



## Ninth Circuit: Loan Servicer Can Rely on Standard Notice-And-Cure Provision to Defeat Statutory Claims

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On December 15, 2017, the Ninth Circuit affirmed the dismissal of borrowers' statutory claims against their loan servicer because the borrowers failed to give the servicer notice and the opportunity to take corrective action before filing the case. *Giotta v. Ocwen Loan Servicing, LLC*, No. 16-16665, 2017 WL 6397179 (9th Cir. Dec. 15, 2017). This decision is significant because the notice provision at issue is standard in most residential mortgages and deeds of trust, and because this is the first Circuit Court of Appeal to directly address: (1) the provision's applicability to non-contractual statutory claims; and, (2) a servicer's ability to rely on the provision (which refers to the "Lender"), issues that have divided district courts across the country. The decision (though unpublished) will thus bolster a notice defense for both servicers and noteholders in borrower litigation.

### Defaulted borrowers sued their loan servicer regarding property-inspection and property-valuation fees.

The plaintiffs in this case were borrowers who had admittedly defaulted on their home-mortgage loan. Although their deed of trust explicitly authorized fees for property inspections and property valuations, the plaintiffs sued their loan servicer and others to challenge those fees, arguing that the servicer improperly used an affiliate to arrange the inspections and valuations without disclosing the affiliate's cost and profit structure. Plaintiffs did not assert a contract claim, but instead claimed that lack of disclosure rendered the fees (and associated billing statements) deceptive and unfair under the federal RICO statute and Fair Debt Collection Practices Act and under California's Rosenthal Fair Debt Collection Practices Act and Unfair Competition Law.

### District court dismisses case because fees were contractually authorized and because the borrowers failed to provide contractual notice.

The district court dismissed the plaintiffs' complaint for two independent reasons. *Giotta v. Ocwen Loan Servicing, LLC*, 2016 WL 4447150 (N.D. Cal. Aug. 24, 2016). First, the court found the fees were appropriate under the deed of trust and were not otherwise deceptive, unfair, or unlawful. *Id.*, \* 7-9.

Second, the district court relied on plaintiffs' failure to comply with a provision of their deed of trust requiring notice before filing suit. *Id.*, \* 2-6. That provision prohibited both "Borrower" and "Lender" from filing "any judicial action ... that arises from the other party's actions pursuant to this Security Instrument ... until such Borrower or Lender has notified the other party ... of such alleged breach and afforded the other party hereto a reasonable period after the giving of such notice to take corrective action."

In applying the notice provision, the district court rejected plaintiffs' argument that the provision didn't apply to their statutory claims because plaintiffs were suing under statutory rather than contractual duties. The court held the legal theory wasn't dispositive because the case arose from actions—charging fees for property inspections and valuations—that were done "pursuant to this Security Instrument" because the fees were specifically authorized by the deed of trust. *Id.*, \* 4-5. The district court rejected contrary district-court decisions. *Id.*, \* 6.



The district court also rejected the borrowers' argument that a servicer could not invoke the notice provision, which referred to the "Lender" rather than the servicer, because a subsequent loan modification defined "Lender" to include both the noteholder and the servicer. *Id.*, \* 4.

### **Ninth Circuit affirms dismissal, holding notice provision is applicable to statutory claims against loan servicers.**

Plaintiffs only appealed the dismissal of their FDCPA, RFDCPA, and UCL claims. The Ninth Circuit's decision affirming the appeal relied solely on plaintiffs' failure to comply with the notice provision, which the Court found applied to statutory claims and to claims against loan servicers.

The Court first held that the notice provision applied to plaintiffs' statutory claims. The Court agreed that the case arose "from the other party's actions pursuant to this Security Instrument" because it related to fees that were specifically authorized by the deed of trust. *Giotta*, 2017 WL 6397179, \* 1.

The Court also agreed that a loan servicer could invoke the notice provision even though the provision refers to the "Lender." But rather than rely on the loan modification the district court referenced, the Ninth Circuit relied on a provision of the deed of trust stating that "[t]he covenants and agreements of this Security Instrument shall bind (except as provided in Section 20) and benefit the successors and assigns of Lender." *Id.* The Court found the defendant had been assigned the loan's servicing rights and was thus an "assign" of the lender entitled to the benefits of the deed of trust, including the notice provision. *Id.*

Finally, the Court rejected plaintiffs' argument that enforcing the notice provision as to their FDCPA claim would "abrogate" the protections of the statute or amount to a contractual waiver of the statute's protections. The Court found that the statute's consumer-protection purposes would not be contravened or waived by enforcing the notice provision, which does not bar recovery but simply imposes an easy-to-satisfy condition to recovery. *Id.*

The Ninth Circuit's decision in *Giotta* will be significant because the notice provision is present in most standard mortgages and deeds of trust. And district courts around the country had previously issued numerous conflicting decisions on both the types of claims to which the provision applied and whether a loan servicer could rely on the provision. *Giotta* is the first Circuit Court of Appeal to address these issues and gives loan servicers support for an additional defense to borrower litigation.

For more information on the matters discussed in this *Locke Lord QuickStudy*, please contact the authors.

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