CONSUMER CREDIT

FEES CHARGED BY HOME EQUITY LENDER ARE NOT INTEREST

Texas Bankers Ass'n v. Association of Community Organizations for Reform Now (ACORN), 303 S.W.3d 404 (Tex.App.—Austin, 2010)

FACTS: In 1997, Texas voters approved an amendment to the Homestead Provision of the Texas Constitution, making Texas the last state in the nation to allow homeowners to borrow against their home equity. The Texas Constitution was amended again in 2003 to authorize the legislature to delegate the authority to issue interpretations of the home equity lending provisions. Pursuant to this amendment, the legislature delegated interpretive authority over the home equity provisions to the Commissions, *see* Tex. Fin.Code Ann. §§ 11.308, 15.413 (West Supp.2008), and the Commissions in turn adopted a number of regulations interpreting the home equity provisions, *see* 7 Tex. Admin. Code §§ 153.1-.96 (2009) (Joint Fin. Regulatory Agencies, Home Equity Lending) ("Rules 153.1-.96.").

ACORN filed suit against the Commissions under the APA, seeking to invalidate nine of the Commissions' regulations, and the Texas Bankers Association ("TBA") intervened in support of upholding the regulations. ACORN argued that the regulations either contradicted the plain meaning and intent of the constitutional provisions or represented new rules that the Commissions had no authority to enact. The trial court granted summary judgment, invalidating seven of the challenged regulations and determining that the remaining two were valid. An appeal and cross-appeal followed.

HOLDING: Reversed in part, affirmed in part.

REASONING: The court first addressed the Commissions' and TBA's argument that the trial court erred in invalidating the Commissions' interpretation of the meaning of "interest" for purposes of the cap on fees other than interest in the context of a home equity loan. Section 50(a)(6)(E) of article 16 of the Texas Constitution states that the only permissible type of home equity loan is one that: "does not require the owner or the owner's spouse to pay, *in addition to any interest,* fees to any person that are necessary to originate, evaluate, maintain, record, insure, or service the extension of credit that exceed, in the aggregate, three percent of the original principal amount of the extension of credit." (emphasis added).

This provision limits fees, other than interest, to three percent of the principal amount of the loan. In Rule 153.1(11), the Commissions defined "interest" for purposes of this fee cap as "[i]nterest as defined in the Texas Finance Code § 301.002(4) [sic] and as interpreted by the courts." Section 301.002(a)(4) of the Finance Code, located in the subtitle governing usury, defines interest as "compensation for the use, forbearance, or detention of money." The Commissions further clarified their interpretation of the meaning of "interest" in Rule 153.5(3), stating, "Charges an owner or an owner's spouse is required to pay that constitute interest under the law, for example per diem interest and points, are not fees subject to the three percent limitation." More specifically, section 301.002(a) states, "[in] this subtitle ... 'interest' means compensation for the use, forebearance, or detention of money."

ACORN argued that the commonly understood meaning of "interest" is not the broad definition found in the usury statutes, but the amount of interest described in the promissory note and specified as a percentage rate to be applied to the remaining, unpaid principal. ACORN further contended that the Commissions' interpretation of "interest" encompasses all fees paid to the lender and therefore allows the "interest" exception to swallow the rule limiting fees to three percent of the principal.

TBA and the Commissions argued that the usury definition of interest found in the finance code may reasonably be applied to the constitutional language capping fees "in addition to any interest" because the legislature is presumed to act with complete knowledge of the existing condition of the law and with reference to it. The court noted, however, that the usury provisions of the finance code were enacted to protect the citizens of Texas from abusive and deceptive practices in both cash and credit transactions. The court held that given the inherent differences between the consumer-protection mechanisms of the usury statutes, which require a broad definition of interest, and the protective purposes of the home equity fee cap, use of the usury definition of interest for purposes of the fee cap fails to preserve the legislative intent.

The Commissions' interpretation, which classifies fees charged by the lender as interest, essentially renders the cap meaningless.

The court next turned its attention to the required consumer disclosure notice set forth in section 50(g) which includes the following language: "FEES AND CHARGES TO MAKE THE LOAN MAY NOT EXCEED 3 PERCENT OF THE LOAN AMOUNT." ACORN argued that this language is indicative of the legislature's intent to include fees imposed by the lender in the fee cap. The court reasoned that the plain language of this provision creates a three-percent cap on fees other than interest in the context of a home equity loan. The court held that the Commissions' interpretation, which classifies fees charged by the lender as interest, essentially renders the cap meaningless. The court could not conclude that the legislature, in creating the cap on fees connected with a home equity loan, intended to exclude basically all fees charged by the lender from the cap. The court held that even under a deferential standard of review, the Commissions' definition of interest is contrary to the intent and plain meaning of the constitution. The court held the Commissions' current definition

of interest invalid because its breadth eviscerated the constitutionally mandated three-percent cap on fees.

CREDITOR'S ALLEGATIONS IDENTIFYING PREDECESSOR IN INTEREST AND STATING UNPAID AMOUNT WAS SUFFICIENT TO STATE CAUSE OF ACTION

Oliphant Fin., LLC v. Galaviz, 299 S.W.3d 829 (Tex. App.—Dallas 2009)

FACTS: Creditor Oliphant Financial, LLC ("Oliphant") filed suit against credit card account holder Julio Galaviz, alleging breach of contract, and sought to collect unpaid credit card debt. Oliphant had acquired the unpaid account from Household Bank. Attached to the petition was a statement of the account, correctly identifying the predecessor in interest, debtor Galaviz, and Galaviz's home address. Galaviz did not answer or appear, although the record indicates that the citation and petition were served by personal delivery. Oliphant moved for default judgment on the liquidated claim and attorney's fees. The court ordered amendment of the original petition for deficiencies, which Oliphant did not do. Oliphant instead filed a brief arguing that there were no deficiencies in the original petition. The court dismissed the case for want of prosecution. Oliphant appealed.
HOLDING: Reversed.
REASONING: In its petition, Oliphant alleged that Household Bank and Galaviz entered into a relationship when Household Bank opened a credit account for Galaviz. The petition further stated that Galaviz made purchases on the account but failed to pay the amount due, and that Oliphant purchased Galaviz's account from Household Bank. The petition named Galaviz as the defendant and gave his social security number. An affidavit attached to the petition reflected pertinent account numbers, dates and amounts. The court held that the petition and attachments sufficiently identified Household Bank and that the petition stated a cause of action for breach of the contract Galaviz had with Household Bank which Oliphant acquired and was suing to collect. The court found that the petition and attachments provided Galaviz with sufficient information to enable him to prepare a defense. As such, the court held that the petition gave fair notice of the claim to Galaviz. The court held that because the petition gave fair notice and Galaviz failed to answer and defaulted, Galaviz admitted all allegations of fact. The court held that admission by default entitled Oliphant to a default judgment and that the lower court erred in dismissing the case for want of prosecution.

BORROWERS CANNOT RESCIND CREDIT TRANSACTION THEY DID NOT COMPLETE

Weintraub v. Quicken Loans, Inc., 594 F.3d 270 (4th Cir. 2010)

FACTS: Prospective borrowers Rita and Barry Weintraub brought an action against lender Quicken Loans, Inc. ("Quicken"), alleging that Quicken's failure to provide them with a full refund of their deposit within 20 days of receiving an executed notice to cancel violated the Truth in Lending Act ("TILA"). Prior to closing on a loan to refinance their principal residence, the Weintraubs attempted to exercise the right to rescind given by TILA and demanded a refund of their $500 deposit. Quicken refunded the balance of the deposit after deducting the costs of a credit report and an appraisal but refused to refund the entire amount. The Weintraubs filed suit, seeking a declaratory judgment that Quicken violated TILA, injunctive relief, compensatory and statutory damages and attorney's fees. Quicken moved for summary judgment, which the dictrict court granted, holding that the TILA right to rescind is only available to rescind a consummated credit transaction. Borrowers appealed.
HOLDING: Affirmed.
REASONING: The Weintraubs argued that the right to rescission provision, 15 U.S.C. §1635(a), does not require that a loan be consummated before the right to rescission can arise and that TILA, as a remedial statute, should be construed liberally in the consumer's favor. The Weintraubs further argued that the term "transaction" can refer to the process of doing business regardless of a final agreement or specific result. The court held that no "consumer credit transaction" existed until that transaction had been consummated, that is, until credit had in fact been extended. The court stated that the right to rescind a transaction would essentially be meaningless, as there would be nothing to rescind. Until a loan is consummated, the consumer has incurred no obligation from which he would need a statutorily created right to back out. The object of rescission is presumed to be a transaction creating a security interest in the consumer's property; if no security interest has been created then rescission is unnecessary.

The court held that the loan agreement, having never been consummated, was not a transaction and did not give rise to the application of TILA §1635(a). The court held that the borrowers were not entitled to refund of their deposit under TILA's rescission provision and affirmed the district court's judgment.

PETITION WAS INSUFFICIENT TO SUPPORT DEFAULT JUDGMENT ON CREDIT CARD ACCOUNT

Resurgence Fin., LLC v. Taylor, 295 S.W.3d 429 (Tex. App.—Dallas 2009)

FACTS: Assignee Resurgence Financial brought action against debtor Taylor, asserting a claim for breach of contract for failure to pay a credit card account. Taylor did not answer the petition or discovery requests. A month after filing the suit, Resurgence filed a motion for default judgment. The court returned the default judgment unsigned, noting deficiencies regarding lack of notice, lack of adequate pleading, and lack of evidence. Resurgence filed for default judgment twice more and was denied for the same deficiencies. The trial court dismissed the action "for want of prosecution" and for failure to take action after notice of the court's intent to dismiss. Resurgence appealed.
HOLDING: Affirmed.

REASONING: The court held that Resurgence did indeed fail to support their pleadings. Recovery under a breach of contract claim requires proof of four elements: (1) the existence of a valid contract; (2) performance or tendered performance by the plaintiff; (3) breach of the contract by the defendant; and (4) damages sustained by the plaintiff as a result of the breach. In a no-answer default judgment, the failure to file an answer operates as an admission of material facts alleged in the petition, except as to unliquidated damages on which the judge must hear evidence. By failing to answer the requests for admissions included in the petition, Taylor admitted to enough facts to prove the first three elements of the breach of contract claim. Damages, however, could not be accurately calculated and considered liquidated by the court from the factual, as opposed to conclusory, allegations in the petition and written instruments. Specifically, the affidavit summarizing the state of Taylor's account and amounts owed referenced the interest rate of the contract but failed to establish if the interest was simple or compounded. Also, the credit card statements differed in interest rate. The evidence did not show a definitive basis for calculating the damages. As such, the court found that Resurgence failed to establish its entitlement to the judgment it requested and affirmed the trial court's dismissal.

CREDITOR IN DEFICIENCY SUIT MUST PROVE SALE WAS COMMERCIALLY REASONABLE

Jantzen v. Am. Nat'l Bank of Tex., N.A., 300 S.W.3d 412 (Tex. App.—Dallas 2009)

FACTS: Shawn Jantzen was the maker of a note payable to the American National Bank of Texas. The note was secured by an aircraft as collateral. After the bank asserted that Jantzen defaulted on the note, it seized the collateral and sold it. The bank subsequently brought suit against Jantzen for the deficiency still owed after application of proceeds from the sale of the aircraft. In its petition, the Bank asserted that all conditions precedent to its recovery had occurred or been performed, but did not specifically plead that it had disposed of the collateral in a commercially reasonable manner.

Jantzen filed counterclaims and answered that the aircraft had not been sold in a commercially reasonable manner. The Bank moved for summary judgment on its claim for deficiency under the note and on Jantzen's counterclaims. The trial court granted summary judgment and Jantzen appealed.

HOLDING: Reversed.

REASONING: On appeal, Jantzen argued the trial court erred in granting summary judgment on the Bank's claim for deficiency, because fact issues existed as to whether all conditions precedent to the Bank's recovery had occurred and whether the Bank's disposition of the aircraft was commercially reasonable.

The court explained that a creditor may either specifically aver the sale of collateral was commercially reasonable, or do so generally by stating that all conditions precedent had been satisfied, in its pleading. If pled generally, the creditor must prove the commercial reasonableness of a sale if challenged by the debtor in his answer. The court defined a sale as being commercially reasonable if it is made in the usual manner on any recognized market, at the price current in any recognized market, or otherwise in conformity with reasonable commercial practices among dealers in the type of property at issue. Tex. Bus. & Comm. Code Ann §9.627(b). The court also held that the issue of commercial reasonableness of disposition of collateral is inherently one of fact.

The issue of commercial reasonableness of disposition of collateral is inherently one of fact.

In reviewing summary judgment, the court turned to the issue of whether the Bank, the secured party, had met its burden of proof on the issue of commercial reasonableness. The court found the summary judgment evidence insufficient to prove the reasonableness of the sale because the Bank failed to produce evidence on any of the factors the courts traditionally consider. Although the court did not enumerate each of these factors, the court offered examples of such evidence, including the reasonableness of the method of collateral disposition, the terms of the aircraft sale, and expert testimony to show conformity with industry practices. Accordingly, the court concluded that the summary judgment evidence did not establish as a matter of law that the sale was conducted in a commercially reasonable manner.

DEPARTMENT OF AGRICULTURE LIABLE UNDER FAIR CREDIT REPORTING ACT

Talley v. United States Dep't of Agric., 595 F.3d 754 (7th Cir. 2010)

FACTS: Wayne Talley had a loan through the Department of Agriculture ("Department") that was paid off. The Department erroneously continued to report this loan as delinquent on his credit report, even after the credit agency verified the loan had been repaid and Talley had satisfied all of his obligations. A provision of the Fair Credit Reporting Act requires lenders to report borrowers' payment history accurately to credit agencies, however, even after corrections to the credit report, the Department again reported the debt as delinquent. Talley brought suit in district court against the Department for damages in connection with these repeated discrepancies on his credit report which adversely affected his credit rating.

The Department did not deny that it violated the Act by incorrectly reporting Talley as delinquent, but instead argued that Talley was simply not entitled to damages. The Department contended that it would not fall under the definition of a "person" under the Act, and that sovereign immunity prevents any financial award even if it did violate the Act. The district court concluded that it was clear that the Act was to be extended to all "persons," including the Department and found in Talley's favor.

After a bench trial, the district court awarded Talley $10,000 in compensatory damages, plus $20,000 in attorneys' fees.
HOLDING: Affirmed.
REASONING: Although the Department of Agriculture asserted sovereign immunity, insisting that the federal government was not intended to be included within the definition of "persons" within the Fair Credit Reporting Act, the court agreed with Talley that the Department was liable for its violations.
The Department insisted that the Fair Credit Reporting Act did not supply the authorization that would allow for government liability under the Act. The court rejected this notion, reasoning that the law was clear enough as to its intentions and waived sovereign immunity for damages under the Act.

In the alternative, the court noted that the Tucker Act, general legislation waiving sovereign immunity and allowing for money damages for any civil action or claim against the United States based on any act of Congress, supplied the necessary authorization. The court held that only money damages, and no other form of relief, is allowed under the Tucker Act and does not include or allow punitive damages unless specifically authorized by the Tucker Act. The court concluded that the Tucker Act only requires the fair inference that the statute requires the United States to pay for the harm it inflicts. Accordingly, the Department was liable to Talley for its violations of the Act.

ARBITRATION

COMPUTER MAKER CAN'T ENFORCE ARBITRATION CLAUSE

Omstead v. Dell, Inc., 594 F.3d 1081 (9th Cir. 2010)

FACTS: Plaintiffs Omstead, Malloy, and Smith ("Plaintiffs") brought a class action suit in California against Dell, Inc. ("Dell") for the selling of defective notebook computers. At the time of purchase, Plaintiffs were required to accept a written agreement titled "U.S. Terms and Conditions of Sale" ("Agreement"). The Agreement contained a binding arbitration clause and disallowed any Dell customers from consolidating their grievances against Dell into a class action lawsuit. The district court granted Dell's motion to stay proceedings and compel individual arbitration pursuant to the Agreement. Plaintiffs appealed, arguing that they cannot arbitrate their claims individually because it was not economically feasible, and because the arbitration forum of Texas, mandated by the Agreement, was biased against California consumers.

Under the Federal Arbitration Act, a written arbitration provision is valid and enforceable unless an applicable contract defense, such as unconscionability, renders it unenforceable.

HOLDING: Reversed.
REASONING: The court found that the district court erred when it granted Dell's motion to stay proceedings and compel arbitration. Under the Federal Arbitration Act, a written arbitration provision is valid and enforceable unless an applicable contract defense, such as unconscionability, renders it unenforceable. Whether an arbitration provision is unconscionable is governed by state contract law.

The Agreement contains Texas as the forum which governs under a choice-of-law provision. Plaintiffs argued that the choice-of-law provision is unenforceable, and therefore California law applies. The court agreed with Plaintiffs that California law applied to the Agreement rather than Texas law. The court found that California had a materially greater interest in applying its law because the class consisted solely of California residents asserting violations of California consumer protection laws for goods shipped to the state.

After determining that California law applied to the Agreement, the court found the arbitration provision unconscionable because of the class action waiver, and therefore unenforceable. Under California law, class action waivers are unconscionable if (1) the waiver is found in a consumer contract of adhesion (2) the approximate purchase price was a small enough sum to prevent consumers from pursuing their individual claims, and (3) there are allegations that the party with the superior bargaining powers has carried out a scheme to deliberately cheat a large number of consumers out of individually small sums of money. Because Dell's class action waiver and its defective product meet California's test for unconscionability, the court held the arbitration clause unenforceable.

ARBITRATION CLAUSE DESIGNATING NAF AS ARBITRATOR IS NOT ENFORCEABLE

Ranzy v. Extra Cash of Tex., Inc., 2010 U. S. Dist. LEXIS 22551 (S. D. Tex. Mar. 11, 2010)

FACTS: Plaintiff Cheryl Ranzy took out a payday loan from defendant Extra Cash of Texas, Inc. ("Extra Cash"). Ranzy signed a promissory note ("Note") and a Credit Services Organization Agreement ("Arbitration Agreement") for the loan, in which she agreed to arbitrate all claims against Extra Cash under the procedures of the National Arbitration Forum ("NAF"). When unable to repay her loan, Extra Cash began employing aggressive means of seeking repayment. Ranzy sued Extra Cash, alleging various violations of the Federal Debt Collection Practices Act, among others, and requested an injunction against defendants, prevent-