CONSUMER CREDIT

FAIR CREDIT REPORTING ACT DAMAGES FOR IMPAIRMENT OF CREDIT AFFIRMED

Smith v. Santander Consumer USA, Inc., 703 F.3d 316 (5th Cir. 2012).

FACTS: Plaintiff, Jeffrey Smith, brought action against Defendant, Santander Consumer USA, Inc., for violations of the Fair Credit Reporting Act (FCRA) by failing to promptly investigate Plaintiff's credit dispute and not correcting the information misreported to a credit agency. Plaintiff suffered damages including a higher interest rate after refinancing his home, postponed expenses as a cautionary measure, and embarrassment resulting in damaged professional and family relationships. The jury found that the Defendant violated the FCRA. Defendant appealed, arguing: (1) Plaintiff did not offer sufficient evidence for his claim of damages; (2) Plaintiff failed to mitigate his damages; and (3) the district court improperly admitted letters from third parties to Plaintiff.
HOLDING: Affirmed.
REASONING: The court agreed with Defendant's assertion that Plaintiff's diminution of available credit alone does not constitute a measurable damage under FCRA. The court reasoned that the consumer is unaffected unless steps are taken to use the available credit or there is a showing of need for a higher credit amount.

The court further reasoned that the jury verdict, which was general and not itemized, reflected considerably less than Plaintiff sought. Because the evidence was sufficient for "reasonable and fair-minded men in the exercise of impartial judgment" to support the ultimate award, whether or not this court would have reached the same result, the *Boeing* standard required this court to affirm the jury verdict. The issue of mitigation of damage was a jury question. The court refused to speculate on the makeup of the general verdict because the total award to Plaintiff was less than the full amount of his claimed damages. Therefore, the failure to mitigate damages was no basis for reversing the district court's judgment.

The court also determined that the trial court's admission of letters to reflect the impact of the erroneous credit score on Plaintiff's line of credit was harmless error, if error at all, regardless of whether viewed for their relevance to Defendant's liability or compensable damages.

FEES CHARGED FOR TAX REFUND CHECKS VIOLATED TRUTH IN LENDING ACT

People v. JTH Tax Inc., ___ Cal. App. 4th ___ (2013).

FACTS: Defendant, JTH Tax Inc., doing business as Liberty Tax Service, provided tax preparation and loan services throughout the U.S., including 195 stores in California. Among the services offered by Defendant were e-filing, refund anticipation loans (RAL), and electronic refund checks (ERC). RAL were short term loans provided by third-party banks that had a relationship with Defendant. Defendant advertised and promoted the loans, offered them to its customers, and filled out all of the paperwork for its customers. Defendant delivered the application to the lender bank and then disbursed the loan proceeds to the customer; secured by the customer's anticipated refund. These services came with several charges and fees deducted by the lending bank, including a "handling fee" to establish a temporary special account where the customer's refund was deposited. The ERC application also required the establishment of this special account in order to receive the customer's refund directly from the IRS.

The California Attorney General filed a complaint against Liberty for violation of California's Unfair Competition Law and False Advertising Law. The complaint stated that there were inadequate disclosures to customers in RAL and ERC applications regarding the cost for the extension of credit. The AG sought injunctive relief, civil penalties, and an order of restitution. The court concluded that the handling fee was an undisclosed finance charge in violation of the Truth in Lending Act (TILA). Defendant appealed judgment
HOLDING: Affirmed.
REASONING: The TILA states that a finance charge is "any charge payable directly or indirectly by the creditor as an incident to or a condition of the extension of credit, which does not include any charge of a type payable in a comparable cash transaction." Defendant argued that the handling fee was not a finance charge because it was paid to the lender bank for setting up the special account and that the fee was not paid in cash transactions.

The appeals court agreed with the trial court that details, such as to whom the fee was paid, were inconsequential. Regarding comparable cash transactions, the trial court found that only 4 out of 60,000 transactions were cash transactions. The court ruled that these four were "insignificant exceptions" to an otherwise credit-based business, and therefore, the "comparable cash transaction defense" was unavailable. Defendant also argued that the handling fee was not a finance charge because it was not "interest." Defendant relied upon *Hahn v. Hank's Ambulance Service, Inc.*, arguing that the handling fee was a fee that was exempt from TILA disclosure. 787 F.2d 543 (11th Cir. 1986). The court distinguished JTH's fee from the fee in *Hahn*, reasoning that JTH's fee "gave the customer the *right* to defer payment of a debt."

TRUTH IN LENDING ACT PLAINTIFF DOES NOT HAVE TO SUE TO PROTECT RESCISSION RIGHT

Sherzer v. Homestar Mortgage Services, 707 F.3d 255 (3d Cir. 2013).

FACTS: Plaintiffs, the Sherzers, obtained two loans on their principal dwelling from Homestar Mortgage Services, one significantly larger than the other. The loans closed and Homestar assigned them both to HSBC Bank. Less than three years after the closing date, Plaintiffs' counsel wrote to Homestar and HSBC asserting that Homestar had failed to provide the disclosures required by TILA and that these omissions were material violations. The letter stated that the Plaintiffs were exercising their right to rescind the loan agreements under 15 U.S.C. §1635. HSBC agreed to rescind the smaller of the two loans but denied rescission of the larger one, claiming that Homestar had not materially violated the TILA. More than three years after the initial notice of rescission, the Plaintiffs filed suit in the Eastern District of Pennsylvania seeking a declaration of rescission, remedies for rescission, and damages.

Homestar and HSBC (Lenders) filed a motion for judgment on the pleadings, which argued that suits for rescission filed more than three years after a loan's closing date were time-barred under 15 U.S.C. §1635(f), even when the obligor mailed a notice of rescission within the three-year period. The Plaintiffs argued that providing a written notice of rescission was sufficient to reserve their right and that they were not also required to file suit within three years. The district court granted Lenders' motion and dismissed the case. The Plaintiffs appealed.

HOLDING: Reversed.

REASONING: The court first explained that the TILA allowed the obligor an absolute right to rescind within three days following closing, with or without the disclosures. If the lender failed to make the required disclosures, the obligor was also allowed a right to rescind extending three years from consummation of the transaction or sale of the property, whichever occurred first.

The court relied primarily on the explicit statutory language of §1635(a), (b), and (f), and its implementing regulation, Regulation Z, in concluding that only written notice was required. The statutory language provided that an obligor exercised his right to rescission upon sending notice to the creditor; no language alluded either explicitly or implicitly to a court filing. Regulation Z similarly specified that the obligor was to provide notice either by mail, telegram, or other means of written communication. The court concluded that the absence of any reference to causes of action or the commencement of suits in §1635 suggested that an obligor could accomplish rescission without a formal court filing. Because TILA is a remedial statute, the court read the statute liberally.

The statutory language provides that an obligor exercises his right to rescission upon sending notice to the creditor.

The Lenders cited *Beach v. Ocwen Federal Bank* in arguing that an obligor must bring suit within three years to exercise his right to rescission. Beach v. Ocwen Federal Bank, 523 U.S. 410 (1998). The court distinguished *Beach* by stating that the court in that case merely decided that obligors who had not exercised their right within the three-year period were barred from later asserting rescission as an affirmative defense. It made no mention of how the obligor should exercise this right. The court also found unconvincing Lenders' argument that it would be problematic for a court to recognize that rescission occurred after the three-year period had passed because the obligor no longer had any right of rescission to enforce. Instead, the court found that although after the three-year period the obligor no longer had a right to rescission, he had a statutory right to his property (down payments and the like) and to a clear title. Thus, borrowers who exercised their right by providing notice within the three-year period had standing to bring suit after the period expires.

The court then addressed Lenders' argument that a lender's security interest would become instantly void by law even if the obligor were to send an invalid notice, such as when the mandated disclosures had in fact been made. The court reasoned that if an obligor were to bring a fraudulent or ineffective TILA claim, the lender could choose to file suit to resolve any uncertainty. In such a case, a court might condition the release of a security interest on the return of loan proceeds to protect the lender, rather than treat it as an unsecured creditor. Regarding Lenders' argument that the high cost of litigation would burden enforcement of their rights, the court simply stated that the fact that a particular approach was costly was no reason to disregard the explicit language of the statute, and that this was a matter best left to the legislative process.

CONSUMER CAN RECOVER DAMAGES FOR EMOTIONAL DISTRESS UNDER FAIR CREDIT REPORTING AACT

Llewellyn v. Allstate Home Loans, Inc., 713 F.3d 1173 (10th Cir. 2013).

FACTS: Plaintiff, Glen Llewellyn, purchased property and executed a note with Defendant, Allstate Home Loans, to finance the purchase. The note was secured by a deed of trust on Plaintiff's new property. After the Plaintiff's first successful monthly payment, the loan was sold to NCCI and the servicing rights were transferred to Ocwen Loan Servicing, LLC. Plaintiff refinanced the loan prior to the service transfer, and he did not advise the refinance closing agent that the servicing rights had been transferred when he signed the refinance documents. Plaintiff incorrectly informed Ocwen that his loan had been refinanced. Later Plaintiff delivered the funds to the refinance closing agent but still did not mention the transfer of servicing.

The closing agent wired the funds to the bank, and the funds were eventually wired to Allstate. Neither Ocwen nor NCCI received the funds as a result of the refinancing. Ocwen sent Plaintiff a past-due notice on the loan and a letter discussing foreclosure. In a few days, Ocwen provided a negative credit report regarding Plaintiff to a credit reporting agency. Plaintiff informed Ocwen that his loans had been refinanced and serviced elsewhere, but Ocwen sent another past due notice and issued a foreclosure referral. Additional movement of the mortgage caused it to be finally serviced by NCC Servicing, LLC.

Several months later, Plaintiff filed suit against Ocwen for violation of Fair Debt Collection Practices Act and Fair Credit Reporting Act (FCRA). The district court granted summary judgment for Defendant on all claims, concluding that Plaintiff failed to bring evidence of actual damages. Plaintiff appealed.

HOLDING: Reversed.

REASONING: Plaintiff alleged both economic and emotional damages as a result of Ocwen's violation of the FCRA. In analyzing whether damages could be recovered for emotional distress, the court explored the physical manifestation of the emotional distress asserted by Plaintiff in his affidavit and medical records.

Plaintiff stated that before Ocwen issued the negative credit reports against him, his preexisting symptoms related to Chron's disease and depression were under control without medication. But once he discovered the issuance of a negative credit report in connection with his missing loan payment, his health condition deteriorated rapidly. He showed symptoms of Crohn's disease, including severe abdominal pain, cramping, bloating, constipation, diarrhea, and reoccurring nausea. He also experienced drenching night sweats, anxiety, severe kidney pains, and low-grade fevers and chills. These health problems led to a return of his depression.

Ocwen contended that without more, Plaintiff's affidavit was insufficient to create a genuine dispute as to whether Ocwen's actions caused Plaintiff to suffer emotional damages. The court rejected that argument, noting that Plaintiff explained his injury in reasonable detail and did not rely on conclusory statements. It was reasonable for the court to infer from the aggravation of Plaintiff's previously managed conditions and the development of several new symptoms at the time he discovered the negative credit report that Ocwen caused the emotional distress. The court concluded that an injured person's testimony alone may suffice to establish damages for emotional distress provided that the injured person reasonably and sufficiently explained the circumstances surrounding the injury and did not rely on conclusory statements. Plaintiff's affidavits created a genuine dispute as to whether Ocwen's action caused him emotional damages.

DEBT COLLECTION

DEFENDANTS IN FAIR DEBT COLLECTION PRACTICES ACT CASES MAY RECOVER COSTS WITHOUT A SHOWING OF BAD FAITH

Marx v. General Revenue Corp., ____U.S.____ (2013).

FACTS: Defendant, General Revenue Corporation, was hired to collect debt from Plaintiff, Olivea Marx, for defaulting on a student loan. Plaintiff sued Defendant for violating the FDCPA by harassing her with phone calls and falsely threatening to garnish up to 50% of her wages.

The district court found Plaintiff had failed to prove any violation of the FDCPA. Pursuant to Federal Rule of Civil Procedure 54(d)(1), the court awarded Defendant costs. Plaintiff filed a motion to vacate costs, arguing 15 U.S.C. §1692k(a)(3) sets the exclusive basis in awarding costs in FDCPA cases, which allows a court to award a defendant attorney's fees for bad faith. The motion was denied and Plaintiff appealed. The appeals court affirmed.

HOLDING: Affirmed

REASONING: The Court noted in comparing the relationship between Rule 54(d)(1) and §1692k(a)(3), it would "assume that the ordinary meaning of the statutory language accurately expresses the legislative purpose."

Turning to Rule 54(d)(1), the Court interpreted the word "should" in the Rule to mean a district court had discretion on whether or not to award costs. Rule 54(d)(1) states, however, that a federal statute or Federal Rule of Civil Procedure that is contrary can displace this discretion. A statute is contrary to Rule 54(d)(1) when it limits a Court's discretion by either (1) precluding awards of cost or (2) creating conditions necessary to receive awards of cost. Not all statutes that provide for costs are contrary.

The Court then looked to §1692k(a)(3) to determine whether it was contrary to Rule 54(d)(1). The second sentence of §1692k(a)(3) reads, "An action under this section brought in bad faith and for the purpose of harassment, the Court may award to the defendant attorney's fees...and costs." The Court held §1692k(a)(3) was not contrary to Rule 54(d)(1) for two reasons. First, the language does not limit a Court's discretion in awarding either attorney's fees or costs. Rather, §1692k(a)(3) codifies a court's pre-existing authority to award costs and the background rule that courts may award attorney's fees for bad faith claims. Second, the language did not place conditions necessary for awarding costs. Section 1692k(a)(3) contained language that was in sharp contrast to other statutes found to create those conditions. The Court focused on statutes with language such as, "No costs...*unless*" and "...not held liable...*unless*."

Lastly, the Court rejected the argument that §1692k(a)(3) establishes explicit cost-shifting standards that displace Rule 54(d)(1)'s more general default standard. The Court held §1692k(a)(3) applies only to those cases brought in bad faith and for harassment. Plaintiff did not bring her case in bad faith and for harassment, thus §1692k(a)(3) does not apply.

For these reasons the Court affirmed defendants in FDCPA cases may recover costs without a showing of bad faith.

PROPERTY MANAGER IS NOT SUBJECT TO FAIR DEBT COLLECTION PRACTICES ACT

Harris v. Liberty Community Management, Inc., 702 F.3d 1298 (11th Cir. 2012).

FACTS: Plaintiffs, seven homeowners in the Little Suwanee Point townhouse community, failed to pay over $750 in water bills and community maintenance fees to the community's HOA. In 2009, when the HOA contracted with Defendant, Liberty Management, to handle maintenance and community management matters on its behalf, the HOA was due $140,000 in fees from its residents. Among its duties, Defendant contracted to act as the sole and exclusive agent of the HOA to request, demand, collect, receive, and invoice for any and all future and outstanding charges and assessments. In order to execute collection of fees, the community ratified an amendment to allow Defendant to suspend water service to residents overdue by $750 or more after a series of notices.

Section 1692a(6)(F)(i) exempts persons or entities that collect or attempt to collect any debt owed or due or to the extent such activity is incidental to a bona fide fiduciary obligation.

Plaintiffs' water services were ultimately suspended and they sued under the Federal Debt Collection Practices Act (FDCPA). The district court granted summary judgment in favor of Defendant, concluding it came within an exemption to the FDCPA because its collection of overdue assessments was incidental to a bona fide fiduciary obligation to the HOA Association.

HOLDING: Affirmed.

REASONING: The FDCPA applies in general to debt collectors, but not all entities that collect debts are "debt collectors" under