Conference on Consumer Finance Law. In 2018, Caren was named one of the "20 Most Powerful Women in Collections" by *Collection Advisor*, a national trade publication. Caren oversees a blog titled: Consumer Financial Services Litigation and Compliance dedicated to consumer financial services and has

Lender May Be Held Vicariously Liable for Servicer's Violation of RESPA

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A federal court has denied a lender's motion to dismiss, holding that a lender may be held vicariously liable for its servicer's violation of RESPA. *Rouleau v. US Bank, NA,* C.A. No. 14-cv-568-JL, Op. No. 2014 DNH 084 (D.N.H. Apr. 17, 2015). The Rouleaus sought a mortgage modification from their lender. Before the lender took action on the loan modification, the loan was sold to US Bank and Nationstar Mortgage began servicing the loan. Shortly thereafter, Nationstar sent a letter to the Rouleaus indicating that if they were in the process of applying for or providing information related to a workout with the original lender, Nationstar anticipated receiving their information soon and encouraged the Rouleaus to contact Nationstar to make sure it had the information necessary.

The Rouleaus made several unsuccessful attempts to contact Nationstar to discuss the modification. The Rouleaus heard nothing from either Nationstar or US Bank until receiving notice from US Bank of a foreclosure sale. The Rouleaus filed suit seeking to enjoin the foreclosure and seeking monetary damages against the original lender, US Bank, and Nationstar. The claims against US Bank include a claim that US Bank is vicariously liable for it servicer Nationstar's violation of RESPA. US Bank moved to dismiss the RESPA claim asserting that it is not a servicer as said term is defined in Reg X and therefore not liable.

RESPA regulates the conduct of servicers of federally regulated mortgage loans. A "servicer" is the person responsible for receiving payments from the borrower. Under Reg X, *a servicer* must promptly review a modification application it receives 45 days or more prior to a foreclosure sale and notify the borrower within 5 days of receipt whether the application is complete or incomplete and if incomplete, what information is necessary to complete it. 12 C.F.R. §1024.41(b)(2).

The regulations further require that *the servicer* evaluate the borrower for loss mitigation options within thirty days of receiving the completed application and notify the borrower what options if any, are available. 12 C.F.R. §1024.41(c)(1).

The servicer cannot initiate foreclosure while a loss mitigation application is pending. 12

been published in a number of publications including the Journal of Taxation and Regulation of Financial Institutions, California State Bar Business Law News, Banking and Financial Services Policy Report and Carolina Banker.

C.F.R. §1024.41(f)(2), (g).

Moreover, *a servicer* to whom servicing is transferred while an application is pending must maintain policies and procedures which are "reasonably designed to ensure that the servicer can identify necessary documents or information that may not have been transferred by a transferor servicer and obtain such documents from the transferor servicer." 12 C.F.R. §1024.38(b)(4)(ii).

RESPA further provides a private right of action for violations of Reg X.

In reviewing the claim, the court determined that RESPA created a "species of tort liability." As such, traditional vicarious liability rules applied, making principals vicariously liable for the acts of their agents or employees in the scope of their authority or employment. The court did not give deference to US Bank's argument that it was not covered by the applicable regulations because it was not a servicer under RESPA's definition of the term. Instead, the court held that "RESPA does not limit liability to servicers, but provides that "[w]hoever" violates a statutory requirement may be held civilly liable. Slip Op. at 17. Absent any statutory, regulatory or judicial indication that RESPA does not incorporate traditional tort rules of vicarious liability, the court concluded that the lender could be held vicariously liable for RESPA violations of its servicer.

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