Stopping Foreclosures with the RESPA Servicing Rules

A. Notice of Error of Dual Tracking Violations

The Real Estate Settlement Procedures Act permits the borrower to demand that a mortgage servicer cancel or postpone a foreclosure sale when the servicer has initiated the foreclosure while still evaluating the borrower for loss mitigation options or during the 120-day pre-foreclosure waiting period. The borrower or the borrower's agent may assert this right by sending a notice of error to the servicer. Under the Regulation X provision implementing 12 U.S.C. § 2605(e), a written inquiry that asserts an error by the servicer with respect to the borrower's mortgage loan is referred to as "notice of error." To qualify as this type of notice of error, the notice must assert that the servicer either:

1. initiated a foreclosure before the 120th day of delinquency in violation of Regulation X § 1024.41 (f) or (j), which is a covered error under Regulation X § 1024.35(b)(9), or

2. moved for a foreclosure judgment or conducted a foreclosure sale in violation of Regulation X § 1024.41(g) or (j), which is a covered error under Regulation X § 1024.35 (b)(10).

For most notices of error, a servicer must acknowledge the request within 5 business days of receipt, and respond within 30 business days of receipt.[1] However, if the borrower or borrower's agent sends a dual tracking notice of error that is received by the servicer more than 7 days before a scheduled foreclosure sale, the servicer must respond prior to the date of a foreclosure sale or within 30 business days after the servicer receives the notice of error, whichever is earlier.

Thus, if the servicer receives this notice of error more than 7 days before a scheduled foreclosure sale, the servicer may have to cancel or postpone the sale in order to comply with the error notice response requirements.[2] If the servicer receives this notice of error 7 or less days before a scheduled foreclosure sale, a servicer is not required to comply with the response obligations but must make a good faith attempt to respond to the borrower, orally or in writing, and either correct the error or state the reason the servicer has determined that no error has occurred. [3]

B. RESPA Preemption: Violation as Defense to Foreclosure or Claim for Wrongful Foreclosure

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[1] Reg. X, 12 C.F.R. § 1024.35(d) and (e).
[2] Reg. X, 12 C.F.R. § 1024.35(e)(3)(i)(B) and § 1024.35(f)(2); Official Bureau Interpretation, Supplement 1 to Part 1024, ¶ 35(e)(3)(i)(B)-1.
[3] Reg. X, 12 C.F.R. § 1024.35(f)(2).

In cases in which there have been RESPA violations that relate to whether the mortgage loan is in default or whether the mortgage holder has the right to foreclose, consumers in non-judicial foreclosure states should be able to use these violations in an action brought under the state procedure that allows consumers to request that an unlawful foreclosure sale be enjoined. For example, a consumer may argue that a sale would be unlawful because it was being conducted in violation of the dual tracking provisions of Regulation X sections 1024.41(f), 1024.41(g), or 1024.41(j), and that the borrower had sent a notice of error demanding that the dual tracking error be corrected by cancelling the sale.[4] The substantive law that makes the servicer's action unlawful is federal law, but the consumer is invoking traditional state law procedures and remedies. The state law remedies include those provided by foreclosure statutes (pre- and post- sale remedies for improper foreclosure), state common law (tort and contract claims), and other state statutes, such as UDAP statutes. In all of these instances the federal statute (RESPA) can define the foreclosing party's duties and the state laws provide a remedy for breach/violation of those duties. The RESPA violation could also be asserted as a defense in a judicial foreclosure action.

State law often restricts the types of claims or defenses that are deemed to be valid in defending or avoiding a foreclosure. To the extent that state law would prevent a RESPA violation from being treated as a defense to foreclosure, it would be in conflict with RESPA, and therefore preempted.[5] The Sixth Circuit's analysis of a federal statute with a preemption provision similar to RESPA is instructive. [6] The Protecting Tenants at Foreclosure Act (PTFA), when it was in effect before its sunset, did not preempt state laws that provide longer time periods for tenants to retain possession or other additional protections after a foreclosure sale, but it did preempt state laws that were less protective of tenants.[7] In rejecting arguments that a foreclosure sale had terminated the tenant's lease under Kentucky common law, or that the PTFA could not form the basis of a claim for wrongful eviction under Kentucky law, the Sixth Circuit stated: "The purpose of the PTFA could not be accomplished if it did not preempt state laws that set lower standards for successors in interest than the Act requires. Therefore, the PTFA preempts state law that is less protective of tenants, including the provisions of Kentucky law at issue here."[8] Similarly, state laws that would permit a servicer or mortgage holder to proceed with foreclosure despite noncompliance with the dual tracking provisions of Regulation X sections 1024.41(f), 1024.41(g), or 1024.41(j), for example, are preempted by RESPA.

In promulgating the 2013 RESPA Servicing Rule, the CFPB noted in the section-by-section analysis that Regulation X section 1024.41(f)(1), which prohibits servicers from taking the first step to initiate foreclosure proceedings under state law during the initial 120 days of a borrower's delinquency, preempts state foreclosure timelines to the extent that they allow an earlier commencement of foreclosure.[9] Although the CFPB highlighted this provision in the

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4 *See* §§ 3.2.2.4, 3.2.8.7, NCLC's *Foreclosure and Mortgage Servicing*.

5 *See* § 3.5, NCLC's *Foreclosure and Mortgage Servicing*.

6 Mik v. Federal Home Loan Mortg. Corp., 743 F.3d 149 (6th Cir. 2014).

7 Pub. L. No. 111–22, § 702 (2009); § 12.7, NCLC's *Foreclosure and Mortgage Servicing*

8 Mik v. Federal Home Loan Mortg. Corp., 743 F.3d 149, 165 (6th Cir. 2014). *See also* Nativi v. Deutsche Bank Nat'l Trust Co., 167 Cal. Rptr. 3d 173 (Cal. Ct. App. 2014).

9 *See* Section-by-Section Analysis, § 1024.41(f), 78 Fed. Reg. 10,833 (Feb. 14, 2013) ("The Bureau understands

section-by-section analysis, other loss mitigation provisions that operate in a similar manner, such as Regulation X section 1024.41(f)(2), should also preempt state laws to the extent they permit a foreclosure sale to proceed before a complete loss mitigation application has been evaluated.

Some courts have held that because RESPA section 2615 provides that "[n]othing in this chapter shall affect the validity or enforceability of any sale or contract for the sale of real property or any loan, loan agreement, mortgage, or lien made or arising in connection with a federally related mortgage loan," a violation of RESPA cannot be raised directly in a foreclosure proceeding as a valid defense to a foreclosure.[10] This is a misreading of section 2615, as discussed in § 3.2.2.10.4 of NCLC's *Foreclosure and Mortgage Servicing*. Moreover, many of these decisions involve groundless allegations of RESPA violations brought by unrepresented homeowners, and none of them have considered the Dodd-Frank Act amendments to RESPA or the foreclosure avoidance provisions of Regulation X that became effective on January 10, 2014.

The CFPB has similarly misapplied RESPA section 2615, by providing that the notice of error procedures do not limit a lender or servicer from initiating or proceeding with foreclosure.[11] However, an explicit exception in the regulation was added by the CFPB for a notice of error asserting a violation of the dual tracking provisions of Regulation X sections 1024.41(f), 1024.41(g), or 1024.41(j). If a timely notice of error is sent to the servicer, and the servicer cannot respond to the notice by the foreclosure sale date, the lender or servicer must cancel or postpone the foreclosure sale.[12]

Finally, the effect of RESPA section 2615 can be negated by arguing that compliance with the foreclosure avoidance provisions of Regulation X is a condition precedent to enforcement of the power of sale or the right to a foreclosure judgment under the mortgage contract between the borrower and the mortgage holder. Paragraph 22 of the Fannie Mae/Freddie Mac Single-Family Uniform Instrument is the provision in most mortgage contracts that addresses the mortgage holder's right to foreclose.[13] Although it is referred to as a non-standard provision, due to variations in state foreclosure procedures, there are many similarities in the boilerplate language contained in paragraph 22, particularly as between states having a judicial foreclosure process and those having a nonjudicial process. Importantly, the state-

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and intends that any such requirement will preempt State laws to the extent such laws permit filing of foreclosure actions earlier than after the 120th day of delinquency.").

10 *E.g.*, Svoboda v. Bank of Am., 964 F. Supp. 2d 659, 671 (W.D. Tex. 2013) (alleged RESPA violation asserting failure to respond to qualified written request cannot provide a basis for wrongful foreclosure claim); Allen v. United Financial Mortg. Corp., 2010 WL 1135787, at *5 (N.D. Cal. Mar. 22, 2010) (rejecting argument that alleged RESPA violation based on failure to send transfer of servicing notice invalidated a Trustee's Notice of Default or Notice of Sale); Embrace Home Loans, Inc. v. Richardson, 2015 WL 897348 (Conn. Super. Ct. Feb. 6, 2015) (involving improper allegation by borrower that mortgage holder violated RESPA by failing to give notice of the assignment of loan). *See also* Barrett-Bowie v. AmeriDream Educational Concepts, L.L.C., 2014 WL 3629683 (N.D. Tex. June 23, 2014) (purported RESPA violation asserting that plaintiff failed to prove it was legal holder of the mortgage note could not provide a legal basis for a wrongful foreclosure claim under Texas law).

11 Reg. 12 C.F.R. § 1024.35(i)(2).

12 Official Interpretations to Reg. X, ¶ 35(e)(3)(i)(B)-1; § 3.2.2.10.3 of NCLC's *Foreclosure and Mortgage Servicing*.

13 Copies are available at www.freddiemac.com and www.fanniemae.com.

specific versions of paragraph 22 in nonjudicial foreclosure states all refer to the mortgage holders need to comply with "Applicable Law" when invoking the power of sale or right to foreclose. "Applicable Law" is defined in the definition section of the Uniform Instrument to mean "all controlling applicable federal, state and local statutes, regulations, ordinances and administrative rules and orders (that have the effect of law) as well as all applicable final, non-appealable judicial opinions." Thus, the foreclosure avoidance provisions of Regulation X are controlling applicable federal regulations that may be incorporated into the Uniform Instrument, where applicable, whenever the document refers to "Applicable Law."

For example, most of the nonjudicial states that use a Deed of Trust have a statement in paragraph 22 addressing the timing for when the foreclosure sale may occur, such as: "After the time required by Applicable Law, Trustee, without demand on Borrower, shall sell the Property at public auction to the highest bidder . . ."[14] The "time required by Applicable Law" in this context should include all time limitations on the servicer's right to proceed with foreclosure imposed by state and federal law, including RESPA and Regulation X. Thus, a servicer is in breach of paragraph 22 if it proceeds with a foreclosure sale before the borrower is more than 120 days delinquent in mortgage payments;[15] before the borrower has received an evaluation of a complete loss mitigation application; before the time the borrower had to appeal a loan modification denial or before receiving notice of the appeal outcome; before the borrower has rejected a loss mitigation option offer; or before the borrower has failed to perform under a loss mitigation agreement.[16]

Most of the Uniform Instruments in nonjudicial foreclosure states have a similarly-worded provision that describes the servicer's or mortgage holder's right to invoke the power of sale after the borrower has failed to cure a default, such as: "If the default is not cured on or before the date specified in the notice, Lender at its option may require immediate payment in full of all sums secured by this Security Instrument without further demand and may invoke the power of sale and any other remedies permitted by Applicable Law."[17] If the phrase "permitted by Applicable Law" is construed to modify both the "power of sale" and "any other remedies,"[18] it can be argued that invoking the power of sale is not "permitted by Applicable Law" if the servicer has failed to comply with the foreclosure avoidance and dual tracking provisions of

14 *E.g.*, Arizona Deed of Trust, ¶ 22 ("After the time required by Applicable Law and after publication and posting of the notice of sale, Trustee, without demand on Borrower, shall sell the Property at public auction to the highest bidder for cash at the time and place designated in the notice of sale."); California Deed of Trust, ¶ 22 ("After the time required by Applicable Law, Trustee, without demand on Borrower, shall sell the Property at public auction to the highest bidder at the time and place and under the terms designated in the notice of sale in one or more parcels and in any order Trustee determines.").

15 Reg. X, 12 C.F.R. §§ 1024.41 (f)(1), 1024.41(j).

16 Reg. X, 12 C.F.R. §§ 1024.41(f)(2), 1024.41(g).

17 *See* California Deed of Trust, ¶ 22.

18 The statutory construction doctrine referred to as the "rule of last antecedent" might suggest that the phrase "permitted by Applicable Law" modifies only "any other remedies." However, a better reading of the language, based on the addition of the word "other" in the sentence, is that the drafters intended "any other remedies" to refer to remedies similar to the power of sale, and therefore all remedies including the power of sale must be "permitted by Applicable Law." In other words, the phrase "permitted by Applicable Law" in the sentences is a qualifier for a series of antecedents. Moreover, it would be nonsensical to read the language as authorizing a mortgage holder to invoke a power of sale not permitted under applicable law. To the extent there is ambiguity in the language, it should be construed against the drafters.

Regulation X.

The failure to comply with paragraph 22 of the Uniform Instrument can be a basis to challenge an acceleration or foreclosure.[19] Some courts have held that compliance with paragraph 22 sets a condition precedent to a valid foreclosure.[20] Advocates may rely upon court opinions in cases involving challenges to FHA-insured lenders' initiation of foreclosure without complying with the loss mitigation requirements found in federal regulations, which are incorporated into FHA mortgages.[21] As in those cases, advocates may assert a paragraph 22 violation based on noncompliance with RESPA regulations either as a breach of contract claim or as a wrongful foreclosure based on the failure to satisfy a necessary condition precedent. Even if such a claim is considered as an equitable defense, it may be raised in an affirmative action brought in a non-judicial foreclosure state as a defense in equity to stop a foreclosure sale.[22]

C. Availability of Injunctive Relief under RESPA

RESPA does not expressly provide for injunctive relief or other equitable remedies. Thus, a number of courts have refused to enjoin or set aside a foreclosure sale or provide other injunctive relief based on violations of RESPA.[23] These decisions have focused on the language in RESPA section 2605(e) providing for specific, but limited, remedies, and have ignored the inherent power of federal courts to issue injunctive and declaratory relief. Moreover, these decisions have not considered the foreclosure avoidance amendments to RESPA and Regulation X made by the Dodd-Frank Act and the CFPB's 2013 Mortgage Servicing Rule.

Federal district courts have inherent power to issue equitable relief.[24] The jurisdictional provision in RESPA, section 2614, provides that an "action" pursuant to the provisions of section 2506, 2607, or 2608 may be brought in a federal district court or in any other court of competent jurisdiction.[25] With the merger of law and equity, there is only one form of action, a civil action.[26] By using the term "action" in section 2614, without any restrictions on its ordinary

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[19] *See* § 8.3.2.3, NCLC's *Foreclosure and Mortgage Servicing*.

[20] *See* § 8.3.2.3, NCLC's *Foreclosure and Mortgage Servicing*

[21] *See* §§ 6.2.7.10, 6.2.7.11, NCLC's *Foreclosure and Mortgage Servicing*.

[22] *E.g.*, Wells Fargo Home Mortg., Inc. v. Neal, 922 A.2d 538 (Md. 2007). *See also* § 6.2.7.11, NCLC's *Foreclosure and Mortgage Servicing*.

[23] *See, e.g.*, Houle v. Green Tree Servicing, 2015 WL 1867526 (E.D. Mich. Apr. 23, 2015) (RESPA does not provide for relief of setting aside a foreclosure sale); Minson v. Citimortgage, Inc., 2013 WL 2383658 (D. Md. May 29, 2013); Beck v. Wells Fargo Bank, 2011 WL 6217345 (N.D. Cal. Dec. 14, 2011); Moon v. Recontrust, 2011 WL 2474264 (W.D. Wash. June 20, 2011) (RESPA does not provide for injunction of foreclosure sale as proper remedy); Rivera v. BAC Home Loans Servicing, L.P., 2010 WL 2757041 (N.D. Cal. July 9, 2010). *Cf.* Diamond v. One West Bank, 2010 WL 1742536 (D. Ariz. Apr. 29, 2010) (court issued injunction enjoining foreclosure sale without specifically referencing RESPA claim as the basis for relief).

[24] In addition to inherent authority, declaratory relief is available under the Declaratory Judgment Act whenever there is a case of actual controversy, and regardless of whether the plaintiff seeks any other relief. 28 U.S.C. §§ 2201, 2202.

[25] 12 U.S.C. § 2614.

[26] *See* Fed. R. Civ. P. 2.

meaning, Congress intended the federal courts to have jurisdiction in a RESPA action over claims for both legal and equitable relief.

In *Califano v. Yamasaki*,[27] the Supreme Court held that "[a]bsent the clearest command to the contrary from Congress, federal courts retain their equitable power to issue injunctions in suits over which they have jurisdiction." In *Yamasaki*, the Social Security Administration (SSA) argued that the relevant provision of the Social Security Act gave the District Court power only to enter a judgment "affirming, modifying, or reversing a decision" of the agency.[28] The SSA argued that the District Court did not have authority to issue class-wide injunctive relief directing the SSA to implement procedures that would require it to suspend recoupment of a benefit overpayment until the recipient was afforded a hearing. The Supreme Court rejected this argument, concluding that "[i]njunctions can play an essential role" in benefit overpayment litigation, and that "[w]ithout the power to order a stay of recoupment pending decision, a court for all practical purposes would be unable to 'reverse' a decision concerning prerecoupment rights."[29]

Applying the *Yamasaki* reasoning to RESPA, it can be argued that without an injunction to stop (or set aside) a foreclosure sale conducted in violation of the dual tracking protections under Regulation X section 1024.41(f), a court would be unable to reverse the consequences flowing from the violation, the loss of the borrower's interest in the home. An award of money damages would not provide to the borrower the relief intended by the regulation, which is to prevent the sale of the borrower's home before a decision has been made on a loss mitigation application. Without injunctive relief, the provisions of RESPA added by the Dodd-Frank Act upon which the regulation was founded are meaningless and would fail to carry out the purpose intended by Congress of "avoiding foreclosure."[30]

Courts have held that injunctive relief may be awarded to a consumer under a similar consumer protection statute, the federal Truth in Lending Act (TILA). Declaratory and injunctive relief is often necessary in an action to enforce the right of rescission provided under TILA.[31] Like RESPA, TILA provides for specific private remedies, but does not expressly provide for injunctive relief. However, courts have nevertheless held that a consumer in an action under TILA may obtain an order enjoining a foreclosure of the home,[32] requiring the

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[27] 442 U.S. 682, 705, 99 S. Ct. 2545, 2559, 61 L. Ed. 2d 176 (1979).

[28] *Id*.

[29] *Id*.

[30] In addition to sections 6(j)(3), 6(k)(1)(E), and 19(a) of RESPA, the CFPB relied on its authority under section 6(k)(1)(C) (12 U.S.C. § 2605(k)(1)(C)), which refers to a servicer's obligation to take actions relating to "avoiding foreclosure," in establishing the final loss mitigation rule. *See* § 3.2.8.1, *supra*; Section-by-Section Analysis, § 1024.41, 78 Fed. Reg. 10,822 (Feb. 14, 2013).

[31] *See* National Consumer Law Center, Truth In Lending, Ch. 10 (9th ed. 2015), *updated at* www.nclc.org/library (discussion of the rescission remedy).

[32] *See, e.g*., Hindorff v. GSCRP, Inc., 2013 WL 2903451 (D. Colo. June 14, 2013) (granting preliminary injunction where court found the notice of right to rescind violated Regulation Z); Demarest v. Quick Loan Funding, Inc., 2009 WL 940377 (C.D. Cal. Apr. 6, 2009) (granting preliminary injunction against trustee sale); Horton v. California Credit Corp. Retirement Plan, 2009 WL 700223 (S.D. Cal. Mar. 16, 2009) (granting preliminary injunction against foreclosure); Hughes v. Bravo Credit Corp., 2008 WL 2682699 (E.D. Cal. June 30, 2008) (granting temporary restraining order against foreclosure sale); Bland v. Carone Family Trust, 2007 WL 951344 (S.D. Cal. Mar. 19, 2007) (issuing temporary restraining order to prevent foreclosure sale of home); Deans v.

creditor to remove derogatory information from a credit report,[33] or declaring that the transaction is rescinded.[34]

Consumers have not fared as well in obtaining injunctive relief in actions brought under the Fair Credit Reporting Act (FCRA).[35] Like RESPA, the FCRA does not explicitly provide for injunctive relief in a private action. However, the FCRA authorizes the Federal Trade Commission to enforce compliance with the Act under the Fair Trade Commission Act, which in turn provides for injunctive relief.[36] The Fifth Circuit and a number of lower courts have held that the omission of any reference to injunctive relief in the FCRA's private remedy provision, combined with an express grant of power to obtain injunctive relief to the FTC in the same statute, signals that Congress purposively intended to deny consumers the right to equitable relief.[37] The Fifth Circuit also noted that its reasoning was supported by a subsequent amendment to the FCRA dealing with the reporting of consumer information to the FBI for counterintelligence purposes, which provides consumers with a right to injunctive relief in addition to a damages remedy against the government for improperly obtaining information.[38] The grant of injunctive relief to the FTC under the Fair Debt Collection Practices Act (FDCPA)[39] has also caused most courts to hold that the FDCPA does not permit private parties to obtain injunctive relief.[40]

The inference drawn from the grant of injunctive relief to an agency, to the extent it is

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Long Beach Mortg. Co., 2007WL 772892 (W.D. Mich. Mar. 12, 2007) (issuing temporary restraining order to enjoin sheriff's sale and waiving bond); National Consumer Law Center, Truth In Lending § 11.4.1 (9th ed. 2015), *updated at* www.nclc.org/library. *But see* Christ v. Beneficial Corp., 547 F.3d 1292 (11th Cir. 2008); Schulken v. Washington Mut. Bank, 2011 WL 2940293 (N.D. Cal. July 20, 2011) (following *Christ* and denying leave to amend complaint to assert claim for reinstatement of HELOCs, because injunctive relief not available in TILA class action); Sobh v. Bank of Am., 2011 WL 2792449 (E.D. Mich. July 18, 2011) (denying injunction against state foreclosure proceedings on the basis that TILA does not authorize injunctive relief).

[33] *See, e.g*., Lippner v. Deutsche Bank Nat'l Trust Co., 2008 WL 4200654 (N.D. Ill. Sept. 9, 2008) (ordering mortgage assignee to "reverse any adverse information reported to any credit agencies" after finding consumer was entitled to rescind).

[34] *See, e.g.*, Williams v. Empire Funding Corp., 183 F.R.D. 426 (E.D. Pa. 1998) (certifying class where complaint only sought declaration of class members' right to rescind).

[35] *See* National Consumer Law Center, Fair Credit Reporting § 11.12 (8th ed. 2013), *updated at* www.nclc.org/library.

[36] 15 U.S.C. § 1681s.

[37] Washington v. CSC Credit Servs. Inc., 199 F.3d 263, 268 (5th Cir. 2000) ("the affirmative grant of power to the FTC to pursue injunctive relief, coupled with the absence of a similar grant to private litigants when they are expressly granted the right to obtain damages and other relief, persuasively demonstrates that Congress vested the power to obtain injunctive relief solely with the FTC."), *cert. denied*, 530 U.S. 1261 (2000); Ilodianya v. Capital One Bank, 853 F. Supp. 2d 772 (E.D. Ark. 2012); Gauci v. Citi Mortg., 2011 WL 3652589 (C.D. Cal. Aug. 19, 2011) (dismissing plaintiff's request for declaratory relief on the ground that injunctive relief is not available under the FCRA); Bumgardner v. Lite Cellular, Inc., 996 F. Supp. 525, 526–27 (E.D. Va. 1998); Ditty v. CheckRite, Ltd., 973 F. Supp. 1320, 1338 (D. Utah 1997).

[38] Washington v. CSC Credit Servs. Inc., 199 F.3d 263, 269 (5th Cir. 2000) (citing 15 U.S.C. § 1681u(m), "[i]n addition to any other remedy contained in this section, injunctive relief shall be available to require compliance with the procedures of this section").

[39] 15 U.S.C. § 1692l.

[40] *See, e.g*., McWeay v. Citibank, 521 Fed. Appx. 784 (11th Cir. 2013); Weiss v. Regal Collections, 385 F.3d 337 (3d Cir. 2004). *See also* National Consumer Law Center, Fair Debt Collection § 6.7.2, *updated at* www.nclc.org/library.

even appropriate, should not be relevant in the context of RESPA. Unlike most consumer protection statutes, RESPA includes separate remedy provisions within its statutory framework that are tailored to the specific conduct prescribed in the relevant section. When first enacted in 1974, RESPA focused exclusively on real estate settlement abuses, mainly through the prohibition in section 2607 against kickbacks and unearned fees. Section 2607 contains its own remedy provision, subparagraph (d), which provides for private remedies as well as a provision permitting HUD (and now the CFPB, state attorneys general or insurance commissioners) to bring an action to enjoin violations of the section. Provisions of the 1974 Act also place limits on the amount a borrower may be required to deposit in an escrow account.[41] In the case of these escrow requirements found in section 2609, Congress elected to exclude private remedies.

The Cranston-Gonzalez National Affordable Housing Act of 1990 expanded the scope of RESPA by addressing mortgage servicer practices.[42] These provisions were included in section 2605 of RESPA. As with section 2607, a separate remedy provision was added for servicing violations in section 2605, in subparagraph (f). Unlike section 2607, however, there is no mention of injunctive relief, either as to private parties or government agencies.[43] This statutory framework suggests that the independent remedy provisions within RESPA should be considered separately. While courts may wish to infer, based on the reference to agency injunctive relief in section 2607, that Congress intended to deny consumers the right to equitable relief for all RESPA violations, it is equally plausible that the silence in section 2605(f), when viewed as an independent remedy provision, suggests that Congress intended for all parties, private and government, to have access to federal court's inherent power to issue injunctions.

The decisions holding that federal district courts lack authority to issue an injunction in RESPA cases do not cite or consider *Yamasaki*, and they fail to apply its clear holding that courts retain their inherent authority to issue an injunction unless there is the "clearest command" to the contrary in the statute. Rather than drawing questionable inferences based on doctrines of statutory construction related to the silence of Congress in a statute's remedy provision, courts should assume that Congress is aware of the inherent authority of federal district courts to grant injunctive relief, and therefore there is no need for Congress to explicitly refer to its availability in a remedy provision. Consistent with *Yamasaki* and constitutional considerations of separation of power between the judicial and legislative branches, federal district courts should retain their inherent authority to grant injunctive relief to enforce a consumer protection statute, except when it has been abrogated through the "clearest command" of Congress in statutory language expressly stating that parties should be denied such relief. As the Eleventh and Third Circuits have held, in rejecting the argument that a statute's provision for equitable remedies to an agency suggests that private litigants should be deprived those same remedies, it must be shown under the *Yamasaki* test that "the statute or its legislative history clearly states that Congress intended

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[41] 12 U.S.C. § 2609. Section 2605 was later amended by the Dodd-Frank Act. *See* § 3.1.2, NCLC's *Foreclosure and Mortgage Servicing*.

[42] Cranston-Gonzalez National Affordable Housing Act, Pub. L. No. 101-625, 104 Stat. 4079 (1990) (section 6 of RESPA codified at 12 U.S.C. § 2605).

[43] Although the CFPB is authorized to commence civil actions in federal court seeking equitable relief against any person that violates a federal consumer financial law, including RESPA, this grant of authority is contained in the CFPB's enabling statute rather than RESPA itself. *See* 12 U.S.C. §§ 5562–65 (Dodd-Frank Act §§ 1052–55).

to preclude such relief to private parties."[44] Many courts have applied *Yamasaki* correctly in this manner. [45] There is nothing in RESPA or its legislative history that states that Congress intended to preclude injunctive relief to private parties, and therefore courts retain authority to enjoin violations of RESPA.

The actions of a servicer in violation of RESPA may also give rise to a claim under a state deceptive practices statute.[46] These statutes sometimes explicitly authorize injunctive relief.[47] RESPA preempts only state laws that are inconsistent with it by providing less protections to borrowers, so the use of a state UDAP statute as a vehicle for enforcing RESPA's requirements is not preempted.[48]

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[44] Tanimura & Antle, Inc. v. Packed Fresh Produce, Inc., 222 F.3d 132, 138 (3d Cir. 2000); Frio Ice, S.A. v. Sunfruit, Inc., 918 F.2d 154, 157 (11th Cir. 1990). *See also* Religious Tech. Ctr. v. Wollersheim, 796 F.2d 1076, 1082 (9th Cir. 1986) (no injunctive relief under civil RICO; notes that Congress rejected versions of the act that would have expressly allowed it).

[45] See, e.g., United States v. Princeton Gamma-Tech, Inc., 31 F.3d 138, 147, 148 (3d Cir. 1994) (injunctive relief available under CERCLA); Alabama-Tombigbee Rivers Coalition v. Dep't of Interior, 26 F.3d 1103, 1107 (11th Cir. 1994) ("We find injunctive relief as the only vehicle that carries the sufficient remedial effect to ensure future compliance with [Federal Advisory Committee Act]'s clear requirements. Anything less would be tantamount to nothing."); Sierra Club, Lone Star Chapter v. F.D.I.C., 992 F.2d 545, 549 (5th Cir. 1993) (FDIC could be enjoined in its corporate capacity, rejecting argument that statutory limit on injunctions that applied to FDIC acting in its receiver capacity carried over); Wayside Farm, Inc. v. Bowen, 698 F. Supp. 1356, 1361 (N.D. Ohio 1988) (although Congress gave the Secretary of Health and Human Serv. "an effective enforcement mechanism in its efforts to ensure that facilities which provide care under the Medicaid/Medicare programs do it in a manner consistent with minimal guidelines . . . nothing in that legislative history . . . indicates that this Court's equitable power has been either narrowed or eliminated."); T & E Industries, Inc. v. Safety Light Corp., 680 F. Supp. 696, 705 (D.N.J. 1988) (CERCLA).

[46] *See* § 4.2, *infra*. *E.g*., McKell v. Washington Mut., Inc., 49 Cal. Rptr. 3d 227 (Cal. Ct. App. 2006) (cause of action under California unfair competition and unlawful business practices statute may be based on RESPA violation).

[47] National Consumer Law Center, Unfair and Deceptive Acts and Practices Appx. A (8th ed. 2012), *updated at* www.nclc.org/libary.

[48] *See* § 3.5, NCLC's *Foreclosure and Mortgage Servicing.*