

CARES Act – Is There A Private Right of Action for Violations?



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Lenders of Federally backed loans may be wondering whether borrowers will have recourse against them for any violations of the CARES Act’s moratorium on foreclosures and evictions. Generally, speaking “the fact that a federal statute has been violated and some person harmed does not automatically give rise to a private cause of action in favor of that person.” *Touche Ross & Co. v. Redington*, 442 U.S. 560, 568 (1979). Rather, the statute must either explicitly create a right of action or implicitly contain one. *Id.* at 575. In creating a private cause of action, Congress must act unambiguously and with a clear voice. *Gonzaga Univ. v. Doe*, 536 U.S. 273, 276 (2002). Absent congressional creation of a private cause of action (expressly or

implicitly), a private cause of action does not exist. *Alexander v. Sandoval*, 532 U.S. 275, 286 (2001).

The text of CARES Act does not expressly create a private cause of action for a lender’s violation of the foreclosure and eviction moratorium on federally insured mortgages. See CARES Act, 116 P.L., 136 at §§ 4022, 4024. The question, then, is whether courts will find that there is an implied private right of action.

To answer that question, courts are tasked to “interpret the statute Congress has passed, and to do so by consulting statutory structure and text. ‘Legal context,’ such as prevailing law at the time of the statute’s enactment, matters only to the extent it clarifies text.” *Sandoval*, 532 U.S. at 288. That is, “absent affirmative evidence of intent to allow private civil suits, there can be no private right of action—no matter how desirable that might be as a policy matter, or how compatible with the statute.” *Stokes v. Sw. Airlines*, 887 F.3d 199, 202 (5th Cir. 2018) (quoting *Sandoval*, 532 U.S. at 286-93) (internal quotes omitted).

Since the U.S. Supreme Court's opinion in *Sandoval*, there has been a trend away from finding implied causes of action since the such intent must be found in the text itself. Further, under *Sandoval* "[s]tatutes that focus on the person regulated rather than the individuals protected create no implication of an intent to confer rights on a particular class of persons." *Sandoval*, 532 U.S. at 289. The CARES Act's focus on Federally backed mortgages and obligations of mortgage servicers, rather than individual borrowers protected, strongly supports the idea that the intent was to create individual rights for the borrowers. Thus, the benefits foreclosure and eviction moratoriums are likely to be found to be merely incidental to the underlying purpose of the Act, and do not serve to provide a basis for a private right of action.

Such a finding would be consistent with Fifth Circuit's (and other circuits) interpretation of similar statutes and regulations even when the borrowers stand to benefit through their enforcement. See *Pennington v. HSBC Bank USA, N.A.*, 493 F. App'x 548, 552 (5th Cir. 2012) (finding no

private right of action under HAMP); *Jeansonne v. Generation Mortg. Co.*, 644 F. App'x 355, 357 (5th Cir. 2016) (finding no private right of action under HUD regulations that would allow surviving spouse to continue to reside in home after borrowing spouse); *Johnson v. World All. Fin. Corp.*, 830 F.3d 192, 196 (5th Cir. 2016) ("HUD regulations do not give the borrower a private cause of action unless the regulations are expressly incorporated into the lender-borrower agreement."); *Klein v. Wells Fargo Bank, N.A.*, No. A-14-CA-861-SS, 2014 U.S. Dist. LEXIS 156099, 2014 WL 5685113, at *5 (W.D. Tex. Nov. 4, 2014), *affd*, 613 Fed. Appx. 428 (5th Cir. 2015) (stating that "courts have found [that] there is no private right of action for failure to comply with HUD regulations promulgated under the National Housing Act (NHA)").

Lenders can certainly expect lawsuits and other repercussions for violating of the CARES Act moratorium on foreclosures and evictions. But enforcement of the Act through a private right of action is unlikely.

Here is the link to the CARES Act: <https://www.congress.gov/bill/116th-congress/house-bill/748/text>