

# Mortgage Servicers Face Consumer Lawsuits Under CFPB “Periodic Statement” Final Rule

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The CFPB’s final rule amending Regulation Z, which implements the Truth in Lending Act (TILA) as amended by Dodd-Frank, became effective January 10. Among other things, the new rule requires mortgage servicers to provide borrowers with periodic statements that meet very specific content, form, and timing requirements. This rule does not exempt servicers from the periodic statement requirement even if the servicer receives a “cease communication” request from a borrower’s attorney. So, servicers who receive these requests must choose between: (a) not sending the borrower a statement and risking violation of the new rule and TILA, or (b) sending a statement and potentially violating state consumer collection statutes that prohibit communication with a represented borrower. For the most part, mortgage servicers have chosen option (b). As a result, they may face a rash of lawsuits. While there are no reported decisions yet, the CFPB issued a helpful Advisory Opinion addressing whether a servicer would be liable under the federal Fair Debt Collection Practices Act, 15 U.S.C. § 1692k(e), for sending periodic statements despite a borrower’s “cease communication” request. In its Advisory Opinion, the CFPB expressly exempted servicers from liability under the FDCPA, indicating that they are required to send periodic statements irrespective of whether they receive a “cease communication” request. The CFPB made clear that it “believes that these [periodic statements] provide useful information to consumers regardless of their collections status.” The Advisory Opinion does not address servicers’ liability under parallel state consumer collection statutes, but it provides powerful ammunition to defeat such claims because most state statutes substantively track the FDCPA, and often defer to FDCPA case law. Servicers may also have a “conflict preemption” argument against state law claims. By its terms, TILA preempts any application of state law that is inconsistent with TILA’s mandates. Since TILA now requires servicers to send periodic statements irrespective of whether they receive a “cease communication” request from the borrower, state consumer collection statutes that prohibit periodic statements under those circumstances seem inconsistent with TILA’s mandates, and may be preempted.

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