RECENT DEVELOPMENTS

CONSUMER CREDIT

CAR BUYER CANNOT RECOVER STATUTORY DAMAGES UNDER THE TRUTH IN LENDING ACT FOR FAILURE TO PROVIDE COPY OF PURCHASE AGREEMENT

Baker v. Sunny Chevrolet, Inc., 349 F.3d 862 (6th Cir. 2003).

FACTS: On December 28, 2000, Wanda Baker signed a Retail Installment Sales Contract ("RISC") to purchase a car and took possession of the vehicle. Although she asked for a copy of the contract, defendant, Sunny Chevrolet ("Sunny"), refused Baker's request. Two weeks later, Baker was asked to return to the dealership with a co-purchaser to re-execute the agreement because she was unable to obtain financing under the original RISC. Baker was allowed to review the actual RISC document prior to signing the contract. Baker never received a copy of the original agreement. Three weeks passed before Baker received a copy of the second agreement.

Baker filed a class action lawsuit for violations of the Truth in Lending Act ("TILA") and Regulation Z. The suit alleged that Sunny repeatedly failed to allow the consumer to keep a copy of the contract in connection with the purchase and finance of a motor vehicle prior to consummation of the transaction. Baker did not claim any actual damages, or that any of the disclosures made before she signed the RISC were inaccurate. Rather, Baker sued only for statutory damages. The district court granted summary judgment in favor of Sunny and dismissed the complaint on the basis that Sunny's refusal to provide the copies of the disclosures, while "seemingly inappropriate," could not give rise to TILA statutory damages. Baker appealed.

HOLDING: Affirmed.

REASONING: The Court of Appeals held: (1) violation of the form and timing requirements for closed-end credit disclosures under TILA was not one of the enumerated TILA violations warranting a statutory damages award; and (2) even if under the assumption that Sunny violated TILA's disclosure requirements, Baker was still not entitled to statutory damages for the violation under section 1638(b)(1). The court held that where the car buyer was clearly not prejudiced by the untimely delivery of the RISC, and instead intended to complete the purchase, the failure to deliver the written disclosures in the form that the consumer might keep was actionable only if the consumer showed actual damages.

The stated purpose of TILA was to promote the informed use of credit by assuring meaningful disclosure of credit terms to consumers. The TILA sections involved in this case were: section 1638(a), providing substantive disclosures must be made regarding finance charge, annual percentage rate, total of payments, etc.; section 1638(b), providing form and timing requirements; and section 1640(a), providing damages available for violations of those provisions. The court held, standing alone, the "form and timing" requirement had no substance and only made sense if combined with substantive disclosures. Because section 1638(b) was a separate requirement relating only tangentially to the underlying substantive disclosure requirements of section 1638(a), a section 1638(b) violation was not one of the enumerated violations warranting a statutory damages award.

The affirmative ruling was also defended on the ground of Sunny's compliance with section 1640(b) provisions for the correction of errors. Under section 1640(b), violations corrected within sixty days were not subject to statutory damages, assuming certain conditions were met. In this case, Sunny provided Baker with a copy of the RISC approximately two weeks after the signing date, which was clearly within sixty days.

NO PRIVATE RIGHT OF ACTION FOR A VIOLATION OF FAIR CREDIT REPORTING ACT SECTION 1681s-2(a)

Burns v. Bank of America, ____F.Supp. 2d ____ (S.D.N.Y. 2003).

FACTS: Kevin Burns, Barbara Burns, and Renee DeFina ("Plaintiffs") obtained mortgages through Ameristar Financial Corporation ("Ameristar"). Ameristar then assigned their mortgages to Goldome Realty Credit Corporation who underwent several mergers and name changes and eventually became known as BA Mortgage, a wholly owned subsidiary of Bank of America.

BA Mortgage sought to collect the debt incurred by the Plaintiffs. Plaintiffs claimed that in the process of collecting this debt, the bank willfully committed multiple credit defamations against them and violated their rights under the Fair Credit Reporting Act ("FCRA"). Specifically, Plaintiffs alleged a violation under 15 U.S.C. section 1681s-2(a), which provides that those who furnish credit information have a duty to report that information accurately. Both plaintiffs and defendant filed motions for Summary Judgment.

HOLDING: Defendant's motion for Summary Judgment granted.

REASONING: The FCRA places distinct obligations on three types of entities: consumer reporting agencies, users of consumer reports, and furnishers of information to consumer reporting agencies. The court found that BA Mortgage fit into the final category and further stated that those who furnish information have a duty to report accurate information under 15 U.S.C. section 1681s-2(a), and to investigate reports of inaccurate information, under 15 U.S.C. §1681s-2(b). The court found that Plaintiffs possessed no private right of action because section 1681s-2(a) is limited to enforcement by government agencies and government officials. Because Plaintiffs did not claim which section of the FCRA applied, the court also examined 15 U.S.C. section 1681s-2(b). The court stated that section 1681s-2(b) allows a private right of action in limited circumstances. To fall under this provision Plaintiffs must show that BA Mortgage received notice from a consumer reporting agency that the credit information was disputed. In this case, the Plaintiffs were not a government agency or government officials and they were the only ones who possessed notice of the disputed credit information, therefore the Plaintiffs could not sustain a cause of action under the FCRA.

FURNISHER OF INFORMATION MUST CONDUCT REASONABLE INVESTIGATION AFTER RECEIVING DISPUTE

Johnson v. MBNA Am. Bank, N.A., 357 F.3d 426 (4th Cir. 2004).

FACTS: In 2000, MBNA America Bank, N.A. ("MBNA") informed Linda Johnson that she was responsible for $17,000 owing on a credit card account opened by Edward Slater in 1987. Johnson married Slater in 1991 and he declared bankruptcy in 2000. Johnson obtained copies of her credit report from Experian, Equifax, and Trans-Union and disputed the debt with each company. Johnson claimed she was merely an authorized user of the account and not a co-applicant. Each credit-reporting agency sent an automated consumer dispute verification ("ACDV") to MBNA. In response to each of these ACDVs, MBNA agents reviewed the account information contained in MBNA's computerized Customer Information System ("CIS") and, based on the results of that review, notified the credit reporting agencies that MBNA had verified that the disputed information was correct. Based on MBNA's responses to the ACDVs, the credit reporting agencies continued reporting the MBNA account on Johnson's credit report.

Johnson subsequently sued MBNA, claiming, *inter alia,* that it had violated the Fair Credit Reporting Act ("FCRA") by failing to conduct a proper investigation of her dispute. The jury found that MBNA had negligently failed to comply with the FCRA, and ruled in favor of Johnson.

MBNA filed a motion for judgment as a matter of law arguing that the language of section 1681s-2(b)(1)(A) of the FCRA imposed only a minimal duty on creditors to "conduct an investigation" regarding disputed information. MBNA claimed they conducted a brief review of their records to determine whether the disputed information was correct and their actions met the statutory obligation. The district court denied the motion.

HOLDING: Affirmed.

REASONING: The FCRA imposes certain duties on a creditor who receives notice by a credit-reporting agency that a consumer has disputed information. After notice of a dispute with regard to the completeness or accuracy of consumer credit-report information, a creditor shall: (A) conduct an investigation with respect to the disputed information; (B) review all relevant information provided by the consumer reporting agency; (C) report the results of the investigation to the consumer reporting agency; and (D) if the investigation finds that the information is incomplete or inaccurate, report those results to all other consumer reporting agencies to which the person furnished the information. 15 U.S.C. § 1681s-2(b)(1).

The word "investigation," is defined as "[a] detailed inquiry or systematic examination." *Am. Heritage Dictionary* 920 (4th ed.2000); *see Webster's Third New Int'l Dictionary* 1189 (1981). Thus, the plain meaning of "investigation" clearly requires some degree of careful inquiry by creditors. MBNA's agents testified that their investigation was primarily limited to confirming that the name and address listed on the ACDVs were the same as the name and address contained in MBNA's computerized CIS, and that they never consult underlying documents such as account applications. Based on this evidence, the court held a jury could reasonably conclude that MBNA acted unreasonably in failing to verify the accuracy of the information contained in the CIS.

TRUTH IN LENDING ACT REQUIRES ACCURATE DISCLOSURES

Roberts v. Fleet Bank (R.I), 342 F.3d 260 (3d Cir.2003).

FACTS: Roberts brought suit against Fleet Bank, a credit card company, claiming it did not "clearly and conspicuously" disclose the terms of the credit card agreement as required by the Truth in Lending Act ("TILA"). The consumer received a solicitation encouraging her to open an account with the credit card company. The letter guaranteed a 7.99% fixed annual percentage rate ("APR") and stated the rate was "NOT an introductory rate," and promised that it would not go up in just a few short months. The APR, however, was increased thirteen months later. Roberts filed this class action, asserting a claim pursuant to TILA. Fleet Bank moved to dismiss the TILA claim and the district court granted the motion based on its conclusion that the credit card company had not violated the disclosure requirements of the TILA. Roberts appealed.

HOLDING: Reversed and remanded.

REASONING: The court held that both the TILA and the Board-promulgated regulations required a credit card issuer to disclose the applicable annual percentage rate clearly and conspicuously. The court found that the initial disclosure statement and the Schumer Box included in Fleet Bank's solicitation materials stated only two conditions under which the company could raise the consumer's APR: (1) failure of the cardholder to meet any repayment requirement; or (2) upon closure of the account. The court agreed with Roberts, that a reasonable consumer could read this list as exhaustive and conclude that the fixed APR could be raised only under those two described circumstances. The disclosure was neither clear nor conspicuous.

The court found that because the purpose of the TILA is to assure meaningful disclosures, "the issuer must not only disclose the required terms, it must do so accurately." *Rossman v. Fleet Bank (R.I.) Nat'l Ass'n,* 280 F.3d 384 (3d Cir.2002). "The accuracy demanded excludes not only literal falsities, but also misleading statements." *Id.* at 387. As the "TILA is a remedial consumer protection statute, it should be construed liberally in favor of the consumer." *Id.*

The court agreed with Roberts that the statements in the introductory letter claiming the "fixed 7.99% APR" is "NOT an introductory offer" and "won't go up in just a few short months" could cause a reasonable consumer to be confused about the temporal quality of the offer. The court rejected the company's argument that the phrase "my Agreement terms (including rates) are subject to change," which is included in the Terms of Pre-Qualified Offer section of the Invitation, made clear that the fixed APR was not permanent. The court found that a question of material fact existed as to whether the company made misleading statements in the mailing and failed to disclose the information required under the TILA "clearly and conspicuously."

CARDHOLDER AGREEMENT ALLOWING COMPANY TO CHANGE ANY TERM OF THE AGREEMENT ONLY AUTHORIZED CHANGES RELATING TO SUBJECTS ALREADY ADDRESSED IN THE ORIGINAL AGREEMENT

Sears Roebuck and Co. v. Avery, 593 S.E. 2d 424 (N.C. App. Ct. 2004).

FACTS: Ms. Barbara Avery opened a credit card account with Sears Roebuck and Co. ("Sears"). The cardholder agreement did not reference arbitration or any other dispute resolution procedure, but it contained a "Change of Terms" provision which provided that Sears could change any term or part of the agreement, with written notice to the consumer. Later, Sears amended the agreement by sending the cardholders written notice. The amendments included the addition of an "Arbitration" provision. If no written disputes were submitted, Sears considered the amendments accepted by its customers.

Avery's account became delinquent and Sears filed suit against Avery to collect the outstanding balance. Avery filed a counterclaim alleging that the interest rate on the credit card violated state law. Sears made a motion to compel arbitration regarding Avery's counterclaim. The trial court denied the motion to compel arbitration because the parties did not mutually assent to the arbitration provision in the amended-provision notice. Sears appealed the motion.

HOLDING: Affirmed.

REASONING: When addressing whether the "Change of Terms" provision in the original contract between Sears and Avery allowed Sears to add the arbitration clause to its agreement by simply mailing notice of the addition to its cardholders, the court first emphasized the fact that both parties must consent to a valid enforceable arbitration provision.

A "Change of Terms" provision allowing the drafter unilateral right to change, add, or modify the terms of a contract without limitation, is not consistent with the requirement of good faith implied in all contracts of adhesion. In fact, a "Change of Terms" provision would only comport with implied good faith and objective reasonableness if used to add new or modified terms related to subjects already addressed in some fashion in the original agreement. Further, the addition of the arbitration provision was not within the reasonable expectation of the cardholder. Because the original contract between Sears and Avery lacked any dispute resolution procedure, it precluded Sears' right to add an arbitration clause, given that the term was not contemplated in the original agreement.

The addition of the arbitration provision was not within the reasonable expectation of the cardholder.

ARBITRATION

AN OUT-OF-STATE ATTORNEY'S PARTICIPATION IN AN ARBITRATION PROCEEDING DOESN'T CONSTITUTE THE UNAUTHORIZED PRACTICE OF LAW

Colmar v. Fremantlemedia North Am., Inc., 801 N.E.2d 1017 (Ill. App. Ct. 2003).

FACTS: Plaintiff, Colmar, Ltd. was a Delaware corporation that produced and owned motion pictures. Defendant Fremantlemedia North America, Inc. ("FMNA") was also a Delaware corporation based in California. In 1994, Colmar and FMNA entered into a license agreement whereby Colmar licensed a film to FMNA. The contract contained an arbitration clause, which provided that the parties would submit any disputes to arbitration under the rules of the American Arbitration Association ("AAA").

Colmar eventually became dissatisfied because of FMNA's lack of aggressive marketing of the film and requested arbitration. FMNA was represented by a California based attorney, Peter J. Anderson, who was not licensed to practice in Illinois where one of the meetings took place. The arbitrator eventually found that FMNA was not liable. The trial court confirmed the arbitration award and denied Colmar's request to vacate. Colmar filed a second arbitration complaint against FMNA. This second arbitration was held in Chicago and FMNA was again represented by Anderson. The second arbitrator denied Colmar's claims and ordered that the contract be deemed terminated. Colmar filed suit in an Illinois district court seeking to vacate the second arbitration because FMNA was represented in both arbitrations by an attorney who was not licensed to practice law in Illinois. FMNA answered that the representation was permitted under the rules of AAA. The trial court granted FMNA's countermotion to dismiss and affirmed the second arbitrator's award. Colmar appealed arguing that the trial court erred by not vacating the second arbitration award because FMNA was represented by an out-of-state attorney.

HOLDING: Affirmed.

REASONING: The representation of out-of-state counsel took place during arbitration rather than in a court of law. Anderson's representation thus had no effect on the arbitration award. No Illinois court has found that an out-of-state attorney's participation in arbitration proceedings constitutes the unauthorized practice of law in Illinois. Under the AAA's "Commercial Dispute Resolution Procedure and Commercial Arbitration Rules" any party may be represented by an "au-