Payment Application Issues

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TILA Prompt Crediting of Payments

- CFPB rule effective 1/10/2014 - 15 U.S.C. § 1639f(a)

- Prior to 2014, FRB rule – former Reg. Z, 12 C.F.R. § 1026.36(c)(1)

- Servicer must credit “periodic payment” as of the date of receipt, unless:
  - no charge to consumer and
  - no negative credit reporting; or
  - borrower doesn’t follow instructions about how to pay

- No exceptions for small servicers, bankruptcy, or trial loan modifications
Date of Receipt

- OI, ¶ 36(c)(1)(i)-3 provides that “date of receipt” is:
  - date that the “payment instrument or other means of payment reaches the mortgage servicer”
  - Payment by check is received when servicer receives the check, not when the funds are collected
  - Preauthorized payment or telephone bill-payment is received when servicer receives an electronic fund transfer, check, other transfer medium from the third-party payor, not when the funds are actually received

- Fridman v. NYCB Mortg. Co., 780 F.3d 773 (7th Cir. 2015) (date of receipt for electronic payment is date consumer electronically authorizes the servicer to debit her bank account, by clicking a “submit payment” button for example, not date that funds are received by servicer from consumer’s account through Electronic Payments Network (EPN))
Non-conforming or Partial Payments

• Non-conforming payments (that do not comply with written payment instructions), if accepted, must be credited within 5 days of receipt.

• Partial payments may be placed into a suspense account and not treated as accepted:
  ▫ suspense account may be used only if authorized by contract and permitted by state law.
  ▫ when funds held in suspense account are equal to or greater than a periodic payment, they must be applied.
  ▫ must disclose on periodic statement, if provided.

• Servicer not required to accept a partial payment and can return it to the borrower, unless prohibited by the contract or by state law.
  ▫ NOTE: some state laws prevent a servicer from returning a partial payment.
Late Fees or Other Fees

• “Periodic payment” – defined as amount sufficient to cover principal, interest, and escrow for billing cycle

• Payment must be applied even if it is not enough to cover late fees, other fees, or non-escrow payments advanced by servicer.
  ▫ 12 CFR 1026.36(c)(1)(i)

• No pyramiding of late fees (can’t charge a late fee solely for failure to pay a prior late fee) - same as FTC Credit Practices Rule
  ▫ 12 CFR 1026.36(c)(2)
Late Fees Under the Contract: Uniform Security Instrument, para. 2

- Requires payments to be applied in order of priority
  - Interest Due
  - Principal Due
  - Escrow
  - Late charges, other charges
  - Reduction of principal balance

- Payments can only be applied to late fees after outstanding periodic payments have been paid:
  “If Lender receives a payment from Borrower for a delinquent Periodic Payment which includes a sufficient amount to pay any late charge due, the payment may be applied to the delinquent payment and the late charge. If more than one Periodic Payment is outstanding, Lender may apply any payment received from Borrower to the repayment of the Periodic Payments if, and to the extent that, each payment can be paid in full. To the extent that any excess exists after the payment is applied to the full payment of one or more Periodic Payments, such excess may be applied to any late charges due.”
Example

Borrower behind on monthly payments of $885.88, makes payments of $2193.42 on 9/28/15, $1350.10 on 11/30/15, and $885.88 on 12/29/15

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<th>DUE DATE</th>
<th>TRANSACTION AMOUNT</th>
<th>DUE DATE</th>
<th>TRANSACTION DESCRIPTION</th>
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<td>172</td>
<td>264.27 1 LATE CHARGE 157.39</td>
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Information on Periodic Statements

• Periodic statements include information helpful in identifying payment application problems:
  ▫ amount due for the billing period
  ▫ explanation of amount due including fees imposed
  ▫ past payment breakdown
  ▫ transaction activity
  ▫ partial payment information

• Disclosure required of payments servicer decides to hold in suspense account rather than apply to account

• Delinquency information: If consumer is more than 45 days delinquent, statement must include:
  ▫ date consumer became delinquent;
  ▫ account history for previous six months or period since last time account was current showing the amount remaining past due from each billing cycle;
  ▫ total payment amount needed to bring the account current
TILA Damages

- Actual Damages (including emotional distress)
- Costs
- Attorney’s Fees
- Statutory Damages: up to $4,000 for closed-end mortgage violations
  - Arguable that damages can be recovered per violation. TILA limits multiple statutory violations as to disclosure violations, but is silent as to multiple violations of other provisions. 15 U.S.C. § 1640(g)
- Who may be liable (i.e. creditor, assignee, servicer)?
  - TILA § 1640 refers to “creditor”, which is typically the loan originator
Individual Lenders/Seller Financing

- **Common problems:**
  - Sloppy accounting (pen & paper)
  - Capitalizing unpaid interest (or entire unpaid payments) into the loan balance

- **Potential remedies:**
  - TILA if the person originates more than 5 mortgages in a year;
  - Breach of K, depending K terms re: payment application and interest charges
  - State law claims:
    - Usury – charging interest on interest, causing a higher rate of interest to be charged
    - UDAP
Payment Application & Bankruptcy

- Debtor completes Chapter 13 plan, makes all plan payments to cure + all post-petition payments, but servicer says account is still in default
- Common problems:
  - Creditor’s proof of claim fails to correctly calculate the pre-petition default amount
  - Payments are not applied correctly
  - Payment amount changes without proper notice to debtor
  - Trustee payments not claimed/applied to the account
- Potential Options:
  - Pursue TILA, UDAP, FDCPA claims
  - Re-open bankruptcy to resolve payment dispute and/or bring claims for violation of bankruptcy discharge injunction (§ 524(i)), confirmation order, and order to deem current