CONSUMER CREDIT

A CONSUMER REPORTING AGENCY CAN BE SUED UNDER FAIR CREDIT ACT FOR PROVIDING REPORT TO FORMER CREDITOR

Levine v. World Fin. Network, 437 F.3d 1118 (11th Cir. 2006).

FACTS: Stephen Levine opened a store credit account with Structure, Inc. ("Structure"), a clothing retailer. The account was operated through World Financial National Network Bank, a financial affiliate of Structure. Levine paid the account in full and closed it sometime in 1998. The account remained closed. In May and August of 2002, Structure requested a credit report on Levine for "account review purposes." Although Levine no longer had an open account with Structure, Experian sold his credit report to the company. After discovering the transaction, Mr. Levine sued Experian, *inter alia,* alleging that providing the credit report to a former creditor with whom he no longer had an open account violated the Fair Credit Reporting Act ("FCRA"). Levine's claim was dismissed by the federal district court in Georgia for failure to state a claim. Levine appealed.

HOLDING: Reversed and remanded.

REASONING: The court held that Experian violated the FCRA when it provided Levine's credit report to a former creditor with whom he no longer had an open or active account. A consumer reporting agency can violate the FCRA by complying with a former creditor's facially valid request for credit report, if the creditor has reason to believe that request is being made for an impermissible purpose. Section (b) of 15 U.S.C. § 1681 requires that credit report agencies "adopt reasonable procedures for meeting the needs for consumer credit information in a manner which is fair and equitable to the consumer, with regard to the confidentiality, accuracy, relevancy, and proper utilization of such information." Experian failed to meet the requirements of 15 U.S.C. § 1681(b) and 15 U.S.C. § 1681e(a) when it sold Levine's personal information to Structure without making a reasonable effort to verify what the report would be used for.

The court reserved judgment on whether there is an absolute prohibition against such requests by former creditors for accounts that are closed and paid in full, due to lack of discovery. It held, however, that a former creditor will not be able to singularly justify its request for a credit report on a former debtor by stating that the information is needed for "account review purposes." The court further held that a question of fact remained whether Experian had reasonable grounds to know that the request for Levine's credit report was for an impermissible purpose or whether Experian made reasonable efforts to verify the request. This issue was remanded to the district court.

TRUTH IN LENDING ACT REQUIRES DISCLOSURES BY CREDITOR, NOT THIRD PARTY

Vallies v. Sky Bank, 432 F.3d 493 (3d Cir. 2006).

FACTS: Louis Vallies brought a class action on behalf of consumers who obtained loans from Sky Bank to finance purchases of motor vehicles. On the day Vallies signed the loan agreement with Sky Bank, Vallies signed a separate form entitled "Guaranteed Auto Protection ("GAP") Waiver Agreement" that contained the correct cost of the GAP premium and the required Truth in Lending Act ("TILA") disclosures concerning the exclusion of the GAP premium from finance charges. The separate GAP Waiver form was not incorporated into Sky Bank's loan and Sky Bank was not a party to the GAP Waiver Agreement. Vallies filed suit under the TILA, and asserted a number of claims. After voluntarily dismissing some of the claims, the district court granted Sky Bank's motion to dismiss for failure to state a claim.

Vallies challenged the district court's holding that Sky Bank did not violate TILA. In its opinion, the district court conceded that Sky Bank failed to make GAP disclosures, but held that Sky Bank did not violate the TILA because it could "perceive no substantive difference arising from the fact that disclosures were made on a form from a third party, rather than on Sky Bank letterhead." In essence, because the consumer ultimately received the correct disclosure information, Sky Bank did not shirk its disclosure responsibilities and no TILA violation had occurred. The district court relied on the fact that certain provisions of the TILA allow for separate disclosures to conclude that under the TILA a single creditor is not required to make all relevant disclosures. The district court noted that the GAP insurance disclosures "may be made together with or separately from other required disclosures."

The disclosure made by Sky Bank and those made by Fitts-the GAP Waiver agreement-were found to be inconsistent and confusing in material ways.

HOLDING: Reversed.

REASONING: The TILA was enacted "to assure a meaningful disclosure of credit terms so that the consumer will be able to compare more readily the various credit terms available to him and avoid the uninformed use of credit, and to protect the consumer against inaccurate and unfair credit billing and credit card practices." With respect to general disclosure requirements, the TILA regulations provide that "the creditor shall make the required disclosures…clearly and conspicuously in writing in a form that the consumer may keep."

The court reasoned that the fact TILA requires a single creditor to make disclosures is neither hyper technical nor overly formalistic. Creditors need to follow the law where more than one distinct party is allowed to make disclosures, because the likelihood that conflicting or confusing information will be disclosed dramatically increases. The disclosure made by Sky Bank and those made by Fitts-the GAP Waiver agreement-were found to be inconsistent and confusing in material ways. For instance, the Fitts Gap Waiver Agreement made clear that Vallies paid $395 for GAP insurance while the Sky Bank agreement failed to note that Vallies paid anything to Fitts or even that Vallies obtained GAP insurance. This difference materially changed the legal obligations between the parties because the Sky Bank agreement contained no mention of the purchase of GAP insurance or the

fact that Sky Bank did indeed finance Vallies's purchase of the GAP insurance. Because the court found Sky Bank's disclosures inconsistent and confusing, it rejected the reasoning of the district court and reversed its prior judgment.

A REJECTED SALES CONTRACT MAY BE A BASIS FOR TILA LIABLITITY

Gibson v. LTD, Inc. 434 F.3d 275 (4th Cir. 2006),

FACTS: Timothy Gibson ("Gibson") financed his purchase of two trucks from Lustine Toyota/Dodge, Inc. ("LTD") by executing five different retail installment sales contracts. Two sales contracts were executed in connection with his purchase of the 2002 Dodge truck, and the other three in connection with the later purchase of the 2003 Dodge Truck. Because of Gibson's low credit score, he was denied credit by several companies and was forced to sign multiple credit contracts in his pursuit of a lender to finance the purchase of both his trucks. LTD learned that Gibson was no longer employed the day after he signed his credit application for the 2003 truck. After learning of the change in Gibson's employment status, LTD requested that he return the 2003 Dodge truck. Gibson complied, but then bought suit against LTD, alleging that the dealership violated the Truth in Lending Act ("TILA"), committed fraud when it prepared finance agreements for the purchase of two vehicles, and violated the Virginia Consumer Protection Act. The federal district court in Virginia found that the dealer violated TILA and awarded Gibson damages and attorney's fees. LTD appealed.

HOLDING: Affirmed and modified in part.

REASONING: The court held that a rejected sales contract may form the basis for TILA liability. LTD argued, unsuccessfully, that any violation with respect to the unconsummated credit contracts between it and Gibson cannot form the basis for a complaint under TILA, because it regulates only "consummated" transactions. 15 U.S.C. § 1683(b)(1) & 12 C.F.R. § 226. The court, relying on *Nigh v. Koons Buick Pontiac GMC, Inc.*, 319 F.3d 119 (4th Cir. 2003), *rev'd in part* 543 U.S. 50, 125 S.Ct. 460, 160 L.Ed.2d 389 (2004), attempted to determine whether the rejected sales contracts signed by Gibson were consistent with the statutory requirement for a consummated transaction. In *Nigh,* a transaction was consummated under the statute only when a consumer became contractually obligated to a credit transaction. 15 U.S.C. § 1638(b)(1) & 12 C.F.R. § 226.17(b). Considering this incomplete, the court modified the consummation definition in *Nigh* by stating that a transaction was consummated under the statute not only when a consumer became contractually obligated, but also when a consumer signed a retail installment sales contract, when the condition precedent was within the seller's control, when a borrower could no longer alter the terms of credit and upon signing the agreement became contractually obligated.

In the context of a motor vehicle purchase, the court concluded that when a purchaser signs a retail installment sales contract which he no longer can alter, and the dealer retains the exclusive right to decide when the financing arrangement takes effect, the transaction is consummated for TILA purposes. Thus, the consumers consummated their agreements when they signed them, not when the dealer obtained third-party financing.

ARBITRATION

ARBITRATION PANEL DID NOT MANIFESTLY DISREGARD APPLICABLE LAW AND DID NOT VIOLATE PUBLIC POLICY

Sarofim v. Trust Co. of the West, 440 F.3d 213 (5th Cir. 2006).

FACTS: Valerie Biggs Sarofim invested $12.7 million, received as part of a divorce settlement, with Trust Company of the West ("TCW"), an investment company. After three years, Sarofim's investments had lost approximately $6 million. When combined with Sarofim's withdrawals, it left her with an account worth approximately $2.5 million. Because the agreement between Sarofim and TCW provided for disputes to be handled by arbitration, Sarofim initiated arbitration proceedings alleging, *inter alia,* breach of fiduciary duty, fraud, negligent misrepresentation, and breach of contract.

A three-person arbitration panel reviewed the dispute and issued a reasoned award, which held that TCW breached its fiduciary duty by placing her holdings in "wholly and negligently unsuitable" investments. The panel further held that TCW failed to diversify Sarofim's investments, failed to educate Sarofim about the risks of investments, and failed to educate themselves properly on her investment needs. The arbitration panel awarded Sarofim $6.3 million, but denied her request for attorney's fees and costs. The panel awarded Sarofim $2.9 million in punitive damages, the same amount which she had requested in attorney's fees. Sarofim then sought confirmation of the award with the United States District Court for the Southern District of Texas. TCW did not challenge the findings of the arbitration panel, but did seek to vacate the award. The court granted the motion to confirm the award and denied the motion to vacate. TCW appealed this decision.

HOLDING: Affirmed.

REASONING: The court held that an arbitration award may be vacated on two grounds; if the award displays manifest disregard for the law or is against public policy. In order for a party asserting "manifest disregard" to prevail, the party seeking to vacate the award must meet a two-step test: (1) based on available information, if it is not manifest that the arbitrators acted contrary to the applicable law, the award should be upheld, and (2) based on available information, if it is manifest that the arbitrators acted contrary to the applicable law, the award should be upheld *unless* it would result in significant injustice.

The court rejected the TCW's argument that the court's review was restricted to the "four corners of the arbitral award", holding that the court could turn to any applicable evidence. The court then affirmed the factual findings of the lower court, finding that TCW failed to diversify the investments, failed to educate