11TH CIR. REFUSES TO HOLD ASSIGNEE LIABLE UNDER TILA FOR FAILING TO PROVIDE PAYOFF STATEMENT

The U.S. Court of Appeals for the Eleventh Circuit recently upheld the dismissal of federal Truth in Lending Act (TILA) allegations that sought to hold the assignee of a mortgage loan liable for the mortgage loan servicer's supposed failure to comply with the borrower's written request for a payoff statement.

In so ruling, the Court held that TILA creates a cause of action against an assignee where violation is "apparent on the face of the disclosure statement provided in connection with [a mortgage loan] transaction pursuant to this subchapter," and that an alleged failure to provide a payoff statement is not a violation apparent on the face of the TILA disclosure statement.

A copy of the opinion is available at: Link to Opinion.

The borrower obtained a home mortgage loan in 2003. The loan was subsequently sold and assigned. The loan servicer serviced the mortgage at all relevant times. After foreclosure proceedings began, the borrower supposedly requested a payoff statement from the servicer, but the borrower alleged that the servicer never provided it.

The borrower sued the assignee for the servicer's alleged failure to timely provide the payoff statement. The assignee moved to dismiss the borrower's allegations, and the district court granted the motion.

On appeal, the Eleventh Circuit noted that the issue in this appeal was a matter of first impression for any circuit.

As you may recall, TILA provides:

A creditor or servicer of a home loan shall send an accurate payoff balance within a reasonable time, but in no case more than 7 business days, after the receipt of a written request for such balance from or on behalf of the borrower.

15 U.S.C. § 1639g. "[A]ny creditor who fails to comply" is liable for certain remedies. Id. at § 1640(a).

However, the remedies against an assignee of a creditor are more limited. TILA provides that an action with respect to a consumer credit transaction secured by real property may be maintained against any assignee of such creditor only if two requirements are met: 1) "the violation for which such action or proceeding is brought is apparent on the face of the disclosure statement provided in connection with such transaction pursuant to this subchapter;" and 2) "the assignment to the assignee was voluntary." See 15 U.S.C. § 1641(e)(1).

TILA does not define "disclosure statement." On this issue, the Court reasoned that section 1638 (15 U.S.C. § 1638) uses the term "the disclosure statement" to refer to disclosures that "shall be made before the credit is extended," which excludes the payoff balance. In contrast, section 1639g does not use the term "the disclosure statement" or even the word "disclosure."

The Eleventh Circuit observed that TILA uses the term "disclosure statement" consistently, especially because sections 1638 and 1641 reference one particular document by using a definite article ("the") and a singular noun ("disclosure statement").

The Eleventh Circuit turned to the Consumer Financial Protection Bureau (CFPB), the agency responsible for administering TILA. The CFPB's website states that a "Truth-in-Lending Disclosure Statement provides information about the costs of your credit. . . You receive a Truth-in-Lending disclosure twice: an initial disclosure when you apply for a mortgage loan, and a final disclosure before closing." What Is a Truth-in-Lending Disclosure?, Consumer Fin. Prot. Bureau, http://www.consumerfinance.gov/askcfpb/180/what-is-a-truth-in-lending-disclosure.html (last updated Oct. 26, 2015).

The Court also noted that the National Consumer Law Center similarly explains, "[t]he statute requires that closed-end [credit] disclosures be made 'before the credit is extended.'" Nat'l Consumer Law Ctr., Truth in Lending § 4.4.1 (quoting 15 U.S.C. § 1638(b)(1)).

Thus, the Court held:

A disclosure statement is a document provided before the extension of credit that sets out the terms of the loan. But a payoff balance can be provided only after a loan has been made and contains the amount yet to be

repaid. There is no way that the failure to provide a payoff balance can appear on the face of the disclosure statement. We reach our conclusion based on the plain meaning of the text, and we reject [the borrower's] argument that we should fix a supposed "loophole" in the statute.

The Eleventh Circuit supported its interpretation of "the disclosure statement" by showing its consistency with how other courts have used the term.

For example, the Third Circuit explained in dicta that TILA "provide[s] that as an incident to the extension of credit, the creditor must, in most instances, furnish the credit customer with a separate disclosure statement." Johnson v. McCrackin-Sturman Ford, Inc., 527 F.2d 257, 262 (3d Cir. 1975) (emphasis added). In addition, several circuits, including the Eleventh Circuit, also have used the term "disclosure statement" to refer to a document provided at or before closing. See, e.g., Rodash v. AIB Mortg. Co., 16 F.3d 1142, 1143–44 (11th Cir. 1994), abrogated in part on other grounds, Veale v. Citibank, F.S.B., 85 F.3d 577 (11th Cir. 1996); Iroanyah v. Bank of Am., 753 F.3d 686, 688–89 (7th Cir. 2014); Vincent v. The Money Store, 736 F.3d 88, 92 (2d Cir. 2013); Keiran v. Home Capital, Inc., 720 F.3d 721, 724–25 (8th Cir. 2013), vacated on other grounds, 135 S. Ct. 1152 (2015).

Finally, the Eleventh Circuit rejected the borrower's policy arguments to extend TILA to include a cause of action against assignees to include violations of section 1639g because the plain meaning of the statute forecloses the borrower's action, and the Court's job "is to follow the text even if doing so will supposedly 'undercut a basic objective of the statute,'" Baker Botts L.L.P. v. ASARCO LLC, 135 S. Ct. 2158, 2169 (2015) (quoting Baker Botts, 135 S. Ct. at 2170 (Breyer, J., dissenting)). "It is a well-established principle of statutory construction that 'when legislation expressly provides a particular remedy or remedies, courts should not expand the coverage of the statute to subsume other remedies.'" Florida v. Seminole Tribe of Fla., 181 F.3d 1237, 1248 (11th Cir. 1999) (quoting Tamiami Partners, Ltd. v. Miccosukee Tribe of Indians, 63 F.3d 1030, 1049 (11th Cir. 1995)).

Accordingly, the Eleventh Circuit affirmed the district court's dismissal of the borrower's TILA allegations.