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NINTH CIRCUIT RULES: TILA'S NOTICE PROVISION IS NOT RETROACTIVE

By Kathy Shakibi, Esq., McCarthy & Holthus, LLP

In the course of litigating residential mortgage foreclosures, it is not unusual to see pleadings alleging a version of these statements: "Who owns my loan? To whom should I make my payments? Who has the authority to modify my loan?" For quite some time, the law has provided a mechanism for borrowers to receive this information. Two of the ways by which a borrower receives information is through notice provisions required by the Real Estate Settlement Procedures Act ("RESPA") and the Truth in Lending Act ("TILA").

RESPA's Title 12 U.S.C. §2605 (b)'s requirement that a servicer of any federally related mortgage loan notify the borrower in writing of any service transfer has existed since before the financial crisis of 2008. TILA's Title 15 U.S.C. §1641(g) however, is an amendment enacted in 2009, requiring written notice to a borrower when a mortgage loan is sold or transferred. On December 14, 2015, the Ninth Circuit in *Talaie v. Wells Fargo Bank, N.A.*, 808 F.3d 410 held that TILA's notice provision is not retroactive.

THE ISSUE BEFORE THE NINTH CIRCUIT

The Talaie plaintiffs brought a putative class action against Wells Fargo and U.S. Bank alleging various state and federal law claims arising out of a loan modification for the Talaie's home.¹ One of their claims alleged that per the securitization contracts, Wells Fargo transferred the Talaie mortgage loan to U.S. Bank in 2006, and the plaintiffs were not provided notice of the transfer under TILA. Since TILA's notice of loan sale or transfer provision was enacted in 2009, the notice requirement would apply to the Talaie loan, only if the statute applied retroactively.

COURT'S ANALYSIS

TILA's section 1641(g) requires that "not later than 30 days after the date on which a mortgage loan is sold or otherwise transferred or assigned to a third party, the creditor that is the new owner or assignee of the debt shall notify the borrower in

writing of such transfer."² The statute lists the content of such notice. If the new creditor does not comply with the notice provision, Congress has authorized a private right of action for actual damages, statutory penalty and costs and attorney's fees. The Ninth Circuit analysis of retroactivity is simple yet fundamental. The Ninth Circuit relied on the Supreme Court's observations in *Landgraf v. USI Film Prods.*, 511 U.S. 244 (1994) of the following principles:

- If a new statute would impair rights a party possessed when he acted;
- increase a party's liability for past conduct;
- or impose new duties with respect to transactions already completed;
- then courts should not give retroactive effect to the statute without clear congressional intent favoring such a result.³

“
Per the Supreme Court, the presumption against retroactive legislation is deeply rooted in our jurisprudence, and can only be overcome where Congress clearly intended to do so.
 ”

Considering the *Landgraf* principles, the Ninth Circuit reasoned that at the time the defendants acted, they had the right to sell or transfer the loan without notice to the borrower. Furthermore, retroactive application of the notice provision would increase the defendants' liability for past conduct, as well as create new duties on transactions already completed. Given that the *Landgraf* concerns were present, the Ninth Circuit then looked for clear congressional intent favoring retroactivity, and found no clear indication, in section 1641(g)'s text or legislative history that Congress intended for the statute to apply to loans that had transferred before its enactment.

The Ninth Circuit deemed it unlikely that Congress would have subjected creditors to civil liability and statutory penalties without at least giving them a way to comply with the statute. Thus, the Ninth Circuit concluded that section 1641(g) does

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not apply retroactively. Kudos to the Ninth Circuit for its discussion of existing laws that provide answers for questions of “Who owns my loan? To whom should I make my payments? Who has the authority to modify my loan?”

- 1 The Ninth Circuit resolved the other issues raised by the plaintiffs and affirmed the district court’s opinion in a concurrently filed memorandum. 2015 U.S. App. LEXIS 21588.
- 2 *Talaie* at 411.
- 3 *Talaie* at 412 citing from *Landgraf*.



Kathy Shakibi is an attorney with McCarthy Holthus LLP and licensed to practice in California and Washington. Kathy has been practicing in the default services field for over ten years, focusing on foreclosures, compliance and mortgage litigation. Kathy may be reached at kshakibi@mccarthyholthus.com.

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