

Qualified Written Requests and Settlement Conference Representation



Presenters

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Outline

- I. Introduction to Qualified Written Requests
- II. Using QWRs in Settlement Conferences
- III. Ethics and QWRs
- IV. Conclusions & Questions



Part I: Introduction to QWRs



What is a QWR?

- Under RESPA, a QWR is an inquiry from the borrower related to the servicing of the mortgage loan
 - Written correspondence
 - Not on a payment medium, such as a coupon
 - With sufficient information to identify name and account of borrower and determine information sought and/or reason account is in error



Related to Servicing Requirement

- Servicing defined as:
 - “receiving any scheduled periodic payments from a borrower pursuant to the terms of any loan . . . and making the payments of principal and interest and such other payments with respect to the amounts received from the borrower as may be required pursuant to the terms of the loan.” 12 U.S.C. § 2605(i)(3).



Types of QWRs

- Reg. X now classifies QWRs as containing either:
 - Notice of Error
 - Request for Information
- Single QWR can include both



Where to Send QWR?

- If servicer designates a QWR address, borrower **MUST** mail QWR to that address
 - Look on back of a mortgage statement or servicer's website

General Inquiries	To mail a payment	Overnight mail	Insurance matters
PO Box 5170 Simi Valley, CA 93062-5170	PO Box 15222 Wilmington, DE 19886-5222 Payments can also be made by phone, online, or at any Bank of America Banking center	Retail Payment Services, DES-023-03-04 Christiana III 900 Samscot Drive Newark, DE 19713-6002 Accepts overnight mail only in-person payments are not accepted at this address.	Insurance Dept. PO Box 961291 Fort Worth, TX 76161-0291

Notice of Error, Requests for Information and Qualified Written Requests (as defined in RESPA) must be sent to: PO Box 942019, Simi Valley, CA 93094-2019. You have certain rights under federal law to resolve errors and request information related to your account. For more information about these rights, you can go to bankofamerica.com or contact us.



Where to Send QWR?

- If servicer designates an address for notices of error, then must use same address for requests for information
- If multiple addresses, can send QWR to any listed
- If no designated address, can send to any office of the servicer and servicer must respond



Content of Notice of Error

- Reg. X lists ten specific errors plus catch-all related to any other error in servicing
 - Failure to accept a conforming payment
 - Failure to properly apply an accepted payment
 - Failure to credit a payment on date of receipt
 - Failure to pay items out of escrow
 - Improper imposition of fees
 - Failure to provide an accurate payoff balance upon request



Content of Notice of Error

- Failure to provide accurate information about loss mitigation options and foreclosure
- Failure to transfer accurate and timely information to a transferee servicer
- Improperly beginning the foreclosure process
- Improperly concluding the foreclosure process
- An improper denial for loss mitigation should fall under the catch-all provision because error is related to servicing.



Non-Covered Errors

- Errors relating to the origination
- Errors relating to the underwriting
- Errors relating to a subsequent sale or securitization
- Errors relating to a determination to sell, assign, or transfer the servicing



Invalid Notices of Error

- A servicer is also not required to respond to a notice of error if it is:
 - Duplicative;
 - Overbroad; or
 - Untimely



Invalid Notices of Error

- Duplicative Notice of Error
 - “substantially the same as an error previously asserted by the borrower for which the servicer has previously complied with its obligation to respond.”
12 C.F.R. § 1024.35(g)(1)(i).
 - Servicer must respond if borrower provides new and material information
 - Information that was not previously reviewed and reasonably likely to change prior determination about the error



Invalid Notices of Error

- Overbroad Notice of Error
 - Servicer cannot reasonably determine the specific error that the borrower asserts has occurred on a borrower's account.
 - Servicer must respond if it can identify a valid asserted error within an otherwise overbroad notice of error.



Invalid Notices of Error

- Untimely Notice of Error
 - Delivered to the servicer more than one year after either:
 - Servicing of the subject loan was transferred from the servicer receiving the notice of error
 - The mortgage loan was discharged



Content of Request for Information

- Borrower can request information related to the *servicing* of the loan
- Servicer does not have to respond if QWR:
 - Requests duplicative information;
 - Requests confidential, proprietary, or privileged information;
 - Requests irrelevant information;
 - Is overbroad or unduly burdensome; or
 - Is untimely.



Servicer Response Requirements

- **Acknowledge**
 - Must provide written acknowledgement of QWR within 5 business days of receipt
- **Reject**
 - If determines QWR is not valid, must inform borrower within 5 business days of decision
- **Comply**
 - Provide requested information or correct asserted error along with contact information for further assistance within 5 business days of receipt



Servicer Response Requirements

- Exception
 - Not required to acknowledge or respond to notice of error regarding improper commencement of foreclosure or filing for foreclosure judgment/order of sale if notice of error received 7 or fewer days before foreclosure sale
 - Just has to make a good faith attempt to respond and either correct asserted error or state reason for believing there is no error



Response to Notice of Error

- Correct the error or conduct reasonable investigation
 - 30 business days for most errors
 - 7 business days for payoff balance errors
 - 30 business days or before foreclosure sale, whichever is earlier, for improper foreclosure



Response to Notice of Error

- Servicer may request that the borrower provide documentation to support notice of error
 - Cannot require such information as a condition for investigating
 - Cannot conclude that no error occurred solely based on borrower's failure to provide such information
 - Servicer must still conduct a reasonable investigation



Response to Notice of Error

- Servicer prohibited from charging fee
- Servicer prohibited from requiring borrower to make any payment owed on the account as a condition to conducting investigation



Response to Notice of Error

- Corrected Error
 - Written notice of correction
 - Effective date of correction
 - Contact information for further assistance



Response to Notice of Error

- Additional or Different Error
 - Correct error
 - Provide written notice of correction with:
 - Description of error
 - Action taken to correct error
 - Effective date of correction
 - Contact information for further assistance



Response to Notice of Error

- No Error After Reasonable Investigation
 - Written notice stating:
 - No error has occurred
 - Basis for this determination
 - Borrower's right to request documents relied upon by servicer
 - Information regarding how borrower can request such documents
 - Contact information for further assistance



Response to Notice of Error

- Documents relied upon by servicer
 - Servicer must provide documents, at no charge, within 15 business days of borrower's request
 - Can withhold information that is confidential, proprietary, or privileged
 - But must inform borrower in writing within 15 business days of borrower's request



Response to Request for Information

- Provide requested information or conduct reasonable search for information within 30 business days
 - Information not available if:
 - Not in servicer's control or possession
 - Not retrievable in ordinary course of business through reasonable efforts
 - Written notice that information not available
 - Basis for determination
 - Contact information for further assistance



Response to Request for Information

- Different deadline for request for identity and contact information of mortgage owner
 - Information must be provided within 10 business days of receipt
 - Example: Loan held in securitized trust
 - Servicer complies by providing name of trust and name, address, and appropriate contact information for the trustee.



Extensions of Time

- Servicer can extend 30-day period for responding by additional 15 business days if written notice sent before expiration of initial response period
 - Extension not applicable to:
 - Errors regarding payoff statements, commencement of improper foreclosures, or improper filing for foreclosure judgment or sale
 - Request for information regarding identity and contact information for mortgage owner



Extensions of Time

- Multiple, Different, or Additional Errors
 - Servicer can address in a single response or through separate responses
 - If treated as separate notices of error, then can extend response time by 15 business days for each asserted error if written notice provided within first 30 business days



Consumer Protections in the QWR Process

- Servicer prohibited from charging fee or requiring payment owed as a condition for responding to QWR
- Servicer cannot provide adverse information to credit reporting agencies for 60 days while responding to errors related to disputed payments
 - Can provide adverse information while responding to requests for information



Consumer Protections in the QWR Process

- FDCPA Issues
 - Service must still comply with Reg. X even if it is a debt collector and borrower has sent a cease communication letter
 - Not required to respond if borrower specifically withdraws QWR



Exception for Payoff Statements

- General request for payoff statement need not be treated as request for information.
 - Servicers may treat request under Reg. Z requirements, which allows servicer to charge a fee
- Typically payoff statement must be sent within 7 business days
 - But if loan in bankruptcy or foreclosure, then can be sent “within a reasonable time”



Remedies for RESPA Violations

- RESPA § 2605(f) provides private cause of action for failure to properly respond to QWRs
 - Action can be brought in state or federal court within 3 years of violation
 - Safe-harbor for correcting error within 60 days after discovery and prior to commencement of the action and receipt of notice of error



Remedies for RESPA Violations

- Borrower can receive:
 - Actual damages
 - Statutory damages
 - Up to \$2,000 per violation if a “pattern or practice of noncompliance”
 - In class actions, capped at the lesser of \$1,000,000 or one percent of the net worth of the servicer
 - Reasonable attorney’s fees



Part II: Using QWRs in Settlement Conferences



Why use QWRs?

- Response Time
- Consumer Protection
- Liability
- Reliability
- Right to supporting documents



Response Time

- QWR response times
 - Owner of the loan – 10 business days
 - Accurate payoff statement – 7 business days
 - Almost everything else – 30 business days
- Settlement Conference Requests
 - Practically speaking – next settlement conference
 - In Queens, for example, this is over 3 months



Consumer Protection

- For notice of error, borrowers receive protection from negative credit reporting related to disputed payments.
- This is absent if the payments are merely disputed in settlement conferences or pleadings.
- Servicers must respond to QWRs free of charge.



Liability

- Liability is the biggest advantage of the QWR.
- Non-compliance results in:
 - Actual damages,
 - Attorney's Fees, and
 - Up to \$2,000 in statutory damages.
- Unlike a motion under CPLR 3408, a suit under RESPA punishes each individual violation rather than an overall failure to act in good faith.



Reliability

- Unlike representations made during settlement conferences, QWRs:
 - are in writing; and
 - come from someone with knowledge of the borrower's account.
- Furthermore, while inaccurate representations at a settlement conference are unlikely to be penalized, an inaccurate response to a QWR is a violation of RESPA.



Right to Supporting Documents

If the borrower asserts an error and the servicer denies that there is an error:

- The borrower has the right to request copies of the documents on which the servicer relied in making its judgment; and
- The servicer must provide copies of those documents within 15 business days.

Although the NMS and HAMP rules provide a right to appeal an improper denial, neither rules require this level of follow up.



Sample Situation: Information Gathering

At the opening of a case, an attorney representing a borrower in a foreclosure case needs some basic information to determine what will be at issue.

We've included on Page 16 of the written materials a Sample QWR for the outset of a case, requesting some background information:

- Identity of the owner
- Any restrictions in the Servicing Agreement that would bar HAMP or other modifications
- Payment History
- Itemization of Costs and Fees



Tyrone Slothrop
175 Quincy Street
Brooklyn, NY 11216

January 30, 2014

VIA CERTIFIED MAIL, RETURN RECEIPT REQUESTED

Blicero Loan Servicing
P.O. Box 10335
Des Moines, IA 50306-0335

Re: Qualified Written Request – Loan # 23545674

Dear Customer Service:

As provided by Section 6 of the Real Estate Settlement Procedures Act (RESPA), this letter is a "qualified written request".

Please provide:

1. The identity of the owner of my loan;
2. Any restrictions in the Servicing Agreement that would bar HAMP or other modifications;
3. My complete payment history; and
4. An itemization of any costs and fees charged to my account.

I understand that under Section 6 of RESPA you are required to acknowledge my request within 5 business days, must provide the name of the owner of my mortgage with 10 business days and must provide the remaining information within 30 business days.

Civil penalties for failure to comply with Section 6 of RESPA may include actual damages, statutory damages of up to \$2,000 and an award of attorney's fees and costs.

Sincerely,

Tyrone Slothrop



Sample Situation: Raising Counterclaims and Defenses

- Most counterclaims raised by a borrower can be framed as requesting that the servicer correct an error in the account.
- Potential RESPA liability increases damages.
- Sending a notice of error early in the case allows the borrower to gather information early about the servicer's likely response.
- Additionally, unlike discovery, the response to the QWR must be provided free of charge.
- Some examples are included in Pages 18-21 of the written materials



Sample Situation: Modification Denials

- Improper denial for loss mitigation is proper grounds for a notice of error.
- By making the issue a QWR issue, borrowers' attorneys can add RESPA liability to an appeal of an incorrect decision.
- Challenging the denial by QWR removes the deadline to challenge the denial and allows the borrower to receive the documents on which the servicer relied.
- Some examples are included in Pages 23-25 of the written materials



Sample Situation: Fee Overcharges

- Fee overcharges are specifically listed as an appropriate area for a notice of error.
- Challenging these fees by QWR creates RESPA potential liability.
- Additionally, if the servicer does not remove the fees, it must produce supporting documents, likely including invoices, receipts, etc.
- An example is included in Pages 27-28 of the written materials



Part III: Ethics and QWRs



Unethical QWR



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Michael Grinthal
Christopher Schwartz
Supervising Attorneys

50th Anniversary: Mobilizing for Justice

January 30, 2014

VIA FAX, EMAIL AND FIRST CLASS MAIL

Blicero Loan Servicing
P.O. Box 10335
Des Moines, IA 50306-0335

Loan Number: 23545674
Property Address: 175 Quincey Street, Brooklyn, NY 11216

Dear Customer Service:

My office represents Tyrone Slothrop with regards to the foreclosure action pending in Kings County Supreme Court bearing Index Number 1231/2013. As provided by Section 6 of the Real Estate Settlement Procedures Act (RESPA), this letter is a "qualified written request".

Please provide:

1. The identity of the owner of Mr. Slothrop's loan;
2. Any restrictions in the Servicing Agreement that would bar HAMP or other modifications;
3. Mr. Slothrop's complete payment history; and
4. An itemization of any costs and fees charged to his account.

I understand that under Section 6 of RESPA you are required to acknowledge my request within 5 business days, must provide the name of the owner of my mortgage within 10 business days and must provide the remaining information within 30 business days.

Civil penalties for failure to comply with Section 6 of RESPA may include actual damages, statutory damages of up to \$2,000 and an award of attorney's fees and costs.

Sincerely,

Joseph Rebella, Esq.



Do Not Send to A Represented Party

Rule of Professional Conduct 4.2(a) provides that:

A lawyer shall not communicate or cause another to communicate about the subject of the representation with a party the lawyer knows to be represented by another lawyer in the matter, unless the lawyer has the prior consent of the other lawyer or is authorized to do so by law.

This rule exists to prevent situations in which represented party is taken advantage of through greater skill of adversary's attorney and specifically to prevent against liability-creating statements or disclosures from the party, particularly those protected by privilege.



Do Not Send to A Represented Party

- Party includes employees whose acts or omissions in the matter under inquiry are binding on the corporation or imputed to corporation.
- Exception for contact “authorized by law” does not apply to this situation.
- In an active foreclosure case, the opposing party is always represented by counsel, so you can never send a QWR to the Plaintiff, without opposing counsel’s consent.



Is the Servicer a Represented Party?

- But what if the servicer is not the named Plaintiff?
- Example: your client is sued by US Bank as Trustee for Certificate Trust 2005-2. US Bank as Trustee is clearly represented by the attorney who signs by the complaint, but is the servicer (who is not US Bank) represented by the attorney?



Is the Servicer a Represented Party?

- Rule 4.2(a): applies to parties the “lawyer *knows* to be represented by another lawyer in the matter” (emphasis added)
- Rule 1.0(k): “‘knows’ denotes actual knowledge of the fact in question. A person’s knowledge may be inferred from circumstances.”
- Do you know that that the foreclosure attorneys represent the servicer?



Is the Servicer a Represented Party?

- You *might* actually know:
 - Allegations in complaint
 - Certificate of merit
 - Letters from client’s file
 - Bank representative ordered
- You *should* be able to infer from circumstances:
 - Standard practice for foreclosure cases
- From a policy point of view, all of the Rule 4.2(a) concerns apply.



The QWR Paradox

The QWR Paradox:

1. Must send the QWR to the Servicer's specified address; but
2. Cannot send the QWR to the Servicer

What to do?



Have Your Client Send it!

Rule of Professional Conduct 4.2(b) provides that:

A lawyer may cause a client to communicate with a represented person unless the represented person is not legally competent, and may counsel the client with respect to those communications, provided the lawyer gives *reasonable advance notice* to the represented person's counsel that such communications will be taking place. (emphasis added)

NYSBA's comments to the Rules explicitly provide that a lawyer may counsel a client "by drafting papers for the client to present to the represented person."

Accordingly, a borrower's attorney may prepare a QWR for her client's signature, provided that the attorney provides reasonable advance notice to opposing counsel.



What Constitutes Reasonable Advance Notice?

Reasonable advance notice is notice:

- provided sufficiently in advance; and
- of sufficient content, so that
- the represented person's lawyer can advise the client with respect to the client to client communications before they take place.

In this context, the communication at issue:

- is not taking place in real time, and
- is directed to a specialized department of the servicer,
- which already knows that the QWR is designed, in part, to create liability.

Moreover, the mandated response time to the QWR provides sufficient time for the servicer to consult with counsel before responding.

So, an email or fax stating that a QWR is being sent and including a copy of the QWR should be sufficient notice under the rules.



Conclusion

To send a QWR ethically during settlement conferences:

1. Draft it under the client's name.
2. Provide notice to opposing counsel that your client is sending a QWR to the servicer.
3. Have the client sign it and send it to servicer's QWR address.



Ethical Conduct



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Christopher Schwartz
Supervising Attorneys

50th Anniversary: Mobilizing for Justice

January 30, 2014

VIA FAX, EMAIL AND FIRST CLASS MAIL

Trystero, Thurn and Taxis, LLP
28 East Main Street, Suite 1800
Rochester, New York 14614

RE: Blicero v. Slothrop, et al., Index No. 1231/2013

To whom it may concern,

I have instructed my client, Tyrone Slothrop, to send a qualified written request to your client, Blicero Loan Servicing. I have attached a copy of the qualified written that Mr. Slothrop intends to send.

Sincerely,

Joseph Rebella, Esq.

Encl.



Thank You

Any Questions?

