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OHIO LEGISLATIVE SERVICE COMMISSION

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To: The Honorable Louis Terhar
Ohio Senate

From: Carla Napolitano, Attorney *cn*

Date: February 5, 2019

Subject: H.B. 489/132nd questions

You asked LSC questions related to a provision of H.B. 489 from the 132nd General Assembly. The provision under R.C. 1349.72 states that before a person collecting a debt secured by residential real property collects or attempts to collect any part of the debt, the person must first send a written notice with the information specified in the statute to the debtor. The notice requirement only applies if (1) the debt is a second mortgage or junior lien on the debtor's residential real property and (2) the debt is in default.

Your questions are (1) what qualifies as *collects or attempts to collect* on the debt, (2) is the statute applicable only in foreclosure situations, (3) does collecting a payment qualify as collecting a debt (if it is in default), (4) does the notice have to be sent each time before said collection, (5) what qualifies as a compliance failure, and (6) does this capture HELOCs or only other products outside of HELOCs.

LSC cannot give definitive answers to these questions – only a court can say for certain. I have below tried to point out the pertinent provisions of the bill or other pertinent information.

What qualifies as collects or attempts to collect?

R.C. 1349.72(A) requires that before a person collecting a debt secured by a residential real property *collects or attempt to collect* any part of the debt, a notice must be sent. *Collects or attempt to collect* are not defined terms in the act. In the absence of a statutory definition, the common meaning of the term is used. *Black's Law Dictionary* defines "collect a debt or claim" as to obtain payment or liquidation of it, either by personal solicitation or legal proceedings.¹ Consequently, the question would appear to be whether the communication with the debtor is to obtain, or attempt to obtain payment. The content of the communication of what constitutes an "attempt to collect" is left open to interpretation. Only a court could decide the scope of this provision for certain.

¹ *What is COLLECT*, The Law Dictionary Featuring Black's Dictionary Free Online Legal Dictionary 2nd Ed., <https://thelawdictionary.org/collect/> (accessed February 5, 2019).

Is this applicable only to foreclosure situations?

There is nothing in the statute that provides that this provision is limited to foreclosure situations. The public testimony on the act suggests that the statute is intended to protect debtors that are "threatened" with foreclosure, but the statute itself does not limit the protection to only those debtors facing foreclosure. See "**Public testimony**," below.

Does collecting a payment qualify as collecting a debt (if it is in default)?

As described above, the statute does not define "collecting or attempting to collect debt." *Black's Law Dictionary* defines collecting a debt as obtaining payment.

Does the notice have to be sent each time before said collection?

Again, the statute does not provide any limitation on how many times the notice must be sent out. If the statute is interpreted broadly, then each time a collection is made, would trigger the notice requirement. Interpreted more narrowly, the notice would need to be sent once, when the person begins to collect or attempt to collect on the debt. Only a court could say for certain.

What qualifies as a compliance failure?

"Compliance failure" is used in R.C. 1349.72(D) and it is not specifically defined, however the subject of division (D) is any owner of debt subject to divisions (A), (B), and (C). It would seem that the compliance failure is the owner of debt subject to division (A), (B), and (C) that does not comply with any act required in those divisions.

Does this capture HELOCs?

The act does not make any other qualification for the debt other than what has already been described above. If the home equity line of credit (HELOC) is a second mortgage or a junior lien on the debtor's residential property, it would seem to be subject to the statute's provisions.

Public testimony

Marc Dann from Dann Law Firm offered proponent testimony to the House Committee on Government Accountability and Oversight on March 7, 2018 (see attached document), Mr. Dann states the following:

The bill also provides relief to borrowers victimized by a particularly odious kind of mortgage servicer: companies that service underwater second mortgages. Many of these loans were first made by predatory lenders like Washington Mutual, Countrywide, Argent, and New Century and were used to provide the down payment for the first mortgage on a home that had been appraised at a price that far exceeded the property's actual value. These loans, as the collapse of the housing market here in Ohio and across the nation starkly demonstrated, were destined to fail.

Today, many of those second mortgages have fallen into the hands of unscrupulous debt buyers who use the threat of foreclosure to extort payments from Ohio borrowers. HB 489 will force these predators to register with the Department of Commerce, maintain a presence in Ohio, provide borrowers with a warning notice that includes a recommendation to consult a lawyer, provide proof of their right to collect the note.