

## ASSIGNEE CANNOT BE LIABLE FOR FAILURE TO PROVIDE PAYOFF STATEMENT UNDER TILA

On March 1, 2016, the Eleventh Circuit Court of Appeal held that the assignee of a loan cannot be liable for the failure to provide a payoff statement as required by the Truth in Lending Act, 15 USC 1639g. The case is *Evanto v. Federal National Mortgage Association*, No. 15-11450 and it has wide reaching implications for all legal post-origination TILA compliance issues. The case revolves around what many consumer advocates argue is a loophole in the TILA statute. The TILA statute requires creditors and assignees alike to provide a payoff statement within seven days of the borrower's request. A creditor can be liable for any violation of the TILA statute. *See* 15 USC 1640. An assignee on the other hand, has more limited liability, and is liable only for those violations, which among other things, are "apparent on the face of the disclosure statement . . . ." 15 USC 1641(e)(1)(A). The term "disclosure statement" is not defined. Every other use of the term "disclosure statement" in TILA suggests it means a Truth in Lending Act Disclosure Statement described in Section 1638. Common usage would also suggest a disclosure statement means a loan origination disclosure statement, and not, as was argued by the consumer in *Evanto*, a payoff statement (or the lack thereof) required by Section 1649g. In an argument that would have made the late Justice Antonin Scalia proud, lenders asserted that the statute means what it says, and does not provide a remedy for an assignees' violation (including a vicarious one caused by a loan servicer's failure) of Section 1639g. Consumer advocates argued such a reading was incompatible with the intent and purpose of the TILA statute, and that the Court should fashion a remedy by holding assignees liable despite the limitations imposed by Section 1641. The Eleventh Circuit sided with the text. In an opinion which cited, amongst other things, the late justice Antonin Scalia's work on textual interpretation *Reading Law*, the Eleventh Circuit stated unequivocally, "The plain meaning of the statute forecloses *Evanto*'s action, and "[o]ur job is to follow the text even if doing so will supposedly 'undercut a basic objective of the statute,'" ← citing *Baker Botts L.L.P. v. ASARCO LLC*, 135 S. Ct. 2158, 2169 (2015). The opinion was a matter of first impression for the Eleventh Circuit and Circuit Courts of Appeal nationally. It has wide ranging implications because TILA imposes other post origination obligations on assignees and loan servicers, such as the requirement to identify the owner and assignee of the loan, and provide certain contact information, found at Section 1641(g). Such provisions, like Section 1639g,

appear to be without a civil enforcement mechanism after the Eleventh Circuit's ruling in *Evanto* where assignees and loan servicers are responsible for compliance after the creditor assigns the loan away. The Eleventh Circuit's decision is vindication for Judge Robert N. Scola who authored pioneering opinions on the issue in *Signori v. Fed. Nat. Mortg. Ass'n*, 934 F. Supp. 2d 1364, 1366 (S.D. Fla. 2013) and *Alaimo v. HSBC Mortg. Services, Inc.*, 13-62437-CIV, 2014 WL 930787, at 1 (S.D. Fla. 2014), in which Burr Forman secured landmark victories for Federal National Mortgage Association on the issue. The opinions had not been universally followed in the years since their release, *see e.g. Lucien v. Fed. Nat. Mortg. Ass'n*, 21 F. Supp. 3d 1379, 1384 (S.D. Fla. 2014), but were implicitly approved in *Evanto*. Administrative enforcement of Section 1639g by the government is unaffected by the Eleventh Circuit's ruling, so industry members including servicers and assignees would still do well to be diligent about compliance with all TILA requirements.