CONSUMER CREDIT

TRUTH IN LENDING SUIT MAY BE BROUGHT EVEN THOUGH LOAN HAS BEEN REFINANCED

Barrett v. JP Morgan Chase Bank, N.A., 445 F.3d 874 (6th Cir. 2006).

FACTS: In 1989, William and Sandra Barrett bought their home in Lexington, Kentucky, relying in part on funds obtained through a loan from Cumberland Bank. They eventually refinanced this loan with National City Bank. In March 2000, the Barrett's upgraded their home furnace and electrical system through a loan from the local governmental housing assistance program. Shortly thereafter, the Barretts borrowed money from Bank One (now JP Morgan Chase) through two loan transactions that were at issue in this dispute. In May 2000, Bank One helped the Barrett's refinance the National City Bank Loan. The refinancing called for the Barretts to sign a $20,864.40 note, that paid off the balance on the earlier mortgage and covered a $2,404.40 credit life insurance premium. The Barretts claimed that Bank One violated the Truth in Lending Act ("TILA") by allegedly telling them they were required to purchase credit life insurance to obtain the loan.

In January 2001, the Barretts consolidated and refinanced all of their outstanding debts (including the May 2000 Bank One loan) with a new loan from Bank One. As a result of this financing, Bank One released all prior security interests it held in the Barretts' home and replaced them with a new mortgage. According to the Barretts, Bank One violated TILA's disclosure requirements in processing this loan because it did not timely give the Barretts copies of the closing documents and because Bank One's notice of their three-day right to rescind the loan transaction was inaccurate.

In May 2001, the Barretts refinanced the January 2001 Bank One loan with a new loan from ABN AMRO Mortgage Group, Inc. As a result of this last refinancing, Bank One released all of its security interests in the Barretts' home. In September 2002, the Barretts asked Bank One to rescind the January 2001 loan, and in January 2003, they asked the bank to rescind the May 2000 transaction as well. The bank refused to rescind either transaction, and the Barretts filed this lawsuit in federal court. They sought relief under (1) TILA; (2) state laws for fraud and misrepresentation; and (3) under the Kentucky Consumer Protection Act ("KCPA"). The district court granted summary judgment to Bank One and declined to exercise supplemental jurisdiction over the Barretts' state-law claims. The Barretts appealed.

HOLDING: Reversed and Remanded.

REASONING: The district court reasoned the Barretts were not entitled to rescission because both loans with Bank One were paid in full, through refinancing with another company, and thus Bank One no longer had a security interest in their home. The United States Court of Appeals for the Sixth Circuit disagreed. The court noted TILA was enacted to promote the informed use of credit by consumers. TILA requires creditors to provide borrowers with clear and accurate disclosures of terms dealing with things like finance charges, annual percentage rates of interests, and the borrower's rights. When a loan made in a consumer credit transaction is secured by the borrower's principal dwelling, as it was in this case, the borrower "may rescind the loan agreement until midnight of the third business day following the consummation of the transaction or the delivery of the disclosures required under TILA." 15 U.S.C. §1635(a). In the event a lender does not comply with the Act's disclosure requirements, "the three-day right to rescind becomes a three year right to rescind, expiring three years after the data of consummation of the transaction or upon the sale of property." 15 U.S.C. §1635(f). Bank One argued that there is nothing to rescind relating to the May 2000 and January 2001 transactions because any security interest the bank once held was released when the Barretts refinanced.

The court examined the language of the Act and the definition of rescission. The Act provides a borrower "shall have the right to rescind the transaction," and "when an obligor exercises his right to rescind, he is not liable for any finance or other charge," and that the creditor shall return to the obligor any money or property given as earnest money, down payment, fees, or otherwise. 15 U.S.C. §1635(a). Thus, by its terms, TILA gives borrowers the right upon rescission not to only void the security interest, but to recover statutorily identified finance charges relating to the transaction. The definition of rescission according to one dictionary means "a party's unilateral unmaking of a contract that restores the parties to their pre-contractual positions." Black's Law Dictionary 1308 (7th ed. 1999). Consistent with these definitions, the statutes and regulations refer to a right to rescind the entire transaction, not just a right to rescind the security interest.

TILA requires creditors to provide borrowers with clear and accurate disclosures of terms dealing with things like finance charges, annual percentage rates of interests, and the borrower's rights.

TILA and its implementing regulation also identify specific events that extinguish the right to rescind. The right to rescind expires (1) three years after consummation, (2) upon transfer of all of the consumer's interest in the property, or (3) upon sale of the property, whichever comes first. 15 USC §1653(f). Nowhere do the regulations mention that the act of refinancing an existing loan transaction by itself cuts off the right of rescission. Thus, the court found that the act of refinancing does not nullify the right of rescission. The case was remanded to the district court to determine whether the bank failed to make adequate disclosures which would have extended the Barretts' right of rescission to three years.

PROVIDING TWO DIFFERENT RESCISSION DISCLOSURE FORMS MAY VIOLATE TRUTH IN LENDING

RESCISSION MAY BE AVAILABLE EVEN AFTER THE NOTE IS PAID IN FULL

Handy v. Anchor Mortgage Corp., 464 F.3d 760 (7th Cir. 2006).

FACTS: Geneva Handy ("Handy") held a mortgage on her home from Homecomings. In September 2000, Anchor Mortgage Corporation ("Anchor") extended to Handy a 15-year fixed rate loan. At the loan closing Handy received five rescission forms. Four forms were identical and titled, "Notice to Cancel – Refinance." These forms informed Handy she had three days to cancel the new transaction and the cancellation would not affect any amount she presently owed. The fifth form was simply titled, "Notice of Right to Cancel," stating she had three days to cancel the loan and that such cancellation would also nullify the transaction. Two years after completing this transaction Handy sought to rescind the Anchor loan. Handy's primary contention was that by providing her with two types of rescission forms, Anchor failed to "clearly and conspicuously" disclose her right to rescind and the length of time to rescind as required by the Truth in Lending Act ("TILA").

While the case was pending in district court, Handy died and the court allowed her son to substitute as plaintiff. After a bench trial, the district court ruled in favor of Anchor explaining that had Handy "looked at her closing documents and found either of these forms, either one of them would have led her to rescind." Handy appealed.

HOLDING: Reversed and remanded.

REASONING: The Seventh Circuit Court of Appeals disagreed with the district court and held "Anchor's simultaneous provision of both a Form H-8 [the first four forms intended for general loans] and a Form H-9 [the fifth form intended for refinancing an existing loan] did not meet TILA's clear and conspicuous disclosure requirement, especially with regard to the 'effects of rescission.'" The court cited *Rivera v. Grossinger Autoplex, Inc.*, 274 F.3d 1118, 1121-22 (7th Cir. 2001) for the proposition that "[t]he sufficiency of TILA-mandated disclosures is determined from the standpoint of the ordinary consumer." The court asserted that "TILA does not easily forgive 'technical' errors." Although Anchor argued that a close reading of the incorrectly provided Form H-9 might be reconciled with Handy's loan, the court found that the notice provided remained insufficient because "[w]here more than one reading of a rescission form is 'plausible,' the form [did] not provide the borrower 'with clear notice of what her right to rescind entail[s].'" *Porter v. Mid-Penn Consumer Disc. Co.*, 961 F.2d 1066, 1077 (3d Cir. 1992).

TILA statutes and regulations refer to a right to rescind the transaction and not just a right to rescind the security interest.

The court also held that even though Handy had recently paid off the loan, the remedies associated with rescission remained available to her because a party's right to rescission "encompasses a right to return to the status quo that existed before the loan." *Barrett v. JP Morgan Chase Bank, N.A.*, 445 F.3d 874, 877 (6th Cir. 2006). The court agreed with the sixth circuit's *Barrett* opinion that "rescinding a loan transaction requires unwinding the transaction in its entirety and thus requires returning the borrowers to the position they occupied prior to the loan agreement." The court noted that TILA statutes and regulations refer to a right to rescind the transaction and not just a right to rescind the security interest. The court stated that Anchor forfeited its right to collect interest and it had to reimburse Handy for any interest paid while the loan was outstanding.

CONSUMERS ARE NOT ENTITLED TO A COPY OF THEIR FULL CREDIT FILES FOLLOWING A REINVESTIGATION

Nunnally v. Equifax Info. Serv, L.L.C., 451 F.3d 768 (11th Cir. 2006).

FACTS: Leroy and Gladys Nunnally ("Nunnallys") requested credit reports from Equifax. Incorrect accounts were listed on the reports. They informed Equifax of the errors and requested reinvestigation. Equifax did not report the results of any reinvestigation to the Nunnallys. The Nunnallys requested credit reports again and upon receipt found the same errors. Again, they notified Equifax and requested a reinvestigation. After the reinvestigation, Equifax sent the Nunnallys letters removing the accounts from their files. Upon receiving these letters, the Nunnallys requested and paid for copies of their complete consumer report files and found no inaccurate information.

Rhodes, a member of the plaintiff class, also discovered inaccuracies in her credit report and reported the errors to Equifax. Equifax sent Rhodes letters advising her of the corrections in her credit report as well. Rhodes thereafter paid for a copy of her complete file after the reinvestigation and like the Nunnallys, found no additional errors.

The Nunnallys, on behalf of an affected plaintiff class, filed this action complaining that Equifax failed to comply with the Fair Credit Reporting Act ("FCRA") when it did not provide them each with a "complete copy" of their consumer reports following the reinvestigations. They sought certification for the plaintiff class, all of whom had requested reinvestigation but did not receive a free and complete copy of their consumer reports. Equifax moved for dismissal for failure to state a claim for which relief could be granted. Equifax argued that the letters sent to the consumers satisfied the requirements of the FCRA. 15 U.S.C.A. §1681i(a)(6)(B)(ii).

The district court denied Equifax's motion to dismiss. The court determined that the letters were excluded from the definition of "consumer reports" stating that the FCRA required the "consumer report" be provided "as part of" or "in addition to" the notice of the results of the reinvestigation. It required something over and above the mere results and that equaled the "consumer's complete file." The district court stated it lacked "certitude" and certified the issue for interlocutory appeal.

HOLDING: Reversed and remanded.

REASONING: The FCRA does not require disclosure of the consumer's complete file after reinvestigation. The requirement of the "consumer report" disclosure is "based upon the consumer's file as that file is revised" from the outcome of the reinvestigation due to the complaint made by the consumers. It does not require a complete file, but merely disclosure of any changes made to the consumer report after the reinvestigation is complete. Any written, oral, or other communication of information determined from the reinvestigation by the consumer reporting agency will suffice, and thus Equifax's letters satisfied its obligation to the consumer. Furthermore, the FCRA plainly refers to disclosures of the consumer's

complete file in other sections, but does not require nor reference disclosure after a reinvestigation.

TRUTH IN LENDING CLAIM NOT BARRED BY BANKRUPTCY OMISSION

Ajaka v. Brooksamerica Mortgage Corp., 453 F.3d 1339 (11th Cir. 2006).

FACTS: Ajaka borrowed $35,000 from BrooksAmerica, secured by a second mortgage on his primary residence. Two years later, Ajaka filed a Chapter 13 bankruptcy proceeding in the United States Bankruptcy Court for the Northern District of Georgia, Atlanta Division.

In early 2003, Ajaka met for the first time with Charles Baird, his counsel on this appeal. During that meeting, Baird informed Akaja for the first time, that he may have a viable claim under the Truth In Lending Act ("TILA"). Baird also told Ajaka that his bankruptcy schedules would have to be amended to reflect the TILA claim. While Baird advised Ajaka that he would need to disclose his TILA claim as an asset in the bankruptcy proceeding, Ajaka testified in his deposition that he had little knowledge of the nature and effect of his TILA claim.

Later, Baird sent a rescission demand on behalf of Ajaka to BrooksAmerica, the original holder off the note and security deed. The letter did not inform Baird of the name of the entity to whom BrooksAmerica assigned the mortgage. Because the deed records did not show an assignment of the note and security deed, Ajaka claims that Baird was unable to immediately determine the assignee against whom a TILA claim would be asserted. In addition, Ajaka claims that because BrooksAmerica failed to provide him with notice of the assignment, he was never made aware of the assignment or the assignee. Baird informed Ajaka's bankruptcy attorney that a TILA claim should be listed as a potential asset in the bankruptcy proceeding and in March 2003, Ajaka filed the instant action, alleging a TILA violation by the defendants.

In April 2003, within the time period for filing an objection to confirmation of Ajaka's Chapter 13 reorganization plan, Residential Funding Corporation ("RFC"), who had not yet been served with the complaint and summons in Ajaka's TILA action, filed a complaint for declaratory judgment and equitable relief as part of the bankruptcy proceeding. All of Ajaka's creditors had more than six weeks from the time they learned of his TILA claim to the expiration of the 180 day period for objecting to confirmation of his Chapter 13 reorganization plan and, if they so desired, seeking conversion of Ajaka's bankruptcy from Chapter 13 to Chapter 7.

In June of 2003, after the time period had expired, Ajaka filed a formal amendment to the bankruptcy action that included disclosure of his TILA claim as a contingent asset. Defendants filed their motion for summary judgment in this case claiming that Ajaka's TILA claim was barred by judicial estoppel because he failed to disclose it in the bankruptcy proceeding. Ajaka appealed the trial court's granting of the motion.

HOLDING: Reversed and remanded.

REASONING: The court held that the appeal rises or falls on Ajaka's intent. The court noted that Ajaka's creditors did know about the potential TILA claim within the time period during which they could seek revocation of the confirmation of the Chapter 13 reorganization plan. The court reasoned there was sufficient evidence that Ajaka did not intend to conceal his TILA claim from his creditors. Furthermore, the court reasoned the bankruptcy attorney did amend Ajaka's schedules to include the TILA claim. The court held that taken together, these facts were sufficient to conclude that a question of material fact existed as to whether Ajaka had the motivation and intent to manipulate the judicial system under the circumstances, and the district court erred in granting summary judgment to the defendants.

CREDIT AGENCY SUED FOR NOT CORRECTING ERROR IN CONSUMER FILE HELD BY ANOTHER AGENCY

Morris v. Equifax Info. Services, 457 F.3d 460 (5th Cir. 2006).

FACTS: Kenneth Morris obtained a "3-1 Credit Report" (reports from all three major credit reporting bureaus) from TrueCredit's website. The credit report contained information that Morris wanted changed or deleted. The items were specified in a letter written to Equifax. One of the accounts specified for change in the letter was an RNB-Target entry that was labeled as a past due account. Morris said in the letter that he did not owe anything to Target and that the account was opened by his former wife during the marriage. The account was not a joint account and the past due charge on the account occurred after the dissolution of the marriage. Equifax promptly forwarded the letter to CSC Credit Services ("CSC") and responded to Morris in a letter stating that Equifax did not control his credit file and that he needed to pursue the dispute with CSC. CSC sent an automated letter to Target informing them of the dispute. Target did not inform CSC to stop reporting the account as joint. The same exchange between CSC and Target occurred a month later. Equifax never informed Morris of any reinvestigation but CSC did inform Morris of the second reinvestigation.

Morris subsequently checked his credit report and found the same information displayed on the Target charge account. Morris sued CSC and Equifax for violations of the reinvestigation requirements of the Fair Credit Reporting Act ("FCRA"), 15 U.S.C. §1681i, and a state law libel claim. His alleged damages included receiving a less than favorable mortgage rate and receiving higher insurance quotes. He later applied for two credit cards and they both denied him a line of credit. Morris amended his lawsuit to include those damages as well. Morris sued Target in a separate action that ultimately led them to send an automated data form that removed the negative information from Morris's credit report. CSC settled with Morris prior to trial. Morris moved for partial summary judgment because Equifax admitted noncompliance with the reinvestigation provisions. Equifax filed a motion for summary judgment for both claims because the dispute letter sent by Morris did not obligate Equifax to comply with §1681i and they did not own his credit file (Equifax had no authority to change his file). Equifax further argued that the libel claim was excluded by § 1681i.

The case was given to a magistrate judge who recommended denying Morris's motion and granting Equifax's motion because CSC, not Equifax, owned Morris's credit file. The magistrate also recommended absolving Equifax of the libel claim, based on a finding that the credit reporting agency

never knew of any falsity on the credit report. Morris objected, arguing that Equifax did know of the falsity because Morris informed them of the mistake. Morris also argued that the FCRA does not excuse the consumer reporting agency from following reinvestigation obligations because it does not own the credit file. The district court accepted the magistrate's recommendations and Morris appealed.

HOLDING: Reversed in part, affirmed in part, and remanded.

REASONING: The court held that although the state libel claim was a part of the suit, it was correctly dismissed because in order to establish malice "Morris must present 'sufficient evidence to permit the conclusion that the defendant in fact entertained serious doubts as to the truth of his publication.'" *St. Amant v. Thompson*, 390 U.S. 727 (1968). The court reasoned that the argument "fails under both §1681h(e) and the conditional privilege under Texas law."

The court also concluded that just because Equifax did not own Morris's file at the time they received the dispute letter, it did not excuse them from the obligations under §1681i. The court pointed to the hearings on amending the FCRA, where the Federal Trade Commission had testified that "[p]ersons who purchase consumer reports for resale (also known as 'resellers') are covered by the FCRA as consumer reporting agencies and have all the obligations of other CRAs, including the duty to reinvestigate ...." *H.R. 2622--Fair and Accurate Credit Transactions Act of 2003: Hearing Before the H. Comm. on Financial Services*, 108th Cong. (2003). The court further emphasized that §1681i did not put CSC under any statutory obligation because they did not receive a letter directly. Equifax did receive a direct dispute letter and the letter obligated them to follow the statutory rules.

The court reversed and remanded the case with instructions. The court affirmed part of the summary judgment ruling against Morris on the libel claim.

MERE USE OF INCORRECT FORM BY LENDER DOES NOT EXTEND RIGHT TO RESCIND

Mills v. Equicredit Corp., 172 Fed.Appx. 652 (6th Cir. 2006).

FACTS: Frank and Eva Mills ("the Millses") refinanced their home mortgage twice with EquiCredit Corp. in August 1999, and again in February 2000. At each closing, the Millses signed a form entitled "Notice of Right to Cancel," that explained their right to cancel the mortgage within three days from either the date of the transaction, the date they received their Truth in Lending disclosures, or the date they received that notice, whichever occurred last. The Millses defaulted on their second loan. Fairbanks Capital Corporation ("Fairbanks") subsequently purchased the loan in April 2002 from Equicredit and began foreclosure proceedings in November 2002. In that same month counsel for the Millses sent a letter to Fairbanks and EquiCredit explaining that they were rescinding the February 2000 transaction pursuant to the "Notice of Right to Cancel." Neither Fairbanks nor EquiCredit responded to that letter. The Millses filed a complaint and the foreclosure proceeding by Fairbanks was suspended. The Millses claimed that Equicredit was liable to them for rescission pursuant to various sections of the Home Ownership & Equity Protection Act ("HOEPA") or alternatively the Truth in Lending Act ("TILA"). EquiCredit moved for summary judgment on the basis of a statute of limitations violation preventing claim under TILA, that the court granted in entirety.

On appeal of the summary judgment, the Millses contended that they were entitled to rescission of the February 2000 loan transaction because EquiCredit used the incorrect form to notify them of their right to rescind.

HOLDING: Affirmed.

REASONING: There is a one-year statute of limitations to prevail on a claim for damages for violations of TILA, if proper TILA disclosures are made. However, if TILA disclosures are never made, the borrower has a continuing right to rescind for three years after the date of the transaction. The Millses never alleged that EquiCredit failed to notify them of their right to rescind, but rather concluded that EquiCredit's use of the incorrect form was misleading. Because the Millses admitted to being aware of their rights under TILA, the district court considered the use of the incorrect form by EquiCredit a harmless technicality. The appellate court affirmed that the form still properly notified the Millses of their right to cancel the loan transaction and therefore triggered the one-year statute of limitations preventing recovery in this case.

DEBT COLLECTION

DEBT COLLECTOR CAN BE SUED FOR THREAT OF LEGAL ACTION

Brown v. Card Serv. Ctr., 464 F.3d 450 (3d Cir. 2006).

FACTS: In early 2004, Elizabeth Brown received a collection letter from Card Service Center ("CSC"), a debt-collection firm, attempting to recover a delinquent credit card balance. The letter requested that Brown contact CSC within five days to make payment arrangements. The letter also stated that should Brown fail to make payment arrangements, her account "could" be forwarded to CSC's attorney and that "refusal to cooperate could result in a legal suit." Brown did not contact CSC and she continued to receive collection letters. CSC did not refer the account to their attorney, nor did they take legal action against Brown. In early 2005, Brown filed suit in the United States District Court for the Eastern District of Pennsylvania. Brown claimed that because CSC never intended to take legal action against her, the CSC letter contained false and misleading statements that amounted to a threat meant to intimidate and coerce her in violation of §1692e of the Fair Debt Collection Practices Act ("FDCPA"). Brown also claimed that the 5-day deadline was "illusory" because CSC never intended to take legal action against her.

CSC filed a 12(b)(6) motion to dismiss the complaint for failure to state a claim under the FDCPA. The district court granted the motion and dismissed the complaint without prejudice.