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When Borrowers' Rights and CFPB Collide

"It's difficult when you've got two separate sets of proposed rules and legislation that have not been finalized."

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Michelle A. Mierzwa *joined Wright, Finlay & Zak's Compliance Division in 2015, providing loan originators, lenders, servicers, trustees and others in the mortgage industry with state and federal compliance and regulatory counsel. Since 1998, Mierzwa has specialized in the representation of residential finance lenders, servicers, investors and trustees. She worked with mortgage servicers of all sizes to ensure their compliance with state and federal laws, including, but not limited to, California and Nevada Homeowner Bill of Rights, state and federal FDCPA, RESPA, TILA, Washington Foreclosure Fairness Act, Nevada, Oregon and Washington Foreclosure Mediation Programs, Service members Civil Relief Act, Dodd-Frank Act, and subsequent CFPB Rules. Mierzwa recently spoke with* DS News *about S.B. 1150—a "survivor bill of rights" on the verge of becoming law in California and which enhances the rights of successors in interest to the borrower regarding the property—and how it relates to the CFPB's mortgage servicing rules enacted in January 2014.*

Does S.B. 1150 in California conflict with the CFPB's servicing rules? The biggest enhancement that California is looking to add to successor-interest rights is a private right of action. They're looking to allow successors in interest to have all of the rights of a borrower with respect to due diligence to contact them regarding loss mitigation, to evaluate them for assumption and loss mitigation alternatives, and for there to be a private right of action for that successor if the servicer fails to comply with the statute. A private right of action for the successors in interest is something that the CFPB rules do not contemplate. That is a pretty big deal for servicers, because the private right of action necessarily equates to more litigation being filed by consumer advocates and borrowers' counsel, and that substantially increases the cost of servicers doing business in the state.

How do you think that conflict can be reconciled, or do you think the CFPB will consider adding the private right of action for successors in interest at some point? I think if the CFPB had wanted that to be included, they would have included it. The proposed rules have been essentially under submission for many months, and the CFPB is imminently expected to release the final versions of those rules after the comment period and their evaluation of the stakeholders' comments. If they had intended to go that way, I believe that they would have included provisions for private rights of actions relating to the successors in interest rights in the proposed rules. With respect to the California legislature and the proponents of S.B. 1150, we have worked diligently to try to reduce the adverse impact of this bill on servicers and lenders. But the one sticking point that we've not been able to get them to agree on is the removal of that private right of action. That is one of the main reasons why the proponents are pursuing this enhancement to successor rights in California statutes.

How are your servicer clients approaching this issue? It's difficult when you've got two separate sets of proposed rules and legislation that have not been finalized. The servicers know that the CFPB rules are going to be forthcoming, and they have an idea based on the proposed rules what the requirements are going to be regarding successors in interest. There is an enhanced requirement for evaluating successors and treating them, in many respects, like the borrower after they've established their status as a successor. The servicers realize that is in their future, and a lot of them have already been enhancing their communication with successors under the current version of the rules, which requires servicers to have policies and procedures that would enable them to facilitate communication with the successors. So they've already developed those policies and procedures under the current version of the rules. What is going to be the challenge is for them to enhance the requirements for actually evaluating those successors for loss mitigation alternatives, determining under the individual state laws of each state whether or not these individuals who are contacting them are actually successors—and then dealing with situations where there are multiple claimants to the property and how to evaluate them for loss mitigation alternatives that may be available based on the investor requirements.

They know it's coming, but they don't know exactly what the provisions are going to be under the federal CFPB rules. When you add onto that the proposed California bill which has many different terms that are not exactly like the CFPB rules, it really creates some uncertainty and need to re-evaluate their processes regarding the treatment of the successors as these state and federal laws are in flux.

Do you think the California Homeowner Bill of Rights will set a precedent for similar legislation on a national level? What we've seen, especially with respect to the California Homeowner Bill of Rights, is that legislation was enacted after the National Settlement but prior to the CFPB rules. We did see similar legislation, at least in Western states. The state of Nevada adopted almost identical provisions to the California Homeowner Bill of Rights into their state. We also saw the state of Washington enact some administrative code provisions that had similar requirements, and some Washington statutes that had similar due diligence requirements as contained in the California Homeowner Bill of Rights. It is possible that, similar to what happened with the original Homeowner Bill of Rights legislation in Western states, those same states may consider adopting enhanced requirements for successors in interest.