RECENT DEVELOPMENTS

CONSUMER CREDIT

BORROWERS CAN'T PURSUE RESCISSION CLASS ACTION UNDER TILA

McKenna v. First Horizon Home Loan Corp., 475 F.3d 418 (1st Cir. 2007).

FACTS: A group of Massachusetts homeowners filed a complaint that the defendant, First Horizon Home Loan Corporation, had violated the Truth in Lending Act ("TILA"). They claimed that First Horizon inaccurately disclosed information relating to consumers' statutory rescission rights and failed to respond to requests for rescission of residential refinancing. Plaintiffs believed that the TILA violations entitled them to rescission of their loans and statutory damages.

Some plaintiffs moved for class certification, claiming First Horizon's practices had victimized countless others. The magistrate judge recommended that the class be certified. If the action succeeded, the members of the class who elected to rescind could seek reimbursement of amounts previously paid, statutory damages, and attorney's fees. The district court adopted the magistrate judge's recommendations. First Horizon filed an interlocutory appeal for a review of the class certification (*see* Fed. R. Civ. P. 11). The court granted review.

HOLDING: Reversed, vacated, and remanded.

REASONING: The court agreed with the Fifth Circuit's holding in *James v. Home Constr. Co. of Mobile, Inc.*, 621 F.2d 727 (5th Cir. 1980) that class actions are not available for rescission claims under the TILA, finding that Congress did not intend rescission suits to receive class-action treatment. Class actions are specifically addressed in the section of the TILA relating to damages, but there is no comparable mention in the rescission section. The court noted that this should be treated as deliberate and that it provided a strong suggestion that Congress did not intend to include a class-action mechanism within the compass of the rescission section. The class-action provision in the TILA's damages section was in the nature of a cap. Unrestricted class action availability for rescission claims would open the door for vast recoveries, which would be inconsistent with the nature of the damages cap.

Also, Congress enacted a moratorium on class actions for relatively minor violations, which would include the type of violation at issue here. While TILA was designed to protect consumers, it was not intended to open lenders to overwhelming liability for relatively minor violations. The court recognized that the highly individualized character of the process and the range of variations that may occur rendered rescission largely incompatible with the class-action mechanism. The plaintiffs argued that Congress' actions were not evidence of an intent to circumscribe rescission liability. The court noted that Congress likely intended to limit the large-scale liability inherent in rescission class actions.

Finally, the court observed that the significant incentives for creditor compliance cast doubt on the need for a class-action mechanism. TILA grants enforcement authority to federal agencies to impose substantial monetary penalties for each violation and the power to remove and suspend officers and directors. Debtors enjoy an array of private remedies that allow for the possibility of sizable recoveries.

APPRAISAL AND TITLE INSURANCE FEES WERE EXCLUDED FROM HOEPA

Mitchell v. Beneficial Loan & Thrift Co., 463 F.3d 793 (8th Cir. 2006).

FACTS: Ty and Kimberly Mitchell asserted that Beneficial Loan & Thrift Company violated the Home Ownership and Equity Protection Act ("HOEPA"). HOEPA, as relevant here, requires creditors to make additional disclosures to borrowers if the total "points and fees" payable at closing exceed eight percent of the total loan amount, or $400, whichever is greater. The Mitchells argued that the $455 appraisal fee and the $821 title insurance fee should have been included in the total points and fees of their loan. If either one of these had been included, the total points and fees would have exceeded eight percent of the total loan amount, making the loan subject to HOEPA.

The district court granted summary judgment to Beneficial. The Mitchells appealed the issue whether a loan transaction is subject to HOEPA. The United States Court of Appeals for the Eight Circuit affirmed and the Mitchells petitioned for rehearing, arguing that some amounts financed were not disbursed, making them "points and fees" under HOEPA.

Because the appraisal and title fees in question were paid to an "unaffiliated third party," Beneficial had not benefited from these fees.

HOLDING: Vacated prior opinion and filed an opinion affirming the district court.

REASONING: The court found, pursuant to its holding in *Haug v. Bank of Am.*, 317 F.3d 832, 836 (8th Cir. 2003), that because the appraisal and title fees in question were paid to an "unaffiliated third party," Beneficial had not benefited from these fees, and, therefore, was not in violation of the Real Estate Settlement Procedures Act. When appraisal and title insurance fees are bona fide and reasonable, they are excluded from HOEPA's definition of total points and fees.

CREDIT FREEZE LAW UNCONSTITUTIONAL

U.D. Registry, Inc., v. State, 50 Cal. Rptr. 3d 647 (Cal. Ct. App. 2006).

FACTS: U.D. Registry ("UDR") was a credit reporting agency that issued credit reports under California law. UDR collected credit-related public information about individuals and sold it to its members. The members used the reports to decide whether to lease real property to prospective clients and agreed in advance not to disclose the information to others.

Under the California credit freeze law stated that a consumer could put a security freeze on his or her credit report by making a request in writing, by certified mail, to a credit reporting agency. The security freeze prevented the agency from releasing any of the consumer's information without the express authorization of the consumer. CAL. CIV. CODE § 1785.11.2 (West 2004). The stated legislative reason for the law was to prevent identity theft.

UDR challenged the credit freeze law on the basis that it impinged on UDR's right to free speech under the federal and California constitutions to disseminate consumer credit reports containing truthful, lawfully obtained information. The trial court ruled that the credit freeze law was unconstitutional with respect to information included in the credit reports that was culled from public records. The trial court enjoined the defendants from enforcing the credit freeze statute contained in "and/or" obtained from matters of public record, otherwise the credit freeze statute remained in full force.

HOLDING: Affirmed in part and reversed in part.

REASONING: The court of appeals held that the injunction preventing the enforcement of the credit freeze statute against UDC was valid. However, the court held that the trial court could not rewrite the statute to exclude from coverage all publicly obtained information.

The court analyzed UDR's credit reports using the intermediate scrutiny test for commercial speech from *Cent. Hudson Gas & Elec. Corp. v. Public Serv. Comm'n*, 447 U.S. 557 (1980). The court found that the credit reports concerned lawful activity, were not misleading, and that the asserted government interest of preventing identity theft was substantial. But the court found that because there was no evidence that a single report prepared by UDR led to identity theft, the credit freeze restriction did not materially and directly advance the government's interest. Additionally, the credit freeze restriction was excessive because the state did not prove that preventing the dissemination of information, which is mostly public information in the first place, was not an excessive restriction. Because the law in question did not survive the intermediate scrutiny test, it would not survive the strict scrutiny test applicable to non-commercial speech. The facts, as applied in this case, protect UDR on a free speech basis from enforcement of the credit freeze statute.

The appeals court decided against rewriting the statute. The appeals court reasoned that a court may reform a statute in order to preserve it against constitutional invalidation when: (1) the statute can be reformed to in a manner that closely effectuates the policy judgments of the enacting body; and (2) the enacting body would have preferred the reformed construction of the invalidated statute. The trial court's construction that prevented a consumer from freezing information contained in and/or obtained from public records permitted the disclosure of information that the legislature sought to keep confidential—names, social security numbers, addresses, etc. Because the legislature intended to allow consumers to prevent the dissemination of any information, reformation of the statue was not permissible.

The trial court ruled that the credit freeze law was unconstitutional with respect to information included in the credit reports that was culled from public records.

Additionally, the statute was not facially unconstitutional because it was not demonstrated that there was a "total and fatal" conflict between the credit freeze statute and the constitutional right to free speech. The state was enjoined from enforcing the credit freeze statute against UDR but was not restrained from enforcing it against other credit reporting agencies.

MISCELLANEOUS

UNITED STATES SUPREME COURT LIMITS PUNITIVE AWARDS

Philip Morris USA v. Williams, 127 S. Ct. 1057 (2007).

FACTS: Jesse Williams' widow, on behalf of his estate, filed suit for negligence and deceit against Philip Morris, the manufacturer of Marlboro cigarettes, the brand that Williams favored. At trial, a jury found that Williams' death was caused by smoking; that Williams smoked in significant part because he thought it was safe to do so; and that Philip Morris knowingly and falsely led him to believe this. The jury ultimately found that Philip Morris was negligent and had engaged in deceit. In respect to deceit, the jury awarded compensatory damages of $821,000 along with $79.5 million in punitive damages. The trial judge subsequently found the $79.5 million punitive damages award excessive, and reduced it to $32 million. Both sides appealed. The Oregon Court of Appeals rejected Philip Morris' arguments and restored the $79.5 million jury award. The Oregon Supreme Court rejected Philip Morris' arguments that the trial court improperly rejected its proposed jury charge and that the punitive damages award was grossly excessive. The jury charge would have instructed the jurors not to punish the defendant for the impact of its alleged misconduct on nonparties. Philip Morris sought certiorari.

A defendant threatened with punishment for injuring a nonparty victim has no opportunity to defend against the charges.

HOLDING: Vacated and remanded.

REASONING: The court held the Constitution's Due Process Clause forbids a state to use a punitive damages award to punish a defendant for injury that it inflicted upon nonparties. U.S. CONST. amend. XIV, § 1. A defendant threatened with punishment for injuring a nonparty victim has no opportunity to defend against the charges. The court found that permitting punishment for injuring a nonparty victim would add a near standardless dimension to the punitive damages equation. Evidence would lack on too many variables leading to magnification of the fundamental due process concerns of risks of arbitrariness, uncertainty and lack of notice. Finally, the court found no authority supporting the