



Consumer Finance Monthly Litigation Update

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This update is a summary of civil decisions of significance in the consumer financial services industry from federal courts throughout the United States that were released and made available by Westlaw during the previous month. This update is a complimentary service offered by Burr & Forman LLP and is distributed during the first week of each month via email. Individuals may subscribe/unsubscribe to this monthly update by sending an email to financialservices@burr.com.

SUPREME COURT DECISIONS

No civil decisions of significance in the consumer finance industry reported as of the date of publication.

1ST CIRCUIT DECISIONS

No civil decisions of significance in the consumer finance industry reported as of the date of publication.

2ND CIRCUIT DECISIONS

TRUTH-IN-LENDING ACT & EQUAL CREDIT OPPORTUNITY ACT (ATTORNEY'S FEES)

Diaz v. Paragon Motors of Woodside, Inc., 2007 WL 2903920 (E.D.N.Y. Oct. 1, 2007)

Plaintiff sued the defendant car dealership alleging violations of various provisions of the Truth-in-Lending Act (TILA) and other New York state laws. The court granted partial summary judgment in favor of the plaintiff on the TILA claims and other state law claims. The court awarded the plaintiff \$1000 in TILA statutory damages and \$7,890 in state law damages. The plaintiff then filed a motion for attorney's fees in the amount of \$72,665.50 and \$13,914.02 in disbursements pursuant to Rule 54(d) of the Federal Rules of Civil Procedure. The defendant opposed the award arguing that the amount of fees requested is unwarranted because of the plaintiff's limited success. Additionally, the defendants objected to certain portions of the plaintiff's request. The court first held that the rates billed by the plaintiff's attorneys were in-line with local standards. The lead attorney was awarded a fee of \$375/hour, the lowest ranking attorney was allowed \$245/hour and two paralegals were awarded \$120/hour. The court then limited the plaintiff's calculation of time spent on the case by a small margin, not allowing billing for any time spent on unsuccessful claims that were unrelated to the successful claims. The court concluded that because the plaintiff's Equal Credit Opportunity Act (ECOA) claims were related to the plaintiff's TILA claims that the hours billed on ECOA work could be charged; however, time spent on unsuccessful warranty claims was not allowed. The court then held that while the plaintiff was only partially successful on his New York business law claim that was only because the claims would have duplicated his TILA awards. The court held that this did not indicate that the plaintiff was only partially successful and attorney's fees should not be reduced. Finally, the court held that it was not appropriate to further reduce the plaintiff's attorney's fees only because they were disproportionate to the actual damages awarded. The court stated that any further reduction would greatly reduce the incentive for attorneys to bring TILA and consumer protection law claims. Therefore, the court awarded the plaintiff \$64,236.50 for attorney's fees. The court greatly reduced the plaintiff's costs request because the court determined that a \$10,837 expert witness fee was not recoverable under New York law. Therefore, the court also awarded the plaintiff \$3,117.02 in costs.

**TRUTH-IN-LENDING ACT, HOME OWNERSHIP AND EQUITY PROTECTION ACT
& REAL ESTATE SETTLEMENT PROCEDURES ACT (NOTIFICATION OF LIEN)**

Johnson v. Scala, 2007 WL 2852758 (S.D.N.Y. Oct. 1, 2007)

Plaintiffs purchased real property that, unbeknownst to them, was subject to an outstanding tax lien. After being informed of the lien, the plaintiffs brought this lawsuit alleging violations of the Truth-in-Lending Act (TILA), the Home Ownership and Equity Protection Act (HOEPA) and the Real Estate Settlement Procedures Act (RESPA) by the seller of the property, the mortgage provider and its nominee, the mortgage lender and the law firm that acted as the closing agent for the mortgage provider. The mortgage provider and its nominee and the law firm filed motions to dismiss claiming that the plaintiffs had failed to state a claim upon which relief could be granted and that the claims were barred by the statute of limitations; the plaintiffs then submitted a cross-motion for partial summary judgment with respect to their TILA claim. The court first held that the defendant mortgage lender had not violated the TILA. The defendant mortgage lender made disclosures of the amount financed, finance charges, annual percentage rate and total payments. The court held that these disclosures were all that was required of the mortgage lender. The fact that the plaintiff was not informed of a tax lien on the property was unrelated to the TILA. Additionally, the plaintiffs' TILA complaints were time-barred by the one year statute of limitations. Therefore, the court dismissed the TILA claims against every defendant. The court then held that the plaintiffs' HOEPA claims should be dismissed as to all defendants. First, HOEPA is a part of TILA, and therefore, the complaints are time-barred. Second, because HOEPA was created to prevent predatory lending practices with respect to second or subordinate financing of residential property, HOEPA applies only to a second loan or a refinancing of a loan not to a purchase money mortgage loan and is therefore inapplicable in the instant case. The court then dismissed the plaintiffs' RESPA claims as to all defendants with the exception of the seller. RESPA provides only three private causes of action. 12 U.S.C. § 2607 and 2608 provides a private cause of action but are subject to a one year statute of limitations that was exceeded in this case. The remaining private cause of action, § 2605, governs the servicing of mortgage loans and the administration of escrow accounts. The plaintiffs did not plead any facts with respect to the servicing of the mortgage or the administration of an escrow account and therefore the RESPA claims were dismissed.

3RD CIRCUIT DECISIONS**TRUTH-IN-LENDING ACT, EQUAL CREDIT OPPORTUNITY ACT & REAL ESTATE
SETTLEMENT PROCEDURES ACT (STATUTE OF LIMITATIONS)**

Christopher v. First Mut. Corp., 2007 WL 2972561 (E.D. Pa. Oct. 9, 2007)

Plaintiff obtained several home equity loans from the defendant in 1997, 1998 and 2000. The plaintiff brought this action alleging that the defendant violated the Truth-in-Lending Act (TILA), the Equal Credit Opportunity Act (ECOA), the Real Estate Settlement Procedures Act (RESPA) and various other state consumer protection laws. The defendant filed a motion for judgment on the pleadings contending that the plaintiff's claims are barred by the applicable statute of limitations. The plaintiff contested the motions, but agreed to withdraw any arguments based upon equitable tolling of the statutes of limitations. The court first held that because all of the plaintiff's TILA claims were filed after the three year statute of limitations had expired and

more than one year from the date of the occurrence of any violation, his TILA claims were time-barred. The court also stated that because he filed his action before the defendant instituted a foreclosure proceeding, that he could not circumvent the one-year damage limitation by asserting his right to recoupment or setoff before any mortgage foreclosure existed. The court further articulated that the plaintiff did not bring the current action as a defense to a collection action and therefore the statute of limitations cannot be extended. The court also held that the plaintiff's ECOA claims were time-barred because they were not filed within two years of the occurrence of a violation. Finally, the court held that the plaintiff's RESPA claims were time-barred because they were filed more than three years after a violation of 12 U.S.C. § 2605 and more than one year after a violation of § 2607 or 2608. Therefore, the court dismissed the plaintiff's TILA, ECOA and RESPA claims because they were barred by the statute of limitations.

FAIR DEBT COLLECTION PRACTICES ACT (CREDITOR APPLICABILITY)

Sprague v. Neil, 2007 WL 3085604 (M.D. Pa. Oct. 19, 2007)

Plaintiff brought suit against defendant credit card company alleging that its collection practices violated certain provisions of the Fair Debt Collection Practices Act (FDCPA) and other state consumer protection laws. The defendant filed a motion to dismiss arguing that it was a creditor and not a debt collector, and therefore was not bound by the provisions of the FDCPA. The court held that it was obvious that the defendant was a creditor and not a debt collector because the defendant extends credit to and collects debts that are owed to it by its cardholders. Because the defendant is a creditor and did not hire an outside company to collect its debts, the court held that the defendant is not bound by the FDCPA. Additionally, the court held that while the plaintiff's debt was originally owned by another credit card company, the defendant and that company merged in January of 2002. The first creditor then transferred all of its rights to its property to the defendant. This merger does not make the defendant a debt collector. The plaintiff's account also was not in default when purchased by the defendant and, therefore, even if the defendant were collecting a debt for the original creditor, it would fall under an exception of the FDCPA that allows the purchase of a debt not in default to be excluded from the provisions of the FDCPA. Accordingly, the court dismissed the plaintiff's FDCPA claims.

FAIR CREDIT REPORTING ACT (CLASS CERTIFICATION AND SETTLEMENT RATIFICATION)

Klingensmith v. Max & Erma's Restaurants, Inc., 2007 WL 3118505 (W.D. Pa. Oct. 23, 2007)

Plaintiff filed suit on behalf of himself and others similarly situated against the defendant restaurant chain for an alleged violation of the Fair and Accurate Credit Transactions Act of 2003 (FACTA), a subset of the Fair Credit Reporting Act (FCRA). Plaintiff alleged that between December 2006 and March 2007 the defendant was engaged in the practice of printing the expiration date of consumers' credit cards on its receipts in violation of the FACTA. The court had previously certified a class consisting of all persons who had received electronically printed receipts from the defendant's restaurant occurring after December 4, 2006, wherein the receipt displayed the expiration date of the person's credit card or debit card number. The class was modified to exclude any individual who was the victim of identity theft or credit card fraud or otherwise sustained an actual injury as a result of the defendant's violation. The plaintiff submitted an unopposed settlement agreement which provided that the defendant: (1) enter into a

Consent Decree in which it agrees to remain in full compliance with the FCRA; (2) disseminates 225,000 vouchers consisting of two \$4.00 discount-from-purchase certificates; (3) disseminates an additional 500 vouchers to a mutually-agreed-upon charity; (4) pay an incentive award of \$2,500 to the class representative; and (5) pay counsel fees and costs in the amount of \$110,000 if approved by the Court. The court first certified the class, ignoring concerns that allowing class certification in such cases could destroy the defendant's business and create an outcome where the potential liability suffered by the defendant is much greater than the actual harm suffered by the plaintiff. After the court examined the settlement request, it determined that the proposed settlement was fair, adequate, and reasonable as to the intended class members. The court granted the plaintiff's motion to approve the settlement and also granted the plaintiff's unopposed motion for fees.

FAIR DEBT COLLECTION PRACTICES ACT (STATUTE OF LIMITATIONS)

Bontempo v. Wolpoff & Ambramson, L.L.P., 2007 WL 3174050 (W.D. Pa. Oct. 29, 2007)

Plaintiff obtained a credit card account with a credit card company and fell behind in payments. The company hired the defendant law firm whose practice includes consumer debt collection to attempt to collect the debt from the plaintiff. The defendant contacted the plaintiff and demanded payment to no avail. The defendant then filed arbitration claims against the plaintiff pursuant to the credit card agreements. Plaintiff filed a lawsuit on behalf of himself and other similarly situated alleging that the defendant violated certain provisions of the Fair Debt Collection Practices Act (FDCPA). The defendant moved for summary judgment. The court granted it in part and denied it in part. The plaintiffs then filed an amended class action complaint which included allegations that the defendant violated the FDCPA by using false, deceptive or misleading means in connection with the collection of debts. The defendant moved for judgment on the pleadings on the amended complaint arguing that the claims are time-barred because they are based on different fact patterns and a distinct legal theory from the claims raised in the original complaint, such that they do not relate back to the filing of the original complaint under Federal Rule of Civil Procedure 15(c). The defendant argued that the original complaint focused on the pursuit of binding arbitration against the plaintiffs and that their amended complaint is that it misrepresented its right to collect attorneys' fees in state court filings. The defendant argues that this amended complaint raises a new theory. The court held that the amended complaint did relate back to the filing of the original complaint because the claims asserted in the amended complaint arose out of the conduct, transaction, or occurrence set forth in the original pleading. The court held that the defendant had fair notice of the general fact situation and legal theory upon which the plaintiffs proceeded. Because the commencement of a class action suspends the applicable statute of limitations, the court held that the claims in the plaintiffs' amended complaint were not time barred and rejected the defendant's motion for a judgment on the pleadings.

4TH CIRCUIT DECISIONS

FAIR DEBT COLLECTION PRACTICES ACT & FAIR CREDIT REPORTING ACT (CREDITOR APPLICABILITY AND PREEMPTION)

Boccone v. American Express Co., 2007 WL 2914909 (D. Md. Oct. 4, 2007)

Plaintiff had a credit card account with defendant. The plaintiff had authorized the defendant to make recurring payments to an internet service provider (ISP). After the plaintiff requested a new card from the defendant, the defendant, pursuant to the agreement signed by the plaintiff, provided the new card information to the ISP so that the company could continue to make charges to the plaintiff's account for services rendered. The plaintiff filed an action against the defendant, asserting violations of the Fair Debt Collection Practices Act (FDCPA) and state law defamation based on the allegation that the defendant listed an alleged debt on his consumer report without disclosing it was disputed and therefore made false or misleading representations. The defendant filed a motion for summary judgment on both claims. The court first rejected the defendant's argument that the action was barred by the statute of limitations. While the debts were charged to the credit card in 2000 and 2001, the plaintiff's complaint focuses on the defendant's charging off of the credit card debt in May of 2005. Because the charge-off status is the basis for his allegation, the plaintiff's complaint satisfies the one year statute of limitations. The court then determined that the defendant was not a debt collector as defined under the FDCPA. The plaintiff presented no evidence that the defendant was a debt collector and actually referred to the defendant as a creditor; therefore, the court granted the defendant's motion for summary judgment on the FDCPA claims. Finally, the court dismissed the plaintiff's state law defamation claims because the claims were preempted by the Fair Credit Reporting Act (FCRA). The court then stated that because the plaintiff failed to present any evidence that the defendant provided false information with malice and intent to injure, as is required under the FCRA, that the defamation claim could not survive the defendant's motion for summary judgment.

5TH CIRCUIT DECISIONS

FAIR CREDIT REPORTING ACT (FIRM OFFER OF CREDIT)

Villagran v. Central Ford, Inc., 2007 WL 3125297 (S.D. Tex. Oct. 23, 2007)

Hoge v. Parkway Chevrolet, Inc., 2007 WL 3125298 (S.D. Tex. Oct 23, 2007)

Hoffer v. Landmark Chevrolet, Ltd., 2007 WL 3125299 (S.D. Tex. Oct. 23, 2007)

* All three cases have similar language and are discussed together

In the three cases, the plaintiffs received mailings from the defendant car dealerships stating that they were pre-approved for an automobile loan. In each case the offer was promising credit pre-approval from a financing company named Your Auto Loan Finance Source. The offers informed the plaintiffs that they could call a telephone number to receive a pre-approved code, their identity would then be verified and they would receive up to the amount they were certified to purchase a vehicle of their choice. The offer promised low payments and \$0 down payment. The offer also contained fine print that informed the plaintiffs that they were prescreened for the offer and were not guaranteed for a loan if they did not meet the lender's criteria. The plaintiffs filed suit against the defendants alleging that the offers did not constitute firm offers of credit,

and therefore, violated the Fair Credit Reporting Act (FCRA), 15 U.S.C. § 1681b. The plaintiffs filed motions for class certification and the defendants moved for summary judgment. After analyzing the conflicting approaches taken by federal circuits in regard to firm offers of credit, the court rejected the plaintiff's argument that it should adopt the Seventh Circuit's interpretation of the firm offer of credit. The Seventh Circuit's approach requires a determination that the mailing is "of value" to the consumer. The court held that disclosure of exact terms of an auto loan during the pre-approval and solicitation process is not only beyond what the FCRA requires, but it is an unrealistic standard. The court held that an offer need not include interest rates, repayment period or similar terms. The only requirement is that a defendant makes an offer of credit that will be honored if the consumer meets the pre-established criteria. The court held that because the plaintiffs did not attempt to accept the offer and determine if the defendants would honor its terms, they have presented no evidence that the defendants did not intend to honor the offer. Therefore, the court granted the defendants' motion for summary judgment and held that the offer was a firm offer of credit as defined under the FCRA. The court then held that even if the plaintiffs were to survive summary judgment, their inability to locate a complete list of possible plaintiffs would make a class action lawsuit difficult and present problems that individual lawsuits would not. This would preclude satisfaction of the requirement listed in Rule 23(b)(3) of the Federal Rules of Civil Procedure and would force the court to deny the plaintiffs' motions for class certification.

6TH CIRCUIT DECISIONS

FAIR DEBT COLLECTION PRACTICES ACT (CREDITOR APPLICABILITY)

Campbell v. Triad Fin. Corp., 2007 WL 2973598 (N.D. Ohio Oct. 9, 2007)

Plaintiffs obtained an automobile loan from the defendant financial corporation secured by an interest in their automobile. After the plaintiffs defaulted on the loan the defendant financial corporation began trying to collect payment from the plaintiffs. After that effort failed, the defendant financial corporation hired the defendant skip tracing company to repossess the automobile. The plaintiffs allege that the defendants harassed the plaintiffs and violated the Fair Debt Collection Practices Act (FDCPA) and various other state laws. The defendants filed a motion for summary judgment on the FDCPA claims alleging that they are not debt collectors and are not bound by the FDCPA. The court held that the defendant financial corporation was a creditor, and therefore was not liable for violations of the FDCPA. While the plaintiffs allege that one of the defendant financial corporation's employees used another name to collect the debt, the court held that a least sophisticated consumer would not have a false impression that a third party was attempting to collect a debt. The defendant skip tracing company also argued that they only locate personal property for clients and are not in the business of collecting debts. The plaintiffs cited nothing to contradict this allegation; therefore, the court concluded that the defendant skip tracing company was also not a debt collector within the parameters of the FDCPA. Accordingly, the court granted summary judgment in favor of the defendants in regard to the plaintiffs' FDCPA claims.

TRUTH-IN-LENDING ACT (RESCISSION & FORBEARANCE AGREEMENTS/WAIVER)

Vermurlen v. Ameriquest Mortg. Co., 2007 WL 2963637 (W.D. Mich. Oct. 9, 2007)

Plaintiffs entered into a mortgage loan agreement with the defendant in 2004. After reviewing the loan documents they received at closing, the plaintiffs determined that the documents did not include the terms that the plaintiffs had expected. The plaintiffs defaulted on their loan in April of 2006. The parties entered into a forbearance agreement which released the defendant of all of the plaintiffs' claims arising out of the 2004 loan transaction and created a payment schedule that would allow them to cure their default. The plaintiffs defaulted again and the defendant began the foreclosure process. The plaintiffs then brought this action against the defendant alleging a violation of the Truth-in-Lending Act (TILA) and other state law claims. Both parties filed for summary judgment. The defendant argued that the notice they provided to the plaintiffs satisfied all statutory and regulatory requirements and that the plaintiffs waived the right to rescind the agreement by signing the forbearance agreement. The defendant provided the plaintiff with two rescission forms. The first stated that law required the plaintiffs have three days to rescind their loan agreement after signing. The second stated that the defendant would give the plaintiffs extra time, one week, to consider their loan and have the ability to cancel the loan. The plaintiffs argued that these conflicting statements were confusing to the least sophisticated consumer. The court held that because the documents unambiguously informed the plaintiffs that they served to extend the time to cancel and neither presented conflicting terms that the defendant did not violate TILA or Regulation Z and were entitled to summary judgment on the plaintiffs' first claim. The court then followed Eleventh Circuit precedent and held that the forbearance agreement signed by the parties was invalid because if parties were permitted to waive potential TILA claims, the public interest in deterring inconsistent and undecipherable lending practices would be greatly hampered. Therefore, while the court decided that the defendant did not violate TILA, it also found that the forbearance agreement did not waive the plaintiffs' right to bring an action under TILA. The court granted the defendant's motion for summary judgment in regard to the TILA claim and the plaintiffs' motion for summary judgment in regard to the forbearance agreement.

FAIR CREDIT REPORTING ACT & FAIR DEBT COLLECTION PRACTICES ACT (VALIDITY OF DEBT)

Daniel v. Asset Acceptance L.L.C., 2007 WL 3124640 (E.D. Mich. Oct. 23, 2007)

Defendant debt collector purchased the plaintiff's debt of \$57.44 from an energy company. The plaintiff disputed the debt and requested that the defendant provide information regarding the alleged debt. After the defendant failed to provide the information, the plaintiff brought this action alleging that the defendant violated the Fair Credit Reporting Act (FCRA) and Fair Debt Collection Practices Act (FDCPA) by obtaining her credit report under false pretenses. The defendant filed a motion for summary judgment as to all of the plaintiff's federal claims. The plaintiff first alleged that the defendant violated the FCRA, 15 U.S.C. § 1681b by obtaining her credit report without a permissible purpose. The court held that because the defendant bought a past due account from a creditor before it obtained the plaintiff's credit report, that the defendant had a permissible purpose because it obtained her credit report for the purpose of collecting a debt. The plaintiff also argued that the defendant violated the plaintiff's rights under § 1681s-

2(b) because as a furnisher of information to a credit reporting agency (CRA), the defendant had a responsibility to report accurate information. The court held that because the plaintiff did not allege that the defendant was first notified of a dispute by a CRA, the plaintiff cannot bring a private right of action against the plaintiff as a furnisher of information. The plaintiff then brought various allegations under the FDCPA alleging that the defendant was in violation of the FDCPA because it attempted to collect a non-existent debt. The court rejected all of the plaintiff's claims, asserting that whether the plaintiff owes the alleged debt is a question of fact for a trial against the energy company, but not against the debt collector. The court granted the defendant's motions to dismiss in regard to all of the plaintiff's federal law claims.

FAIR CREDIT BILLING ACT & FAIR CREDIT REPORTING ACT (ARBITRATION)

Heiges v. JP Morgan Chase Bank, N.A., 2007 WL 3166769 (N.D. Ohio Oct. 26, 2007)

Plaintiff obtained a corporate credit card from the defendant credit card company. The plaintiff alleged that he never consented to being personally responsible for any charges made on the card. When the plaintiff's corporation was dissolved, it still owed almost \$7,000 on the card. After the defendant credit card company informed the defendant credit reporting agencies (CRAs) that the plaintiff was personally in default with regards to the credit card debt, the plaintiff filed this action alleging violations of the Fair Credit Billing Act (FCBA) and the Fair Credit Reporting Act (FCRA). The defendant claimed that an arbitration agreement it had sent the plaintiff was applicable and filed a motion to stay further proceedings pending arbitration based on Ohio law. The plaintiff argued that he was not bound by the arbitration agreement because: he never signed an arbitration document; in his individual capacity he was never a party to the agreement; he did not know that by being an authorized user he was waiving his rights to trial; and the arbitration provision was unconscionable, and therefore, unenforceable. The court first held that Ohio law governs whether the parties agreed to arbitrate. Because the plaintiff presents questions of contract formation, the choice of law provision in the agreement could not be used. Because the contract was signed in Ohio, the card was primarily used in Ohio and the card was used by an Ohio corporation means that its primary effect was in Ohio. The court then held that Ohio law would allow Delaware law to determine whether, once the arbitration clause was proved valid, that the contract was then unconscionable. The court decided that it was not necessary that the plaintiff sign the arbitration agreement, his acceptance of the plaintiff's arbitration offer was inherent in his decision to use the card. Then, the court held that the plaintiff's argument that he did not know he would be personally responsible for the card is unconvincing because the contract agreed to by the parties unambiguously stated that the plaintiff would be personally liable for the debt. The court then used Delaware law to reject several of the plaintiff's arguments as to the validity of the arbitration agreement. The court held: the agreement did state the plaintiff was waiving his right to a trial and jury; did reveal that he was personally responsible for the debt; would be applicable to the defendant for any wrongdoing; and would be presided over by the National Arbitration Forum or the American Arbitration Forum. Finally, the court held that Delaware law has already decided that the adhesion nature of a contract is not a basis, without more, for finding its provisions substantively unconscionable; therefore, the court granted the defendant's request for a motion for a stay pending the completion of arbitration.

7TH CIRCUIT DECISIONS

FAIR DEBT COLLECTION PRACTICES ACT (CLEARLY STATED DEBT)

Williams v. OSI Educational Services, Inc., 2007 WL 2938376 (7th Cir. Oct. 10, 2007)

Plaintiff filed a suit on behalf of herself and others similarly situated alleging that the defendant debt collector violated provisions of the Fair Debt Collection Practices Act (FDCPA). The defendant had sent the plaintiff a collections letter with the amount owed in principal, interest and fees included. In the letter the defendant stated that the balance in the letter may not accurately reflect the exact amount of interest accruing daily. The plaintiff alleged that this letter did not clearly state the amount of debt in violation of 15 U.S.C. § 1692g(a)(1). After the district court granted summary judgment in favor of the defendant, the plaintiff filed a timely appeal. The court stated that a common sense reading of the defendant's letter would inform the reader that the balance is accurate as of the date the letter is written, but that the amount due will increase because of interest that is accruing daily. Because the letter set forth the amount of the debt with sufficient clarity and accuracy to comply with the requirements of the statute, the court affirmed the district court's grant of summary judgment in favor of the defendant.

TRUTH-IN-LENDING ACT (DURATION OF LOAN)

Hamm v. Ameriquest Mortg. Co., 2007 WL 3010973 (7th Cir. Oct. 17, 2007)

Plaintiffs entered into loan transactions with the defendant that were secured by mortgages on their homes. The plaintiffs signed disclosure statements that listed the due dates for the first and last payments of their loans, but failed to state the complete time period of the loan. The plaintiffs brought suit against the defendant alleging violations of the Truth-in-Lending Act (TILA). The parties filed for summary judgment in the district court. The Seventh Circuit merged two identical cases, one in which the district court held for the plaintiff and another where the district court held for the defendant. The court discussed the cases simultaneously. The court first held that the defendant violated TILA because it did not include the duration of the loan on the agreement. While the agreement stated the date of the first and last payment, and the court admits that it would be rather easy to infer the length of the loan, the court determined that a borrower reading the loan form would have to make assumptions and take some steps to determine her payment period. The court stated that the key point is that the borrower should not have to make assumptions; she should be told her payment period in explicit terms and therefore, the defendant violated TILA. The court remanded both cases back to the district court for further proceedings consistent with the opinion.

**FAIR DEBT COLLECTION PRACTICES ACT (LAWYER COMMUNICATION,
SETTLEMENT OFFERS & MISREPRESENTATION)**

Evory v. RJM Acquisitions Funding L.L.C., 2007 WL 3071678 (7th Cir. Oct. 23, 2007)

The Seventh Circuit Court of Appeals consolidated four cases that contained nine questions under the Fair Debt Collection Practices Act (FDCPA). The court answered the questions and then indicated the dispositions of each of the appeals from those answers. The first question was whether, if a consumer is represented by a lawyer, a debt collector must give the same written notice to the lawyer that 15 U.S.C. § 1692g would require were the consumer unrepresented and the notice directly to the consumer. The court concluded that any written notice sent to the lawyer must contain the information that would be required by the FDCPA if the notice were sent to the consumer directly. Judge Posner articulated that it would be odd if the fact that a consumer was represented by a lawyer excused the debt collector from having to convey useful information. The second question was whether communications to lawyers are subject to sections 1692d through 1692f which forbid harassing, deceptive, and unfair practices in debt collection. The court held that they were applicable because the statutes state that debt collectors can not use prohibited means to harass or deceive any person. The court then stated that the standard to be used in determining if a representation is false, deceptive or misleading to a lawyer under section 1692e must be if it would be likely to deceive a competent lawyer, even if he is not a specialist in consumer debt law. The fourth question was whether a settlement offer contained in a letter from the debt collector to a consumer is lawful per se under section 1692f. The court held that having the debt collector contact the consumer to offer a settlement is legal and not overtly deceptive to the consumer if it contains safe-harbor language which states that the debt collector is not obligated to renew the offer. The court held that consumer surveys on the deceptive nature of settlement offers would be the most useful sort of evidence for finding that a settlement offer violated § 1692. The next question was whether it is per se lawful to send these settlement offers, if its lawfulness should be affected by whether it is addressed to a lawyer, rather than to the consumer directly. The court held that they doubt that any lawyer involved in representing debtors would be deceived by the settlement offers made by debt collectors. The court then held that the determination that a representation is or is not false, deceptive, or misleading is always to be treated as an issue of fact. The ninth question was whether a claim of deception can ever be rejected on the pleadings in the Seventh Circuit since the court treats issues of deception as ones of fact rather than law. The court answered in the affirmative, stating that if a plaintiff rests on the text of the communications and there is nothing deceptive about the communication to the court, then the court would have to dismiss the case.

FAIR CREDIT REPORTING ACT (FIRM OFFER OF CREDIT)

Forrest v. Universal Savings Bank, F.A., 2007 WL 3102077 (7th Cir. Oct. 25, 2007)

Plaintiff received a mailing from the defendant which indicated she was prequalified to receive a credit card. The mailing stated that she was qualified for a 10.99% variable annual percentage rate with no annual fee and a credit line of up to \$15,000. The letter also provided that she was qualified to receive other products, including a computer, provided that she met certain guidelines. The mailing also stated that her credit information was used to determine her eligibility. The terms provided that if the plaintiff failed to meet the defendant's credit criteria that credit may not be extended toward her. The plaintiff brought suit against the defendant

alleging that the mailing did not constitute a firm offer of credit as is required by the Fair Credit Reporting Act (FCRA), 15 U.S.C. § 1681b, and therefore, the defendant accessed her credit report without a permissible purpose. The district court concluded that the defendant had extended a firm offer of credit, and therefore, dismissed the plaintiff's case. The plaintiff appealed that decision. The Seventh Circuit then reiterated its standard articulated in *Cole* that provides that when determining if an offer is a firm offer of credit, the entire offer must be considered and ruled to have sufficient value for the consumer to justify the absence of the statutory protection of his privacy. The plaintiff's main argument is that the letter is not a firm offer because it does not establish a minimum amount of credit offered. The court held that the letter was a firm offer of credit because it stated that to establish an account the plaintiff must transfer balances of at least \$5,000 to the card. This was sufficient to establish a minimum credit offer of at least \$5,000. Therefore, the court affirmed the ruling of the district court in its granting of the defendant's motion to dismiss.

FAIR DEBT COLLECTION PRACTICES ACT (CLASS CERTIFICATION)

Balogun v. Midland Credit Mgmt., Inc., 2007 WL 2934886 (S.D. Ind. Oct. 5, 2007)

Plaintiff owed a credit card debt to the defendant debt collector. The defendant, partnered with another credit card company, offered the plaintiff the ability to transfer his owed balance to another credit card and make small monthly payments. Plaintiff brought suit against the defendants alleging that the defendants violated the Fair Debt Collection Practices Act (FDCPA) when they provided information to another credit card company about the plaintiff and his debt owed to the first credit card company in order to facilitate the new credit offer. The plaintiff filed a motion to certify a class of all natural persons with Indiana addresses who were sent a document similar to the credit offer on or after one year prior to the filing date of the action, and on or before twenty days after the filing of the suit. The defendant argued that the plaintiff's suit was duplicative of a suit in another jurisdiction and a ruling on the motion should have been delayed until the resolution of the other suit. Additionally, they argued that the plaintiff failed to meet the class requirements of Federal Rule of Civil Procedure 23. The court first held that the propriety of class certification does not depend on the outcome of another suit or on whether a party will prevail on the merits; therefore, the defendant's first argument was invalid. Second, the court held that the plaintiff does have a valid class that meets the requirements of numerosity, commonality, typicality, adequacy and satisfies the requirements of Rule 23(b)(3). Accordingly, the court granted the plaintiff's motion for class certification.

FAIR CREDIT REPORTING ACT (EXPIRATION DATE ON RECEIPT)

Follman v. Hospitality Plus of Carpentersville, Inc., 2007 WL 3052962 (N.D. Ill. Oct. 17, 2007)

Plaintiff, on behalf of himself and others similarly situated, sued the defendant restaurant for violating the Fair and Accurate Credit Transactions Act of 2003 (FACTA), a subset of the Fair Credit Reporting Act (FCRA). Plaintiff alleged that the defendant created a receipt that had the expiration date of the plaintiff's credit card printed on its face. The defendant moved to dismiss the complaint, arguing that the plaintiff failed to sufficiently allege that the defendant's conduct was willful, or, in the alternative argued that the defendant's reading of the statute was plausible such that its conduct could not be considered willful. The court first held that the plaintiff did allege sufficient facts that would raise his claim of a willful violation above a speculative level.

The court stated that willfulness under the FCRA is both a reckless or knowing violation of the statute and that because the defendant failed to heed the warnings of credit card companies and its local business peers that its violation was willful. Additionally, the court refused to address the defendant's argument that its reading of the statute was plausible. The defendant had argued that the statute provided it could choose between printing more than five numbers of the consumer's credit card number *or* printing the expiration date. The court held that on a motion to dismiss the court is only concerned with the sufficiency of the complaint and that the defendant's argument went beyond that. However, the court stated that if it was required to consider the defendant's argument, it would likely agree with every other district court in the country that has addressed the issue and would hold that the defendant's reading is not plausible. Accordingly, the court denied the defendant's motion to dismiss the plaintiff's complaint.

ELECTRONIC FUNDS TRANSFERS ACT (ACTUAL DAMAGES)

Savrnoch v. First Am. Bankcard, Inc., 2007 WL 3171302 (E.D. Wis. Oct. 26, 2007)

Plaintiff filed suit against the defendant bank alleging that it violated certain provisions of the Electronic Fund Transfers Act (EFTA) and various state laws when its automatic teller machines (ATMs) failed to provide adequate notice of a surcharge fee. The defendant filed a motion to dismiss alleging that the plaintiff's complaint should be dismissed to the extent that she seeks actual damages. The defendant argued that actual damages were improper because: (1) the complaint failed to allege that the plaintiff suffered damages as a result of detrimental reliance on the allegedly improper notice of the fee; and (2) the plaintiff consented to the ATM fee. The court held that because the plaintiff was alleging that the fees were not properly disclosed, and not that the defendant failed to post a fee notice, the statutory requirements are different. While detrimental reliance is necessary to assert a violation of the "failure to give notice" provision, it is not required to allege that the defendant failed to provide adequate notice. The plaintiff only needs to show that her damages were a result of the defendant providing her with improper notice. In other words, a plaintiff would have to show that her use of the ATM and subsequent payment of the fee was caused by her reliance on the allegedly defective notice. Therefore, the court denied the defendant's motion to dismiss to the extent the plaintiff seeks to recover actual damages.

8TH CIRCUIT DECISIONS

FAIR CREDIT REPORTING ACT & FAIR DEBT COLLECTION PRACTICES ACT (PREEMPTION & CREDITOR APPLICABILITY)

Thulin v. EMC Mortg. Corp., 2007 WL 3037353 (D. Minn. Oct. 16, 2007)

Plaintiff obtained several mortgage loans from the defendant mortgage corporation and rented the secured property to customers. The plaintiff consistently made late payments to the bank and consequently the bank reported the plaintiff's actions to the credit reporting agencies (CRAs). The plaintiff argues that in doing so, the defendant violated several provisions of the Fair Credit Reporting Act (FCRA), the Fair Debt Collection Practices Act (FDCPA) and various state consumer protection laws. The defendant moved for summary judgment as to all of the plaintiff's claims. The defendant first argued that the plaintiff's state law defamation and negligence claims were preempted by FCRA. The court held that FCRA requires the plaintiff to

allege that the defendant's actions were undertaken with malice or a willful intent to injure in order to survive summary judgment for his defamation claim. Not only did the plaintiff fail to allege malice or a willful intent to injure, but he only baldly stated that he would provide evidence of wrongdoing at trial. The court held that summary judgment is the appropriate time to submit such evidence and that the plaintiff's failure to do so was fatal. The plaintiff also alleged that the defendant violated the FDCPA because it engaged in illegal collection practices, which included making harassing phone calls at the plaintiff's business and home. The court held that the defendant is not a debt collector because it obtained the plaintiff's mortgage loans before they were in default. Therefore, the FDCPA does not apply to the plaintiff and the defendant had a right to make phone calls to the plaintiff. Finally, because the plaintiff did not follow the appropriate channels to alert the defendant of the credit error, he could not bring claims against the defendant under the FCRA. The defendant is a furnisher of information and is only responsible for reporting accurate information according to 15 U.S.C. § 1681s-2. While § 1681s-2(b) allows for a private right of action for providing inaccurate information, it only allows that action after the defendant has been notified of a dispute by a CRA. The defendant never received such a notification, and therefore, was not liable under the FCRA. The court granted the defendant's motion for summary judgment in regard to all of the plaintiff's claims.

9TH CIRCUIT DECISIONS

FAIR DEBT COLLECTION PRACTICES ACT (CREDITOR APPLICABILITY)

Pippert v. Niece, 2007 WL 2982243 (D. Or. Oct. 9, 2007)

The plaintiffs entered into a rental contract with the defendants. The plaintiffs were evicted and charged fines and repair costs in excess of \$5,000. After the defendants sent the plaintiffs various collection letters, the plaintiffs brought this action alleging that the defendants violated the Fair Debt Collection Practices Act (FDCPA) and various state consumer protection laws. Both parties filed motions for summary judgment. The plaintiff argued that because the company that they contracted with when signing the rental agreement sent collection letters under a name that the defendant uses to collect debts, that both the defendant and this in-house debt collection company are considered debt collectors under the FDCPA. The defendant argued that both companies were actually creditors and were collecting the original contracting party's debts and were not responsible for violations of the FDCPA. A creditor that uses a name other than its own to collect debts falls within the definition of a debt collector under the FDCPA. The court held that because the defendant used a letterhead that identified a name that had not been previously used by the contracting defendant, there was a question of fact as to whether a least sophisticated debtor might have believed that the defendant's collection company was a third party collecting for the defendant. The court denied the plaintiffs' motion for summary judgment and granted the defendants' motion for summary judgment related to the FDCPA claims.

FAIR DEBT COLLECTION PRACTICES ACT (COMMUNICATION WITH REPRESENTED CONSUMER)

Tong v. Cap. Mgmt. Svc. Group, Inc., 2007 WL 2972913 (N.D. Cal. Oct. 10, 2007)

Defendant debt collector attempted to collect a debt from the plaintiff. The plaintiff contacted an attorney, who informed the debt collector through a fax that the plaintiff's wife was represented by an attorney and no further contact should be made with the plaintiff's wife. The defendant then sent another letter to the plaintiff. The plaintiff brought suit against the defendant alleging a violation 15 U.S.C. § 1692c(a)(2) of the Fair Debt Collection Practices Act (FDCPA) which prohibits a debt collector from communicating with a consumer after being advised that he was represented by counsel. The defendant moved for judgment on the pleadings arguing that the plaintiff failed to state a claim under the FDCPA because the debt collection letter only stated that the plaintiff's wife was represented by an attorney, not the plaintiff, and because the fax was sent on Sunday night when the plaintiff knew that the defendant would be unable to process the information. The court held that because the fax was attached with information that would have allowed the defendant to notice that the plaintiff was represented, the fax was sufficient to put the defendant on notice that the plaintiff was the subject of the representation letter. Additionally, the court stated that the defendant never denied receiving the letter, notwithstanding the fact that it was sent outside of business hours. The court also stated that if the defendant did assert that it never received the letter, it would not matter because it would then create a factual question. The court denied the defendant's motion for judgment on the pleadings.

FAIR CREDIT REPORTING ACT (PRIVATE RIGHT OF ACTION & PREEMPTION)

Abouelhassan v. Chase Bank, 2007 WL 3010421 (N.D. Cal. Oct. 12, 2007)

Plaintiff filed bankruptcy in July of 2004. In December of 2004 the defendant posted information on the internet and in consumer credit reports that indicated the plaintiff had two years of late payments on a credit card. The plaintiff filed this action against the defendant bank and credit reporting agencies (CRAs) alleging violations of the Fair Credit Reporting Act (FCRA) and other state laws. Defendant bank moved to dismiss the complaint on the grounds that the state law claims were preempted by the FCRA and that the plaintiff had no private right of action under the FCRA. The court first held that an individual consumer cannot bring a FCRA claim against a furnisher of information unless he passes through the filtering mechanism. This mechanism requires the consumer to contact a CRA that will then conduct an investigation and request information from the furnisher of information. Because the plaintiff did not first request an investigation with the CRA, he did not meet the FCRA requirements; therefore, the court dismissed the plaintiff's claim but granted the plaintiff leave to amend his complaint. Second, the court held that because the state law claims did not offer the plaintiff a private right of action consistent with that provided by the FCRA, the plaintiff's state law claims were preempted. Additionally, the court stated that the plaintiff's state law defamation claim should be dismissed because the FCRA requires the plaintiff to provide evidence that the defendant acted with reckless disregard for the truth. The plaintiff's complaint failed to allege that the defendant acted in reckless disregard for the truth; therefore, the plaintiff's state law defamation claim was dismissed.

FAIR DEBT COLLECTION PRACTICES ACT (ABUSIVE DEBT COLLECTION PRACTICES)

Sanchez v. Client Services, Inc., 2007 WL 3203048 (N.D. Cal. Oct. 29, 2007)

Plaintiff couple owed over \$4,000 on a credit card. The credit card company transferred the credit card debt to the defendant debt collector for collection. The defendant made numerous attempts to contact the wife including placing 54 calls to her place of employment and leaving 25 messages on the answering machine. The defendant also left messages for the wife's co-workers to have the plaintiff return the call of the defendant. The defendant continued to make phone calls to the wife's workplace after being informed by the husband to desist. The plaintiffs then filed this action alleging that the defendant violated certain provisions of the Fair Debt Collection Practices Act (FDCPA). The parties filed motions for summary judgment. The plaintiffs first alleged that the defendant violated the FDCPA by calling the wife repeatedly at her work in violation of 15 U.S.C. § 1692b. The defendant replied that the calls were made because they had incomplete location information about where the plaintiffs resided. The court stated that this created a triable fact issue as to whether the defendant had a reasonable belief that an earlier response from the plaintiffs was erroneous or incomplete. Therefore, the court denied the plaintiffs' motion for summary judgment as to § 1692b. Plaintiffs' second claim alleged that the defendant's phone calls to the wife's work violated § 1692c because they were made at an unusual place which should be known to inconvenience the consumer. The defendant argued that the wife was not prohibited from receiving phone calls at her work and only the husband had told the defendant to stop calling, not the wife. Therefore, the court said there was a genuine issue of material fact and denied the plaintiff's motion for summary judgment in regard to the § 1692c claim. Plaintiffs' third claim was that the defendant violated § 1692d because the calls that it placed to the plaintiffs caused the telephone to ring repeatedly and had the intent to annoy, abuse, or harass the plaintiffs. Here, the court stated that the frequency and volume of telephone calls show that the defendant intended to annoy, abuse and harass the plaintiff. Therefore, the court granted the plaintiffs' motion for summary judgment in regard to the § 1692d claim. The plaintiffs' fourth claim alleged that the defendant violated § 1692e because the defendant used false, deceptive or misleading representations in connection with the collection of a debt. The plaintiffs argued that when the defendant threatened legal action upon the plaintiffs it violated § 1692e. The court held that there was a dispute as to a genuine issue of material fact and denied the plaintiffs' motion for summary judgment as to the § 1692e claim. The plaintiffs' final claim alleged that the defendant violated § 1692f by using unfair or unconscionable means to collect a debt. Because the parties disputed the substance of many of the phone calls made to the wife's work, the court said that this issue also contains a genuine issue of material fact and denied the plaintiffs' motion for summary judgment. The defendant then moved for partial summary judgment alleging that the plaintiffs could not demonstrate by clear and convincing evidence that the defendant's conduct was oppressive, fraudulent or malicious; therefore, there could be no justification for an award of punitive damages. The court held that because the substance of the phone calls was disputed and the credibility of the respective parties was also disputed, there was a genuine issue of material fact and the defendant's motion for summary judgment was denied.

REAL ESTATE SETTLEMENT PROCEDURES ACT, FAIR CREDIT REPORTING ACT & FAIR DEBT COLLECTION PRACTICES ACT (BUSINESS TRANSACTIONS, FURNISHER APPLICABILITY & CREDITOR APPLICABILITY)

Johnson v. Wells Fargo Home Mortg., Inc., 2007 WL 3226153 (D. Nev. Oct. 29, 2007)

Defendant reported to several credit reporting agencies (CRAs) that the plaintiff was delinquent on two loans he had with the defendant. The defendant also foreclosed on one of the plaintiff's loans that the plaintiff maintains was current. Plaintiff brought suit against the defendant alleging violations of the Real Estate Settlement Procedures Act (RESPA), the Fair Credit Reporting Act (FCRA), the Fair Debt Collection Practices Act (FDCPA) and other state laws. The defendant filed a motion for summary judgment as to all claims. The defendant first argued that the plaintiff's RESPA claims should be dismissed because RESPA does not apply to credit transactions primarily for business, commercial or agricultural purposes. The plaintiff argued that the two mortgages were for federally related mortgage loans and were subject to RESPA. The court held that because the plaintiff acquired two four-plex rental properties, neither of which was ever owner-occupied, that the plaintiff's loans were business purpose loans and therefore exempted from RESPA. Therefore, the court granted the defendant's motion for summary judgment on the RESPA claims. The defendant then argued that the plaintiff's FCRA claims should be dismissed because the FCRA does not apply to the plaintiff's business transactions as there was no evidence that a CRA notified the defendant, who is a furnisher of information, that the plaintiff disputed any credit information. The court held that because there was a genuine issue of material fact as to whether the defendant was notified of an inaccuracy by a CRA, the defendant's motion for summary judgment as to the FCRA claims must be denied. Finally, the defendant argued that because the plaintiff is not a consumer, and the defendant is not a debt collector, the defendant is not liable for violations of the FDCPA. First, the court held that the loans obtained by the plaintiff were for business and therefore did not fall under the FDCPA's provisions. Second, because the defendant is a creditor and extended credit to the plaintiff, it cannot be a debt collector as is required for liability under the FDCPA. Therefore, the court granted the defendant's motion for summary judgment on the FDCPA claims.

10TH CIRCUIT DECISIONS

No civil decisions of significance in the consumer finance industry reported as of the date of publication.

11TH CIRCUIT DECISIONS

TRUTH-IN-LENDING ACT (STATUTE OF LIMITATIONS)

Johnson v. Mortg. Elec. Registration Systems, Inc., 2007 WL 3085437 (11th Cir. Oct. 24, 2007)

Plaintiff brought suit against the defendant arguing that its actions violated certain provisions of the Truth-in-Lending Act (TILA). The plaintiff had received a home loan from the defendant in March of 2001. The plaintiff alleged that the defendant committed fraud by sending to her an unsigned, unstamped "filed" copy of a Complaint to Foreclose Mortgage. The court held that because the plaintiff did not send a letter asserting her right of rescission until September of 2004

that her claim fell outside of the three-year TILA statute of limitations. Therefore, the court affirmed the district court's grant of summary judgment in favor of the defendant.

FAIR CREDIT REPORTING ACT (FURNISHER NOTIFICATION & PREEMPTION)

Knudson v. Wachovia Bank, 2007 WL 2877564 (M.D. Ala. Oct. 4, 2007)

Plaintiff entered into a loan agreement with the defendant bank to finance an automobile. In July of 2005 when the plaintiff's account was 47 days past due, he alleged that he paid the entire amount due and closed the account. He then alleged that the defendant bank wrongfully continued to report his account as 30 days past due. The plaintiff brought suit against the defendant bank and the defendant credit reporting agencies (CRAs) alleging violations of the Fair Credit Reporting Act (FCRA) and other state consumer protection laws. The court first granted the defendant CRA's motion to dismiss because the plaintiff's requested declaratory relief was not available to him as a private plaintiff. The court then stated that the plaintiff's claim against the defendant bank was insufficient because he did not allege that the bank was notified by the CRA of a dispute regarding the completeness and accuracy of his account. Such a notification is required under 15 U.S.C. § 1681s-2(b) of the FCRA. The court granted the plaintiff time to amend his complaint to remedy the violation. The defendant bank then argued that the plaintiff's state law claims were preempted by the FCRA. The court agreed with the defendant holding that § 1681t(b)(1)(F) preempts state law claims based on violations described in § 1681s-2. Because the defendant is a furnisher of information under the FCRA and, therefore, only liable for violations under § 1681s-2, the plaintiff's state law claims were preempted by the FCRA. The court granted the defendant bank's motion to dismiss in regard to the plaintiff's state law claims.

REAL ESTATE SETTLEMENT PROCEDURES ACT (FINANCE REFERRAL)

Spicer v. Ryland Group, Inc., 2007 WL 3071419 (N.D. Ga. Oct. 18, 2007)

Plaintiff purchased a home from the defendant. The agreement stated that the defendant was obligated to finance her home with the financing subsidiary of the defendant. The plaintiff filed suit on behalf of herself and other similarly situated alleging that the defendant violated the Real Estate Settlement Procedures Act (RESPA) by requiring the use of a certain mortgage company under the threat of charging buyers thousands of dollars more for their homes. The defendant filed a motion to dismiss. The plaintiff specifically contended that by giving and or accepting a fee, kickback, or thing of value in exchange for the referral of real estate settlement services the defendant violated 12 U.S.C. § 2607(a). The defendant argued that its actions fell under the RESPA exception that allows referral of services for affiliated business arrangements. Additionally, the defendant argued that offering the plaintiff an optional discount on the plaintiff's settlement services if the plaintiff uses a specific company fell within the exemption. The court reviewed the documents and held that the choice of using the specified mortgage company was purely optional. The court concluded that the defendant's offering of a discount on settlement costs for using the preferred lender fell within the exception provided for affiliated business arrangements. Therefore, the court granted the defendant's motion to dismiss.

**TRUTH-IN-LENDING ACT & HOME OWNERSHIP AND EQUITY PROTECTION
ACT (LOAN SERVICER APPLICABILITY)**

Williams v. Saxon Mortg. Svc., Inc., 2007 WL 3124470 (S.D. Ala. Oct. 25, 2007)

Plaintiff entered into a mortgage transaction with the defendant. The plaintiff alleged that the defendant violated the Truth-in-Lending Act (TILA) because the defendant's disclosures made during the closing understated the finance charge by omitting certain fees. Additionally, the plaintiff alleged that the defendant failed to provide certain required disclosures for high-rate mortgages and wrongfully imposed pre-payment penalties and a due-on-demand clause in violation of the Home Ownership and Equity Protection Act (HOEPA). The defendant filed for a judgment on the pleadings arguing that it was entitled to dismissal because defendant had no liability under TILA as it was merely a loan servicer. The court said while it is true that loan servicers are generally not liable under TILA, the court denied the defendant's motion for two reasons. First, the defendant had previously stated in court that it was an assignee of the original mortgage company. The court stated that the defendant offered no explanation of why it changed to allege it was only a loan servicer and not an assignee. Second, even if it were only a loan servicer, its argument would not be successful at the Federal Rule of Civil Procedure Rule 12(c) stage of the proceedings. The court stated that it must accept the facts in the light most favorable to the non-moving party and such facts would indicate that the defendant is an assignee and not a loan servicer. Therefore, the court denied the defendant's motion for a judgment on the pleadings.

No representation is made that the quality of legal services to be performed is greater than legal services performed by other lawyers.

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