American Bar Association
Committee on Consumer Financial Services
TILA and Housing Finance Subcommittees
Winter Meeting – Naples, Florida
January 2011

TILA SUBCOMMITTEE

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HOUSING FINANCE SUBCOMMITTEE

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Presentation: Mortgage Lending After Dodd-Frank

Our presentation focuses on key elements of Title 14 of the Dodd-Frank Wall Street Reform and Consumer Protection Act, including

Discussion of Qualified mortgages.
Key parts of definition:
  · Fully amortizing fixed or variable rates
  · No interest only payments or negative amortization
  · Complies with debt-to-income or similar ability to repay guidelines to be set by regulation
  · Total points and fees do not exceed three points
Benefits include:
  · Exemption from risk retention requirement
  · Safe harbor for ability to repay test
  · Some qualified mortgages may have a prepayment penalty
  · Excluded from the “higher-risk mortgage” definition

Ability to repay requirements for all closed-end mortgage loans
HOEPA coverage tests are completely rewritten and much more expansive
  · Now covers purchase money loans and HELOCs
  · Certain points and fees now excluded, may help limit impact

Qualified written requests must be acknowledged within five days (penalties also increased)
Loan broker compensation may not be based on loan terms other than the loan amount
  · But borrower may choose to pay broker fees by accepting an increased interest rate
Appears to exclude servicer employees from mortgage originator licensing requirements
New “higher-risk mortgage” rules, including physical property visit required for appraisals
No arbitration agreements on residential mortgage loans (i.e. closed-end, dwelling secured) or HELOCs
TILA penalties increased
- Class action cap raised to $1,000,000
- Mortgage originators subject to TILA penalties for compensation and steering violations
- Heaviest penalties (by far) applied to violations of the appraiser independence requirements
- Attorney general enforcement expanded

Significant disclosure burdens added, including:
- Monthly statements for closed-end mortgages
- Payment schedule disclosure must include escrow amounts
- Wholesale cost-of-funds rate
- Settlement charges and “aggregate amount of other fees or required payments”
- Disclosures regarding mortgage originator compensation, escrows, creditor’s partial payment policy, negative amortization, hybrid rate reset notice, required flood insurance and appraisals

Mandatory escrow accounts for most first lien closed-end mortgage loans

New force-placed insurance rules

We will also briefly touch upon the following items that the Board announced after the Summer 2010 Annual Meeting.


Interim Rule Revising Disclosure Requirements for Closed-end Mortgages - effective January 30, 2011, as specified in the MDIA. Lenders have the option, however, of providing disclosures that comply with the interim rule before that date. The Board also solicits comment on the interim rule for 60 days after publication in the Federal Register before considering the adoption of a permanent rule.

Proposed Rule to Enhance Consumer Protections and Disclosures for Home Mortgage Transactions

Proposed Rule to Revise Escrow Account Requirements for Jumbo Mortgages

Speakers:
- Kathleen Keest, Center for Responsible Lending, Durham, North Carolina
- Jeff Naimon, Buckley Sandler, Washington, D.C.
TRUTH IN LENDING CASE SUMMARIES

**Murphy v. Federal Deposit Insurance Corporation**

- **Unfair and Deceptive Trade Practices** – Pennsylvania Unfair Trade Practices and Consumer Protection Law does not impose liability on assignees
- **TILA/Assignee Liability** – FTC Holder Rule does not apply to mortgage loans and impose liability on assignees

Edward and Sandra Murphy appealed the dismissal and denial of their motion for partial reconsideration of their claims alleging wrongdoing in connection with their mortgage loan. Washington Mutual Home Loans, Inc., an assignee of their loan, commenced foreclosure proceedings, but dismissed the action after the Murphys allegedly sent a check to reinstate their mortgage. The Murphys later sued WaMu for sending them conflicting loan statements. After suing WaMu, the Murphys amended their complaint to include Wells Fargo Bank, N.A. as a defendant because Wells Fargo became an assignee of the loan. The complaint alleged that Wells Fargo was liable as an assignee for WaMu's wrongdoings. The trial court dismissed the claims against Wells Fargo, finding that the Murphys’ loan was assigned to Wells after the alleged wrongdoings by WaMu occurred. The Murphys appealed.

The U.S. Court of Appeals for the Third Circuit noted that only the Pennsylvania Unfair Trade Practices and Consumer Protection Law claims against Wells Fargo remained. The Murphys argued that the trial court erred in dismissing their complaint for lack of specificity and abused its discretion when it refused to grant their request to file an amended complaint. Specifically, the Murphys argued that amendment would not be futile because, pursuant to the FTC Holder Rule, assignee holders of mortgages are subject to the same liability as the lenders with whom their loans originated. The appellate court noted that the UTPCPL does not impose liability on assignees. The appellate court also noted that the FTC Holder Rule does not apply to mortgage loans and that, even if it did, the Truth in Lending Act’s assignee liability provisions would trump the Rule and preclude Wells Fargo from incurring liability for the wrongs of others. Therefore, the appellate court affirmed the trial court’s decision.
**In re Cobb (Spacone v. Deutsche Bank Trust Company)**

- **TILA-Rescission-Material Disclosures** – Borrower’s incomplete copy of notice of right to rescind insufficient to rebut presumption of receipt of two completed copies of notice created by signed acknowledgement of receipt
- **Collections** – Foreclosure of deed of trust is not “debt collection,” and assignee of deed of trust is not “debt collector,” under Rosenthal Fair Debt Collection Practices Act

Hank Spacone, the Chapter 7 trustee in the bankruptcy case of Carol Cobb, sued Deutsche Bank Trust Company, the trustee of the securitization trust to which Cobb’s mortgage loan was sold. The complaint alleged violations of the Truth in Lending Act, the Rosenthal Fair Debt Collection Practices Act, and California Business & Professional Code § 17200 for unfair competition. The bankruptcy court dismissed the complaint, and the U.S. District Court for the Eastern District of California affirmed.

Spacone alleged that Cobb did not receive two completed copies of the notice of right to rescind, as required by TILA, and supported that allegation with a blank notice that Cobb had in her possession. The bankruptcy court found that Spacone failed to rebut the presumption that Cobb received two copies of the notice of right to rescind that was created by Cobb’s written acknowledgment of receipt of these documents, and the district court agreed, noting that a fully executed notice was proffered by Deutsche. Spacone also alleged a damages claim for Deutsche’s failure to timely respond to Cobb’s request for rescission, but the district court agreed with the bankruptcy court that because there was no TILA violation, the rescission letter was invalid, and Deutsche could not be held responsible for failing to respond to an invalid rescission letter.

Spacone alleged that Deutsche violated the RFDCPA by contacting Cobb after she requested that contacts cease. The district court agreed with the bankruptcy court that foreclosure of a deed of trust does not constitute “debt collection” within the meaning of the RFDCPA and the assignee of a deed of trust is not a “debt collector” for purposes of the statute. Last, the district court agreed with the bankruptcy court that dismissal of the UCL claim was appropriate where the UCL claims were premised on claims of alleged violations of TILA and the RFDCPA, which the district court found were appropriately dismissed.

**Larrabee v. Bank of America, N.A.**

- **TILA/Rescission/Material Disclosures** – Agreement that application fee is nonrefundable is not incompatible with rescission

Does a statement in a fee disclosure that an application fee is non-refundable make the right to cancel notice confusing and result in a three-year rescission period? Thankfully, no, according to this case. Faye Larrabee refinanced her home with Countrywide Bank, FSB in 2007. Countrywide delivered a disclosure to her at application. The disclosure explained that she would have to pay a $299 application fee and the fee was nonrefundable. Larrabee made payments sporadically, and eventually the noteholder, Bank of America, N.A., started to foreclose. Larrabee sent Bank of America a notice of rescission under the Truth in Lending Act. Larrabee also sued Bank of America in the United States District Court for the Eastern District of Virginia. Bank of America moved to dismiss for failure to state a claim. Shortly thereafter, Bank of America assigned the loan to Freddie Mac. Larrabee sent a second rescission notice to Freddie Mac. Bank of America and Freddie Mac moved for summary judgment. The court granted their motion for summary judgment. The court

HC# 4833-8070-7848

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found that the fee disclosure simply stated that the application fee was not going to be refunded if Larrabee decided not to consummate the transaction. It was not incompatible with the right to cancel, which requires a creditor to refund fees if the consumer rescinds the transaction after consummation.

**Coleman v. Crossroads Lending Group, Inc.**

- **TILA/Rescission/Judicial Adjustment to the Process** – Court allowed rescission where consumer pays the net proceeds in installments

  This decision held that a consumer can meet the obligation to return the loan proceeds after rescinding a loan by entering into an installment payment plan. Margaret Coleman refinanced her home and entered into a loan with Crossroads Lending Group, Inc. for $180,000. Sometime later, Coleman sued Crossroads in the United States District Court for the District of Minnesota to rescind the loan. The court granted her the right to rescind the loan. It also ordered the parties to come to an agreement so that Coleman could repay the net loan proceeds in monthly installments.

  Interestingly, the court also found that the net proceeds amount did not include a sum Crossroads paid at the closing to extinguish a lien held by the Housing and Redevelopment Authority of St. Paul. The HRA loan was one of those community investment loans that did not require Coleman to make any payments and was forgiven if she remained in the property for ten years. The court decided that it was inequitable to hold her responsible for that sum under the circumstances.

**Howard v. Bayrock Mortgage Corporation**

- **TILA/Assignee Liability** – Assignee not liable for damages for TILA violations not apparent on face of documents

- **TILA/Rescission-Material Disclosures** – Assignee not entitled to dismissal of claim for rescission based on inaccurate disclosures in HUD-1 disclosure statement

- **TILA/Section 32 (HOEPA) Claims** – Mortgage borrowers adequately alleged applicability of HOEPA despite assignee’s claim that points and fees were not calculated properly

- **TILA/Statute of Limitations** – Court refuses to dismiss TILA and HOEPA claims as time barred where complaint adequately alleged equitable tolling

  Randy and Trisha Howard sued their subprime mortgage lender, Bayrock Mortgage Corporation, and the assignee of their loan, Bank of America, N.A., for rescission and damages for violations of the Truth in Lending Act and the Home Ownership and Equity Protection Act. BOA moved to dismiss the complaint. The U.S. District Court for the Southern District of Alabama granted the motion in part and denied it in part.

  The court granted the motion with respect to the Howards’ claim for damages for violation of TILA. The court found that an assignee is liable for TILA damages only for violations apparent on the face of the disclosure statement. The court noted that the complaint did not indicate that the violations were facially apparent and, therefore, dismissed this part of the complaint.

  The court, however, refused to dismiss the claim for rescission. The Howards alleged that disclosures in the HUD-1 settlement statement were inaccurate. In seeking dismissal of this claim, BOA claimed that violations of TILA cannot be based on problems with the HUD-1, but only with the Truth in Lending statement. The court found that BOA did not meet its burden of showing that
reliance on the HUD-1 is legally fatal to the Howards’ rescission claim and, therefore, refused to dismiss that claim.

The court also refused to dismiss the HOEPA claims. The complaint alleged that the total points and fees were 8.9% of the total loan amount and set forth the total loan amount and the points and fees. BOA disputed the calculation of the total points and fees, particularly the inclusion of a $580 fee charged by the closing agent. BOA claimed that this fee should not have been included because it was paid to a third party and Bayrock did not require the services for which the charge was incurred. The court disagreed, noting that the Howards sufficiently alleged that Bayrock required that the services of the closing agent be provided. Although the complaint was filed after the TILA and HOEPA statutes of limitation had run, the court found that the complaint adequately alleged equitable tolling.

**Gianduso v. U.S. Bank National Association**

- **TILA/Rescission-Judicial Adjustment to Procedures** – Court may modify rescission procedures to require proof of ability to tender before creditor is obligated to return money or property received and terminate security interest

Gary and Najwa Gianduso sued their home mortgage lender, First Franklin Financial Corporation, and the assignee of the loan, U.S. Bank National Association, for damages and rescission for violations of the Truth in Lending Act in connection with their mortgage refinance. The defendants moved for summary judgment, and the U.S. District Court for the Middle District of Pennsylvania granted the motion. First, the court agreed with the defendants that rescission was inappropriate because the Giandusos admitted that they could not tender the loan proceeds. Although the Giandusos alleged that tender is not required until after the creditor has fulfilled its rescission obligations, the court found that it has the discretion to modify the rescission procedures to require proof of an ability to tender before the creditor has an obligation to return any money or property received and terminate the security interest. As for the claim for damages, the court found that the bulk of the claim was barred by the 1-year statute of limitations and that the non-time-barred claim – for failure to properly respond to the request for rescission – lacked merit because the Giandusos were not entitled to rescission.

**Daniels v. The Equitable Bank, SSB**
2010 U.S. Dist. LEXIS 115599 (E.D. Wis. October 29, 2010)

- **TILA/Rescission – Form of Notice** – Borrower stated claim against mortgage lender for violating TILA where lender, in addition to providing two notices of right to rescind at closing, had borrower sign post-dated certificate stating that rescission period had expired and that borrower elected not to rescind

Ricky Daniels sued The Equitable Bank, SSB, among others, for violating the Truth in Lending Act by failing to clearly and conspicuously disclose that he had the right to rescind his mortgage loan transaction within three days of closing. Daniels specifically alleged that at the loan closing, the Bank provided him with two copies of the notice of the right to rescind, and had him sign a post-dated certificate stating that more than three days had elapsed since he received the notice of the right to rescind and that he did not wish to rescind.

The U.S. District Court for the Eastern District of Wisconsin refused to dismiss the claim, finding that the Bank may have violated TILA as well as the Wisconsin Deceptive Trade Practices Act. The court found that the Bank violated TILA’s requirement that the consumer’s rescission right
be clearly and conspicuously disclosed by having Daniels sign the post-dated certificate electing not to rescind. The court also found that the signing of the certificate constituted an impermissible waiver of the three day right to rescind. TILA strictly limits the right to waive the three day rescission right to specified emergency situations and it requires that the waiver be handwritten. In this case, there was no emergency situation and the post-dated certificate was not handwritten.

Brunelle v. Bank of New York Mellon

- TILA/Rescission/Form of Notice – Failure to identify creditor’s address in notice of right to cancel not fatal where consumer is lender’s employee.

Stephen and Ellen Brunelle appealed an order of foreclosure issued by a New Hampshire Superior Court. They argued that they had rescinded the loan under the Truth in Lending Act and Bank of New York Mellon had no right to foreclose. The New Hampshire Supreme Court denied the appeal. The Brunelles argued that the right to cancel notice they received was defective because it did not identify the lender’s address. The appellate court found that the error did not void the notice because the Brunelles worked for the lender and knew its address.

Abdel-Malak v. JP Morgan Chase Bank, N.A.

- TILA/Rescission-Material Disclosures – Negative amortization disclosures are not material disclosures for purposes of rescission
- TILA/Rescission-Effects – Proposal to auction home is not the same as tendering the balance
- Fraud – Mortgage lender’s estimated tax escrows were not fraudulent

Shenouda Abdel-Malak refinanced his home with Washington Mutual Bank (now JP Morgan Chase Bank, N.A.) The loan included a negative amortization feature. Washington Mutual disclosed an estimated monthly escrow payment of $800. However, shortly after the loan closed, the property taxes increased, and Chase notified Abdel-Malak that the escrow account showed a $27,000 shortfall. Chase offered Abdel-Malak the option to make up the shortfall in a single payment or by increasing the monthly payments. Abdel-Malak stopped making payments and put the home up for sale. Chase began foreclosure proceedings. Abdel-Malak filed this case in Maryland state court, and Chase removed the case to the U.S. District Court for the District of Maryland. Abdel-Malak filed an Emergency Motion for a Temporary Restraining Order, and the court denied the motion. Abdel Malak then filed a motion for a preliminary injunction. The court denied that motion as well.

First, Abdel-Malak argued he was entitled to rescind the loan under the Truth in Lending Act because Washington Mutual did not disclose that negative amortization would occur on the loan. The TILA disclosures indicated that negative amortization might occur. The court decided that TILA requires a creditor to disclose that negative amortization will occur if negative amortization is a certainty. However, TILA only allows a consumer to rescind a loan more than three days after consummation if the disclosure error involves a “material” disclosure, and information about negative amortization is not included on the list of “material” disclosures that extend the right to rescind.

Abdel-Malak argued that he was entitled to rescind the loan because he and his wife did not each receive two copies of the right to cancel notice, as required under TILA. The Abdel-Malaks signed an acknowledgement stating that they both received two copies, but asserted to the court that the acknowledgment was false. The court found that the assertion rebutted the presumption created by
the signed acknowledgment. Chase argued that the Abdel-Malaks were nevertheless not entitled to rescind because they were not prepared to tender the remaining loan balance. The Abdel-Malaks proposed a plan to sell the home at auction within 60 days. The court found that the plan did not create a certain enough prospect that the home would be sold and the Abdel-Malaks would be able to tender the proceeds.

The Abdel-Malaks then argued that Washington Mutual committed fraud by underestimating the amount of taxes that would have to be paid out of the escrow account. Apparently, Washington Mutual based its disclosure of the estimated escrow payments on tax records that assumed the property was unimproved land. However, Washington Mutual knew that the Abdel-Malaks had just completed construction of a multi-million dollar home and knew that the tax assessment would increase. The court rejected the notion that Washington Mutual committed fraud by negligently underestimating the tax escrow payments. The court found that a lender/borrower relationship is contractual and a lender does not owe any duty of care to a borrower in Maryland.

**Bonte v. U.S. Bank, N.A.**
2010 U.S. App. LEXIS 21476 (7th Cir. (W.D. Wis.) October 19, 2010)

- **TILA/Rescission-Material Disclosures** – Only “material” disclosure violation extends right to rescind past 3-day rescission period

The Bontes refinanced their home with FMF Capital, LLC. The loan was transferred to U.S. Bank, N.A. U.S. Bank initiated foreclosure proceedings, and the Bontes brought an action in the U.S. District Court for the Western District of Wisconsin. They asked the court to allow them to rescind their loan under the Truth in Lending Act. They alleged that FMF committed a number of TILA disclosure violations. U.S. Bank moved to dismiss the complaint, arguing that none of the alleged errors were “material” disclosure errors as defined under TILA. As a result, U.S. Bank argued that the Bontes’ right to cancel had expired three days after the loan closed. The trial court agreed. The Bontes appealed. The U.S. Court of Appeals for the Seventh Circuit dismissed the appeal.

**Taylor v. Deutsche Bank National Trust Co.**

- **TILA/Rescission – Form of Notice** – Arbitration cancellation provision provided at loan closing did not negate separate and clear notice of right to rescind entire credit transaction

   Deutsche Bank National Trust Co. was the assignee of Otho Taylor’s mortgage loan. After Taylor defaulted and Deutsche initiated foreclosure proceedings, Taylor brought a rescission claim under the Truth in Lending Act. Deutsche moved for summary judgment. Taylor argued that, even though he was provided with an adequate notice of the right to cancel at closing, a separate arbitration agreement contradicted this notice. The arbitration agreement provided that Taylor could cancel the arbitration agreement within 30 days.

   The U.S. District Court for the Eastern District of Virginia found that the existence of the arbitration cancellation provision did not negate the separate and clear notice of the right to rescind the entire credit transaction. The court also found that the disclosed finance charge fell within TILA’s tolerance range and was reasonable. Finally, the court found that Taylor did not prove an ability to tender the loan proceeds. Therefore, the court concluded that Taylor did not have the right to rescind and granted Deutsche’s motion for summary judgment.
Linetsky v. DeJohn
2010 Ohio App. LEXIS 4222 (Ohio App. October 14, 2010)

- **TILA/Statute of Limitations** – Broker’s notice of changes at closing started running of 1-year limitations period on claim for failure to provide timely disclosure of loan terms

  Tanya Linetsky and Eldar Zarbavel entered into a mortgage loan for the purchase of their home. Timothy DeJohn brokered the loan. At closing, DeJohn faxed Linetsky and Zarbavel a notice changing their 30-year fixed-rate loan to a “10/1 IO ARM with a 2nd HELOC 6.850% 1st, 10.5% 2nd.” The fax cover page stated, “Tanya so sorry, Duh.” More than 18 months after closing, the borrowers sued DeJohn. The trial court granted summary judgment for DeJohn. The borrowers appealed.

  The borrowers argued that DeJohn violated the federal Truth in Lending Act by failing to provide timely disclosures of their actual loan terms. While the Court of Appeals of Ohio agreed that DeJohn violated TILA by failing to re-disclose the new loan terms at least three days before consummation, the appellate court concluded that the borrowers’ TILA claim was time-barred. The borrowers argued that their TILA claim was timely because the statute of limitations did not start running until they discovered that the mortgage was not amortizing. However, the appellate court concluded that DeJohn’s notice of changes at closing at least put the borrowers on notice so that they should have discovered the violation within the 1-year limitations period. Thus, the appellate court affirmed the trial court’s judgment for DeJohn on the borrowers’ TILA claim.

  The appellate court concluded that by violating TILA, DeJohn violated the Ohio Consumer Sales Practices Act. Applying the CSPA’s 2-year statute of limitations, the appellate court concluded that the borrowers timely filed their CSPA claim. The appellate court rejected DeJohn’s argument that he was not liable because he gave the borrowers a notice of right to cancel, noting that nothing exists in TILA or CSPA to shield a broker from liability for violating TILA’s rule that disclosures must be made at least three days prior to consummation.

  The borrowers claimed that DeJohn violated the Ohio Mortgage Broker Act by failing to timely inform them of material changes to their loan terms. Noting it was doubtful that a jury would consider DeJohn’s disclosure of material changes hours before closing “timely” under the MBA, the appellate court concluded that the issue of timeliness was not appropriate for summary judgment.

  Finally, the appellate court affirmed the trial court’s judgment for DeJohn on the borrowers’ fraud claim. The fact that the borrowers signed documents notifying them of the changed terms constituted evidence that DeJohn did not defraud them, even if the borrowers did not understand the changes to their loan terms.

HSBC Bank USA v. Chernilas
2010 N.Y. Misc. LEXIS 5005 (N.Y. Sup. October 13, 2010)

- **TILA/Rescission-When Period Ends** – Consumer’s right to rescind expires when property is sold, even if consumer repurchases property
- **TILA/Rescission-Material Disclosures** – Failure to include date in notice of right to cancel was not “material” disclosure violation

  Joseph Chernilas refinanced his home. Chernilas sold the home to Shaul Horan. The loan went into default, and the note holder initiated foreclosure proceedings. Horan sold the home back to Chernilas, and Chernilas argued that he was entitled to rescind the loan under the Truth in Lending Act. The Supreme Court of New York disagreed. The court found that any right Chernilas may
have had to rescind the loan expired the moment he sold the property. The fact that he subsequently repurchased the property did not reawaken that right. The court also found that even if Chernilas had not sold the property, the lender’s failure to identify the last day of the rescission period in the notice of right to cancel is not a “material” disclosure error that extends the rescission period.

Schulken v. Washington Mutual Bank
2010 U.S. Dist. LEXIS 108685 (N.D. Cal. October 12, 2010)

- TILA/Change in Terms – Inability to verify borrowers’ income was insufficient triggering event to suspend HELOC

Jeffrey and Jennifer Schulken sued JPMorgan Chase and others, alleging various claims in connection with their mortgage, including violations of the Truth in Lending Act and Regulation Z. The Schulkens alleged that the defendants improperly suspended their home equity line of credit after they were requested to and did provide certain financial information with the exception of their paystubs, because they are self-employed, and an IRS Form 4506-T. Chase moved to dismiss the claims, and the U.S. District Court for the Northern District of California granted the motion in part and denied it in part.

TILA allows a lender to change material terms of a HELOC when it “has reason to believe that the consumer will be unable to comply with the repayment requirements of the account due to a material change in the consumer’s financial circumstances.” The Schulkens claimed that Chase’s alleged reason for suspending their HELOC – that it was unable to verify their income – was insufficient to establish a “material change in … circumstances,” and the court agreed. Chase argued that it had grounds to suspend the HELOC because the Schulkens materially breached the HELOC agreement by failing to provide all requested financial information. The court was unwilling, at this stage of the litigation, to find that the failure to provide paystubs and IRS Form 4506-T constituted a material breach of the HELOC agreement.

The court did, however, dismiss the Schulkens’ complaint to the extent that it alleged that one letter Chase sent violated the TILA provision requiring suspension notices to state the specific reasons for the suspension. The court found that this letter was not a suspension notice and thus did not need to give reasons for the suspension. The court, however, found that a letter sent five days later was a suspension notice and refused to dismiss the Schulkens’ complaint to the extent that it alleged that this letter violated TILA because it did not give specific reasons for suspension. The court found that the Schulkens adequately alleged that the specific reason stated – the inability to verify their income – “did not state any recognized basis for suspension of their HELOC.”

Palmer v. Ameribanq Mortgage Group, LLC

- TILA/Rescission-Material Disclosures - Finance charge underdisclosed in excess of tolerance, giving borrower extended right to rescind, where borrower was entitled to reduced rate for title insurance
- TILA/Rescission – Judicial Adjustment to Procedures - Court conditions borrower’s right to rescind on production of loan proceeds

Christina Palmer received a mortgage loan from Ameribanq Mortgage Group, LLC, to refinance her property. The closing was originally scheduled for October 6, but it did not take place until October 7. After closing, Ameribanq assigned the loan to Countrywide Home Loans, Inc., which later assigned it to Bank of New York. About five months after closing, Palmer sent Countrywide and Ameribanq a letter seeking to rescind the loan. When Palmer did not receive a reply, she sued
Countrywide and Ameribank. Palmer brought claims under the Truth in Lending Act, the Equal Credit Opportunity Act, and the Pennsylvania Unfair Trade Practices and Consumer Protection Law. Meanwhile, BONY filed a foreclosure action against the property.

The U.S. District Court for the Eastern District of Pennsylvania determined that Ameribank did not accurately disclose the finance charge on the loan, but it granted judgment to Ameribank on the remaining claims. In her first claim, Palmer argued that Ameribank failed to comply with TILA’s rescission notice requirements. However, the defendants showed that Palmer signed two notices of her right to rescind and Palmer did not introduce evidence rebutting the presumption of delivery. Therefore, the court determined that Palmer was provided with the rescission notices.

Palmer also argued that the rescission notices were improper because they contained the wrong date. The notice forms were dated October 6 and provided a rescission deadline of October 9, when in fact the closing occurred on October 7. The court determined that the mistake was a clerical error. The court found that Palmer knew she received the forms on October 7 and that the only plausible reading of the notice was that Palmer had three full days from that date to rescind.

Even if the rescission notices violated TILA, the court found that the bona fide error exception would apply. Ameribank’s notice was prepared by a program designed to produce compliant documents, it was audited before the closing, and it was audited after the closing. The court found that there were sufficient “safety catch or rechecking mechanisms” that were reasonably calculated to avoid such mistakes.

Palmer argued the title insurance fee she paid should have been disclosed as a finance charge. Palmer reasoned that she was entitled to the discounted rate for title insurance because her loan was a refinance transaction, but she was charged the basic rate. The court agreed, finding that Palmer introduced evidence showing that she was entitled to the discounted refinance rate. As a result, the finance charge was understated by approximately $267.

The court determined that Palmer was not entitled to actual damages because she did not detrimentally rely on the disclosure. The court awarded her statutory damages of $200, finding that the violation was insignificant and arose out of a technicality. The court entered the amount against Ameribank, as BONY and Countrywide were assignees and could not be liable.

Palmer also had the right to rescind the loan. The court found that the amount of the understatement exceeded the $35 tolerance for error that applies when a foreclosure proceeding is commended. Therefore, the understatement was a material violation of TILA that extended Palmer’s right to rescind to three years. Palmer sought to rescind the loan within that time. However, after finding that there was a real possibility that Palmer would be unable to meet her rescission obligations, the court conditioned rescission on her ability to tender the loan proceeds, minus the amount of the finance charge and other charges on the disclosure statement.

The court granted judgment to the defendants on the ECOA and UTPCPL claims. The court found there was no evidence to support the ECOA claim. As to the UTPCPL claim, Palmer failed to establish that Ameribank’s conduct was deceitful or that she detrimentally relied on Ameribank’s TILA violation.

**Bushong v. Paramount Equity Mortgage, Inc.**  
2010 U.S. Dist. LEXIS 107609 (D. Or. October 6, 2010)

- **TILA/Rescission – When Applicable** – TILA rescission claim was not barred for failure to plead ability to tender loan proceeds
- **TILA/Assignee Liability** - Assignee liability is limited to violations of TILA that appear on face of disclosure statements

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Robert Bushong sued several entities in connection with two refinance mortgage loans he obtained, seeking rescission under the Truth in Lending Act, damages, and attorney’s fees. U.S. Bank, N.A., the assignee of one of the loans, moved to dismiss the rescission claim. A magistrate judge found that the rescission claim was not barred for failure to plead the ability to tender the loan proceeds. The magistrate also found that the claims for attorney’s fees and statutory damages should be dismissed because TILA limits assignee liability to violations apparent on the face of the disclosures.

The U.S. District Court for the District of Oregon adopted the findings of the magistrate judge. The court agreed that requiring a TILA plaintiff to plead the ability to tender would undermine TILA’s purposes. The court concluded that the Ninth Circuit case of Yamamoto v. Bank of New York does not sanction dismissal at the pleading stage for failure to allege ability to tender. The court also agreed with the magistrate judge that assignee liability is limited to violations of TILA that appear on the face of the disclosure statements.

McDermott v. Mortgage Electronic Registration Systems, Inc.

- **TILA/Rescission-Material Disclosures** – Failure to provide two copies of notice of right to cancel does not extend rescission period
- **TILA/Definition of “Finance Charge”** – Payoff amounts are not finance charges

William McDermott refinanced his home with Aegis Lending Corporation. Aegis sold the loan to U.S. Bank National Association. About six months later, McDermott defaulted, and U.S. Bank began foreclosure proceedings. McDermott mailed a notice of rescission and filed a complaint in Massachusetts state court. U.S. Bank ignored the rescission notice and completed the foreclosure sale. The case was removed to the U.S. District Court for the District of Massachusetts.

On cross-motions for summary judgment, the court granted summary judgment to U.S. Bank. McDermott argued that he was entitled to rescind the loan because Aegis understated the finance charge and failed to give him two copies of a notice of right to rescind at the closing. According to McDermott, Aegis included a sum in the amount financed to pay off his prior liens. But, this portion of the amount financed exceeded the amount of the prior liens by around $8,000. He argued that the $8,000 was a finance charge and, as a result, the total finance charge was understated. The court disagreed, finding that payoff amounts are not a finance charge. McDermott also argued that he should be permitted to rescind because he received only one copy of the notice of right to cancel at the closing. The court disagreed, finding that even though the law states that a creditor must deliver two copies to the borrower, the right to rescind is cut off after three days even if the consumer only receives one copy.

In re Hastings (Hastings v. Southern State Bank)

- **TILA/Rescission-Material Disclosures** – Borrower received two copies of notice of right to cancel at closing and, therefore, was not entitled to rescission

Luanne Hastings refinanced her home with Southern States Bank. Sometime later, she declared bankruptcy and brought an adversary proceeding against SSB in the U.S. Bankruptcy Court for the Northern District of Alabama. She claimed that she was entitled to rescind her loan under the Truth in Lending Act because she did not receive two copies of the right to cancel notice at the closing. Hastings testified that she had no memory of the transaction itself. When she reviewed her copy of the closing documents at the time she filed bankruptcy, she found only one copy of the notice of
right to cancel in the file. SSB presented testimony from a former loan officer familiar with SSB’s document production system at the time of the Hastings loan. The former officer testified that the loan production system was programmed to print five copies of the notice of right to cancel. The court considered the conflicting testimony and decided that SSB did deliver at least two copies of the right to cancel notice to Hastings at the closing. As a result, Hastings was not entitled to rescind her loan.

**Jordan v. Paul Financial, LLC**

- **TILA/Rescission-Material Disclosures** – Failure to disclose negative amortization of loan not material disclosure error allowing consumer to rescind loan more than three days after consummation
- **Unfair and Deceptive Trade Practices** – Failure to disclose negative amortization of loan was sufficient to state claim for fraud and unfair competition

Gregory Jordan refinanced his California home with Paul Financial, LLC. Paul sold the loan to RBS Financial Products, Inc. The loan was a payment option loan. The loan had a teaser rate for the first month, but thereafter the rate would adjust based on an index and margin. The payments were based on the teaser rate. As a result, if Jordan made the required payments, he would not pay enough to pay all the interest, and the unpaid interest would be added to principal and accrue more interest. Paul provided Truth in Lending Act disclosures to Jordan. The disclosures said that negative amortization could occur. Jordan sued Paul and RBS in the U.S. District Court for the Northern District of California. He alleged that he was entitled to rescind his loan under TILA and that Paul and RBS violated California’s Unfair Competition Law and committed common law fraud. RBS moved to dismiss the complaint. The court dismissed the TILA rescission claim, but allowed the fraud and UCL claims to go forward. The court noted that even if Paul did not correctly disclose the negative amortization feature under TILA, it is not a “material disclosure” error that allows a consumer to rescind a loan more than three days after consummation. However, the court permitted Jordan to continue his fraud and UCL claims because the court found that Paul’s failure to tell Jordan that the loan would definitely include negative amortization met the standard required for claims under common law fraud and the UCL.

**In re Dawson (Dawson v. Thomas)**

- **TILA/Rescission – When Period Ends** – Sale of property did not terminate right to rescind where borrower timely commenced action to rescind prior to sale

After the U.S. Bankruptcy Court for the District of the District of Columbia found that Ethel Dawson was entitled to rescind her mortgage loan with James Thomas, Thomas filed a report claiming that because Dawson sold the property at issue, she waived her right of rescission. Section 1635(f) of TILA provides that a right to rescind expires three years after consummation of the transaction or upon sale of the property, whichever occurs first. Noting that reported cases only provide “limited guidance” as to the circumstances under which a sale definitively terminates the right to rescind in the event the borrower has made at least some attempt to rescind prior to the sale, the court determined that a sale of property does not waive a right of rescission that has been properly exercised and preserved through the timely commencement of an action to enforce that right.
Petersen v. England

- Truth in Lending/Statute of Limitations – Court declines to equitably toll statute of limitations where borrower failed to adequately plead fraudulent concealment

Gregory Petersen obtained a loan from American Loan Centers to build a home and secured the loan with his real property. ALC assigned the mortgage to Bank One. A few years later, Petersen obtained a second mortgage, also secured by the real property, from CreditAmerica Savings Company. Petersen defaulted on both loans, and Bank One foreclosed on its first mortgage. The property was sold at a sheriff’s sale. During the 6-month redemption period, Petersen contacted MoneyTree to try and arrange financing. MoneyTree arranged for Petersen to deed the property to investors who would then sell the property back to Petersen. Petersen closed on this loan on the last day of the redemption period. Timothy England, the investor, used the funds to pay off the first and second mortgages and obtain rights to the property. England transferred the property to CT Companies. Petersen signed a contract for deed with CT. Later, Petersen decided he would be better served if he obtained traditional financing. Petersen obtained a mortgage from Finance America, which later assigned the interest to Wells Fargo. Petersen eventually defaulted on the mortgage loan with Wells Fargo, and Wells Fargo foreclosed. Petersen sued Wells Fargo, England and CT Companies for violations of Minnesota’s usury statute, unconscionability, common law fraud, and for rescission under the Truth in Lending Act. Wells Fargo moved to dismiss.

The U.S. District Court for the District of Minnesota granted Wells Fargo’s motion in part and denied it in part. Petersen claimed that he was entitled to rescind the Wells mortgage because the original creditor failed to accurately provide required TILA disclosures. Petersen admitted that the statute of limitations would bar his claim, but he argued that he retained his right to rescind due to fraudulent concealment. The court disagreed and held that Petersen failed to plead fraudulent concealment with particularity and, as a result, failed to establish a claim for equitable tolling of the statute of limitations. Petersen asked the court to void the contract because it was usurious. The court refused to do so because the transaction was outside the reach of the Minnesota statutory provision that allows a court to void a usurious contract. However, the court declined to dismiss Wells Fargo’s motion to dismiss to the extent that Petersen requested other damages for usury. The court dismissed Petersen’s unconscionability and fraud claims because he failed to allege facts that Wells Fargo acted in an unconscionable manner and failed to plead fraud with specificity.

King v. Deutsche Bank National Trust Company

- TILA/Rescission – Material Disclosures – Borrower failed to state TILA claim against assignee for failure to list portion of $250 title examination fee as finance charge where borrower did not allege sufficient facts to show that fee was not reasonable or bona fide

Suzanne King attempted to rescind her mortgage loan which had been assigned to Deutsche Bank National Trust Company. She later sued Deutsche, seeking to enforce the rescission for violations of the Truth in Lending Act. King alleged that the original lender violated TILA due to a material non-disclosure of a finance charge in excess of $35. Specifically, she alleged that the lender failed to list a portion of its $250 fee for a title examination as a finance charge. Deutsche moved for judgment on the pleadings.

TILA excludes title examination fees from the definition of finance charge, but this exclusion applies only to fees that are bona fide and reasonable in amount. The U.S. District Court for the Eastern District of Virginia found that King failed to allege facts sufficient to show that the title fee was not reasonable or bona fide.

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examination fee was not reasonable or bona fide. In order to be bona fide and reasonable, the court stated that it must look at whether the services were rendered in good faith, whether the fee indirectly augmented the creditor's yield, or whether the fee was comparable to the prevailing practices of the industry in the locality. King only alleged that the $250 fee charged in her case was significantly more than the prevailing practices in the local industry and that the fee was generally “unreasonable.” Accordingly, the court granted Deutsche’s motion for judgment on the pleadings.


- TILA/Miscellaneous – Borrower’s testimony that she did not receive rescission notices rebuts presumption of receipt created by signed acknowledgment

Mareeyo Minnie Calhoun obtained a mortgage loan in November of 2006 from Homeowners Friend Mortgage Co, Inc. Homeowners sold the loan to Saxon Mortgage, Inc. Two years later, Calhoun mailed a notice of rescission to Homeowners. Homeowners forwarded the notice to Saxon. Saxon refused to rescind the loan. Calhoun sued for damages, rescission, and declaratory relief. Saxon asked for a declaratory judgment that the loan was not rescindable. Calhoun moved for summary judgment on her claim that the loan was rescindable.

The U.S. District Court for the Eastern District of Louisiana decided that whether the loan was rescindable was a question of fact. Saxon argued that Calhoun had signed an acknowledgment of receipt of the notices of right to cancel at closing. Calhoun countered with an affidavit stating that she never received copies of the notice of right to cancel. The court decided that the acknowledgment of receipt created a presumption that Calhoun received the disclosures under the Truth in Lending Act. The presumption was rebutted by Calhoun’s affidavit. As a result, the court concluded that whether Calhoun received the disclosures remained an open question of fact and denied Calhoun’s motion for summary judgment and Saxon’s motion for a declaratory judgment.

Appling v. Wachovia Mortgage, FSB
2010 U.S. Dist. LEXIS 97726 (N.D. Cal. September 17, 2010)

- TILA/Statute of Limitations – Equitable tolling may apply to claim that TILA disclosures failed to disclose certainty of negative amortization

Terry Appling sued Wachovia Mortgage, FSB, World Savings Bank, FA, Wells Fargo Bank, NA, and IQ Home Loans and Realty Corporation, among others, for violating numerous state and federal laws in connection with his home mortgage loan. Wachovia and Wells moved to dismiss. The U.S. District Court for the Northern District of California found that the statute of limitations barred the Truth in Lending Act claims, but that the claim based on the failure of the loan documents to disclose the certainty of negative amortization may be subject to equitable tolling.

The court dismissed the Fair Credit Reporting Act claim because it was time barred. The court also found that the negligent misrepresentation, breach of fiduciary duty, and California Unfair Competition Law claims were preempted by the Home Owners’ Loan Act.

Finally, the court dismissed the remaining state law claims based on an alleged breach of a Holdback Agreement to retain money from the loan funds in an escrow account to be disbursed to pay for work completed on the property.
Residential Funding Company, LLC v. Thorne

- TILA/Rescission – When Period Ends – Right to rescind cannot be revived in recoupment claim

Gary T. Thorne took out a mortgage loan from Regions Bank in 2003. Regions assigned the loan to Residential Funding Company, LLC shortly thereafter. In 2008, Thorne defaulted, and RFF filed a foreclosure complaint in Ohio state court. Thorne filed an answer and counterclaim. He alleged that RFF did not have standing to foreclose because it did not have physical possession of the note and mortgage on the day it filed the action. He also alleged that Regions violated the Truth in Lending Act by failing to disclose an itemization of amount financed or the yield spread premium paid to the mortgage broker. As a result, he argued that RFF was liable for statutory damages under TILA and the loan was rescindable. Finally, he alleged that Regions and the broker violated various Ohio laws and committed fraud by hiding the yield spread premium payment. RFF moved for summary judgment on the standing to foreclose issue and on the TILA liability claims. The trial court granted summary judgment, and Thorne appealed.

The Ohio Court of Appeals affirmed the trial court’s judgment. The appellate court found that RFF had standing to bring the foreclosure action because it took possession of the note and mortgage shortly after the loan closed in 2003 and Regions executed an assignment of the mortgage to RFF one week prior to the foreclosure filing date. The appellate court then found that Thorne had no TILA claims. Even if Regions had committed a mistake that would give rise to a continuing right to rescind, the right to rescind expired, as a matter of law, three years after the loan closed. Thorne argued that he should be able to raise the rescission issue as a recoupment claim in response to the foreclosure action. The appellate court rejected that argument, noting that while TILA does permit a consumer to raise civil liability claims in recoupment after the statute of limitations expires, the right to rescind can never be revived.

In re Lindquist (Lindquist v. Wells Fargo Bank, NA)

- TILA/Assignee Liability – Assignee is not liable for statutory damages if it refuses to rescind loan based on information in loan file

Sheila Marie Lindquist took out a mortgage loan from Universal Mortgage Corporation in 2007. Universal sold the loan to Wells Fargo Bank, NA shortly after the closing. A year later, Lindquist filed for bankruptcy and mailed a notice of rescission to Wells. Wells reviewed the loan file. Wells found that the TILA disclosures and notices of right to cancel in the file were accurate and correct. It also found that Lindquist signed a form at closing acknowledging receipt of the TILA disclosures and two copies of the notice of right to cancel. As a result, Wells decided the loan was not rescindable and did not take steps to unwind the loan. Lindquist brought an adversary proceeding in the U.S. Bankruptcy Court for the District of Kansas. She claimed that she was entitled to rescind the loan because she did not receive copies of the notices of right to cancel at the loan closing. She also claimed that Wells was liable for statutory damages under TILA for failing to allow her to rescind. Wells moved for summary judgment on the claim for statutory damages. It argued that it was not liable for statutory damages because it was not the original creditor and could not determine that the loan was actually rescindable simply by looking at the loan file.

The bankruptcy court agreed with Wells and granted the motion. The court found that an assignee is liable for civil money damages under TILA only if the assignee could determine that a violation of TILA occurred from reviewing the documents assigned. The documents in Lindquist’s loan file (particularly the acknowledgment of receipt signed by Lindquist) suggested that Lindquist
received the notices of right to cancel. As a result, the court decided that Wells was not liable for civil money damages under TILA.

**Hawkins Tree and Landscaping, Inc. v. Paul Thomas Homes, Inc.**


- **TILA/Miscellaneous** – Consumer’s signed acknowledgment of receipt of disclosures created rebuttable presumption that disclosures were received

  Andrew and Gayla Rute took out a mortgage loan from American Home Mortgage in February of 2007. AHM sold the loan to Wells Fargo Bank, NA shortly thereafter. In August of 2007, a landscape contractor filed a mechanics lien foreclosure action against the property in state court, naming AHM and Mortgage Electronic Registration Systems, Inc. as defendants. AHM and MERS cross-claimed against the Rutes for a judgment on the note and for foreclosure. The trial court granted them a default judgment and ordered a sheriff’s sale. Shortly before the sale date, the Rutes sent a rescission notice to AHM, MERS, and Wells Fargo. Then they moved to reopen the default judgment and for a temporary restraining order to stop the foreclosure sale. The trial court granted the restraining order. The trial court then decided that the Rutes did not have a reasonable defense and issued an order allowing Wells to foreclose. The Rutes appealed. A foreclosure sale occurred before the appeal was heard.

  On appeal, the Rutes argued that they should be allowed to rescind the loan under the Truth in Lending Act because the APR was underdisclosed, a broker fee was not disclosed at all, and they only received three copies of the notice of right to cancel. The Minnesota Court of Appeals denied the appeal. The appellate court reviewed expert testimony and found that the APR disclosures were accurate. It determined that the Rutes did not pay a broker fee in connection with the loan. Apparently, before the loan was made, they told the loan officer at AHM that they were concerned that they could not afford the payments on the new loan. The loan officer told them that he knew a loan broker who would be able to arrange a refinancing of the loan after it was made. They closed the AHM loan and paid that broker $100,000. The broker failed to arrange the refinancing. The appellate court decided that the fee was not a charge in connection with the AHM loan and did not affect the TILA disclosures for the AHM loan. The Rutes then argued that they did not each receive two copies of the notice of right to cancel at closing. AHM produced an acknowledgment of receipt signed by the Rutes at closing. The Rutes testified to the trial court that they did not receive the copies. The trial court did not believe them. The appellate court found no reason to second guess the trial court’s decision.

**Pregler v. First NLC Financial Services LLC**


- **TILA-Rescission/When Applicable** – Joint owner of principal dwelling subject to security interest created by other joint owner had standing to rescind home mortgage transaction for TILA violations

  Kendra Pregler sued numerous parties in connection a mortgage loan transaction involving her home, seeking rescission for violations of the Truth in Lending Act. Pregler owned the home with Jory Behrends. When Behrends refinanced the first and second mortgages on the home, Pregler was not provided with material disclosures or a notice of right to cancel. Ocwen Loan Servicing, LLC,
the servicer of the mortgage loan, and Mortgage Electronic Registration Systems, Inc., the mortgagee as nominee for the lender and the lender’s assignees, moved to dismiss the complaint.

The U.S. District Court for the District of Minnesota denied the motion. The defendants argued that Pregler lacked standing to sue for rescission because she was not a debtor on the mortgage loan. The court disagreed, noting that any consumer whose ownership interest in a principal dwelling is or will be subject to a security interest, such as Pregler, is entitled to rescind a home mortgage transaction. Ocwen also argued that its status as merely the servicer of the mortgage loan prevented it from being liable for TILA violations. The court refused to dismiss Ocwen at this stage of the litigation where Ocwen refused to identify the current holder of the promissory note, it engaged in discussions with Pregler about her ability to rescind, and “Ocwen’s continued participation in the litigation may be necessary to afford Pregler complete relief if it is ultimately determined that Pregler has the right to rescind the mortgage loan transaction.”

_In re Regan (Regan v. HSBC Bank (USA))_  

- **TILA/Assignee Liability** – Assignee is not liable for statutory damages if it refuses to rescind loan based on information in loan file

Robert and Diane Regan refinanced their home three times in the 10 years they owned it. Dream Home Mortgage Corporation made the last loan in 2005. Shortly thereafter, it sold the loan to HSBC Bank (USA). In 2008, the Regans filed for bankruptcy and sent a rescission notice to HSBC. HSBC reviewed the loan file and determined that the Regans did not have a right to rescind. The Regans brought an adversary proceeding against HSBC in the U.S. Bankruptcy Court for the District of Kansas. They alleged that they did not receive two copies of the notice of right to cancel. As a result, they asked the court to rescind their loan and order HSBC to pay attorneys’ fees, costs and statutory damages.

HSBC argued that the Regans signed a form acknowledging receipt of the TILA disclosures. The court noted that TILA establishes a rebuttable presumption that the disclosures were received if the consumer signs a form acknowledging receipt. However, the Regans testified that when they opened the loan file to present it to their bankruptcy attorney, they discovered only one copy of the notice of right to cancel in the loan file. The court found that the Regans’ testimony was credible and sufficiently rebutted the presumption. As a result, the court found that the Regans did not each receive two copies of the notice of right to cancel, as required under TILA, and the loan was rescindable. However, the court refused to find HSBC liable for statutory damages under TILA. The court noted that an assignee is only liable for statutory damages if the disclosure defect is apparent from the applicable disclosures and related information contained in the loan file that the assignee acquires. When HSBC reviewed the loan file after receiving the Regans’ rescission notice, it found a form signed by the Regans acknowledging receipt of the applicable disclosures. As a result, it reasonably concluded that the Regans received the disclosures. As a result, the court found that the Regans’ loan was rescindable, but HSBC was not liable for statutory damages.

_Bibbs v. Security Atlantic Mortgage Co., Inc._  

- **TILA/Section 32 (HOEPA) Loans**– Borrower stated claim against original lender and assignee for failure to adequately disclose finance charge, violation of Home Ownership and Equity Protection Act, fraud, violation of Unfair Trade Practices and Consumer Protection Law, civil conspiracy, and tortious conduct
Mildred Bibbs sued her original lender, Security Atlantic Mortgage Co., Inc., and the assignee of her loan, BAC Home Loan Servicing, L.P., among others, for violating numerous state and federal laws after BAC initiated foreclosure proceedings against her home. Security Atlantic and BAC filed partial motions to dismiss. The U.S. District Court for the Eastern District of Pennsylvania first found that Bibbs adequately alleged that the defendants inaccurately disclosed the finance charge in violation of the Truth in Lending Act. The court then found that Bibbs stated a claim under the Home Ownership and Equity Protection Act by alleging that the HUD-1 Settlement Statement reflected that the total points and fees exceeded 8% of the total loan amount. After a discussion regarding assignee liability for fraud claims under HOEPA, the court refused to dismiss the fraud, violation of Unfair Trade Practices and Consumer Protection Law, civil conspiracy, and tortious conduct claims against both of the defendants.

**Moller v. OneWest Bank, FSB**  

- **TILA-Rescission/Material Disclosures** – Court grants motion for TRO preventing mortgagee from foreclosing where homeowner received deficient notice of rescission and timely rescinded loan

Lorraine Moller filed a motion for a temporary restraining order against OneWest Bank, FSB, to prevent it from foreclosing on her home. Moller alleged that OneWest failed to give her sufficient notice of her right to rescind under the Truth in Lending Act in connection with her mortgage refinance transaction. The U.S. District Court for the District of Colorado granted the TRO and scheduled a hearing on Moller’s request for a preliminary injunction. The court found that OneWest provided Moller with a notice of rescission that listed the wrong date of rescission and was, therefore, deficient. The court also found that Moller sent OneWest a timely notice of rescission. Therefore, the court concluded that Moller met her burden of demonstrating her likelihood of success on the merits and the likelihood of irreparable harm in the absence of preliminary relief.

**Pownall v. PNC Bank**  

- **TILA/Misc.** – Credit cardholder adequately alleged that issuer failed to sufficiently define terms “paid,” “posted,” “received,” and “credited” as they relate to calculation and implementation of finance charges
- **TILA/Misc.** – Credit cardholder adequately alleged that issuer breached contract by charging finance charge even though she paid full balance owed by due date

Jessica Pownall obtained a credit card from PNC Bank. One of her monthly statements stated that her payment due date was June 6, 2009. On that date, Pownall’s husband paid the full balance of the credit card in person at PNC Bank. However, PNC credited the payment on June 8, 2009, two days after the payment had been made. PNC imposed a finance charge on Pownall’s next monthly statement. Pownall brought a putative class action against PNC, among others, alleging breach of contract, breach of the duty of good faith and fair dealing, and violations of the Truth in Lending Act. PNC moved to dismiss.

The U.S. District Court for the Northern District of Ohio denied the motion to dismiss the breach of contract claim. The court found that Pownall adequately alleged that PNC breached the contract by charging her a finance charge even though she paid the full balance owed by the due date. However, the court dismissed the breach of the covenant of good faith and fair dealing claim, noting that this is not an independent basis for a cause of action under Ohio law.
With respect to the TILA claims, the court denied the motion to dismiss the claim alleging that PNC violated the Act when it failed to provide full, clear, and conspicuous disclosure of all information regarding finance charges. The court found that PNC failed to sufficiently define the terms “paid,” “posted,” “received,” and “credited” as they relate to the calculation and implementation of finance charges. With respect to the second TILA claim, Pownall alleged that TILA only permits a maximum assessment of finance charges for the two days between the date she paid her balance in full and the date the payment was credited. In this case, PNC had imposed a finance charge based on Pownall’s regular billing month plus the extra two days. The court noted that Section 226.10(b) of Regulation Z expressly authorizes banks to take up to five days to credit a payment that is not made in accordance with the requirements specified by the bank. The court added that the official commentary to this section clarifies a bank’s right to charge interest during this 5-day period and does not otherwise limit finance charges that accrue before a non-conforming payment is tendered. Therefore, the court dismissed this TILA claim.

**Rosenfield v. HSBC Bank, USA**

- **TILA-Statute of Limitations** – Damages claim barred by statute of limitations where claim was not brought as recoupment or set-off in action to collect debt
- **TILA-Rescission-When Period Ends** – Where suit to rescind is not filed within three years of consummation, rescission is unavailable even where notice is given during 3-year period

Jean Rosenfield sued HSBC Bank, USA, assignee of her mortgage loan, for rescission and damages for violations of the Truth in Lending Act after HSBC began foreclosure proceedings on her home. HSBC moved to dismiss, arguing that Rosenfield’s claims were barred by the statute of limitations. The U.S. District Court for the District of Colorado granted HSBC’s motion.

The court found that Rosenfield’s damages claim was barred by TILA’s 1-year statute of limitations. Rosenfield argued that her damages claim was not barred because she was asserting the TILA claim as a recoupment or set-off in an action to collect the debt. The court disagreed, noting that Rosenfield’s claims were asserted directly in her complaint and that HSBC’s foreclosure proceeding under C.R.C.P. 120 was not an action to collect a debt.

The court found that Rosenfield’s claim for rescission was barred by TILA’s 3-year statute of limitations. Rosenfield’s mortgage refinance closed on November 3, 2006. She sent HSBC a notice of rescission on September 9, 2008 and filed suit in December of 2009. Rosenfield argued that she timely asserted her rescission claim by sending a notice of rescission within three years of the transaction. However, the court found that suit must have also been brought within the 3-year period in order for the rescission claim to be timely.

**In re Kitts (Bird v. Winterfox, LLC)**
2010 U.S. Dist. LEXIS 88590 (D. Utah August 26, 2010)

- **Truth in Lending Act/Definition of “Creditor”** - Definition of “creditor” under Home Ownership and Equity Protection Act covered lender that made loans, even though it did not initiate or actively solicit loans
- **Truth in Lending Act/Section 32 (HOEPA) Loans** - Definition of “creditor” under Home Ownership and Equity Protection Act covered lender that made loans, even though it did not initiate or actively solicit loans

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Truth in Lending Act/Section 32 (HOEPA) Loans - Definition of “mortgage broker” under Home Ownership and Equity Protection Act covered lender’s non-employee that was paid for bringing lending opportunity to lender, negotiating loans, and overseeing drafting of loan documents

J. Kevin Bird, the Chapter 7 trustee in the bankruptcy case of Brian Kitts, sued Winterfox, LLC, for violating the Truth in Lending Act in connection with two short-term, high-interest loans that Winterfox made to Kitts pre-petition. Although the parties stipulated that the Truth in Lending Act disclosures that Winterfox gave to Kitts were incomplete, inaccurate, and insufficient to meet the requirements of TILA, the bankruptcy court nevertheless dismissed the trustee’s complaint, finding that Winterfox was not a “creditor” subject to TILA. The court noted that a lender is a “creditor” for Home Ownership and Equity Protection Act purposes if it originates two consumer loans that qualify as high-cost mortgages within a 12-month period or originates one consumer loan that qualifies as a high-cost mortgage through a mortgage broker. Noting that the term “originate” means to “initiate,” the bankruptcy court found that Winterfox did not originate the loans because neither Winterfox nor its agent actively solicited business from Kitts. Instead, Kitts hired Michael Falk to find him a lender, and Falk contacted Aaron Olivarez, who was providing consulting and loan advice to Winterfox. Moreover, the court found that Olivarez was not a “mortgage broker,” for purposes of TILA, finding that Falk, not Olivarez, was the individual that brought Kitts and Winterfox together. See In re Kitts (Bird v. Winterfox, LLC), 2010 Bankr. LEXIS 94 (Bankr. D. Utah January 8, 2010).

The U.S. District Court for the District of Utah reversed, concluding that Winterfox met both definitions of “creditor” under HOEPA – it originated both loans and originated one loan through a mortgage broker. Rather than defining “originate” as “initiate,” as the bankruptcy court did, the appellate court found that “originate,” in the context of mortgage lending, means to make or issue a loan, which is what Winterfox did in connection with Kitts’s two loans. Moreover, the appellate court found that Olivarez was a “mortgage broker” because he, as a non-employee of Winterfox, received compensation from Winterfox for bringing the lending opportunity to it, negotiating the terms of the loans, and drafting or overseeing the drafting of the loan documents.

Salvagne v. Fairfield Ford, Inc.

- TILA/Miscellaneous – Spot delivery agreement nullified TILA disclosures and triggered class action liability
- ECOA/Miscellaneous – Dealer is not “creditor” for purposes of adverse action disclosures if dealer does not make credit decisions

John Salvagne bought a used car from Fairfield Ford, Inc. He signed numerous documents for the dealer, including a retail installment sale contract and a spot delivery agreement. The spot delivery agreement stated that if the dealer was unable to find someone to purchase the RISC within 10 days, then either party could cancel the sale agreement. A few days later, the dealer invited Salvagne back to the dealership and told him that it was unable to sell the RISC and that he would need to sign a new RISC, with higher payments, if he wanted to keep the car. Salvagne signed the new RISC and kept the car. Sometime later, he sued the dealer, alleging that the dealer violated the Truth in Lending Act and the Equal Credit Opportunity Act and asked the U.S. District Court for the Southern District of Ohio to certify the action as a class action. The court certified a class. Salvagne and the dealer both moved for summary judgment.

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The court granted summary judgment to Salvagne on the TILA claim and to the dealer on the ECOA claim. The court decided that the spot delivery agreement rendered the TILA disclosures meaningless. The court seems to have concluded that spot delivery transactions are confusing and unfair. The court was disturbed by the fact that the spot delivery agreement was a stand-alone agreement, and not part of the RISC itself. As a result, the court analyzed the question in terms of whether the spot delivery agreement “nullified” the RISC, including the TILA disclosures contained in the RISC, and concluded that it did. The court seems to have missed the point. If the original transaction was never consummated, then no TILA disclosures were required at that time. With respect to the ECOA claim, Salvagne argued that the dealer should have delivered an adverse action to him when it increased the rate and payment in the second transaction. The court decided that the dealer did not have to deliver an adverse action notice because it did not make a credit decision in the transaction.

**Quach v. Citimortgage, Inc.**

- **TILA/Rescission – When Applicable** – Borrower not required to allege present ability to tender loan proceeds in order to state rescission claim under TILA

Kim Quach sued Citimortgage, Inc., the purported owner and/or servicer of her mortgage loan, among others, for violating various federal and state laws. Citimortgage moved to dismiss. The U.S. District Court for the Northern District of California first addressed Quach’s rescission claim under the Truth in Lending Act. The court concluded that Quach was not required to allege a present ability to tender the full loan proceeds in order to state a claim for rescission under TILA. Next, the court found that Quach’s damages claim under TILA was timely and refused to dismiss this claim as well. The court also allowed the California unfair competition law claim to proceed. However, the court dismissed the Real Estate Settlement Procedures Act claim because Quach failed to sufficiently allege that Citimortgage was the loan servicer and thus required to respond to her qualified written request. The court also noted that Quach failed to allege damages as a result of the alleged failure to respond to her QWR. The court also dismissed the California Rosenthal Fair Debt Collection Practices Act, slander of credit, breach of implied covenant of good faith and fair dealing, and negligence claims.

**Bakabas v. JP Morgan Chase Bank, N.A.**

- **TILA/Rescission-When Applicable** – Consumer must tender amount owed in order to rescind mortgage loan

Saleh Ali Bakabas sued JP Morgan Chase Bank, N.A. to rescind his loan. JP Morgan Chase Bank moved for summary judgment. The U.S. District Court for the Eastern District of Michigan granted the motion and dismissed the case unless Bakabas paid JP Morgan Chase the remaining principal balance within 30 days from the decision date. The court reviewed existing case law on rescission under the Truth in Lending Act and found that Sixth Circuit precedent allows courts to fashion the order of events to implement the statutory rescission remedy on an equitable basis. Bakabas argued that the court should find that the loan is rescinded so that the amount he owed was unsecured. The court decided that it would be inequitable to strip the mortgage lien from the property before the debt was paid.
**Yarney v. Wells Fargo Bank, N.A.**

- **TILA/Tolerance for Disclosures** – Tolerance for finance charge in rescission claim is one-half of one percent of loan amount
- **TILA-Rescission/Material Disclosures** – Delivery of only one copy of notice of right to rescind, with no allegation of harm, does not extend right to rescind to three years

Sarah Yarney entered into a mortgage loan with EquiFirst Corp. The loan was later acquired by Wells Fargo Bank, N.A. Yarney claimed that she was the victim of predatory practices, ended up with a loan that was at a higher rate than originally promised, and had to pay exorbitant fees. Yarney claimed that EquiFirst violated the Truth in Lending Act. She argued that the amount financed and finance charge disclosures contained in her TILA disclosure were misstated. She also claimed that she received only one copy of the notice of right to rescind. As a result, she claimed that she was entitled to civil money penalties, actual damages, and rescission. EquiFirst moved to dismiss the TILA claims.

The U.S. District Court for the Western District of Virginia dismissed the claims. The court found that the disclosed finance charge and amount financed were within the applicable tolerance allowed for rescission cases – one half of one percent of the loan amount. The court also found that even if Yarney received only one copy of the notice of right to rescind, she failed to explain how she was harmed. Reviewing applicable case law in the Fourth Circuit, the court decided that it would be inequitable to permit Yarney to rescind for a technical violation of TILA (TILA requires a creditor to give each consumer two copies of the notice of right to rescind) without some showing that the error caused the consumer harm or damage. Finally, the court dismissed her claims for civil money damages and actual damages because she sued EquiFirst more than one year after the loan was closed.

**Large v. LVNV Funding, LLC**

- **FDCPA/Miscellaneous** – Plaintiff may not properly state claim for liability under FDCPA by alleging noncompliance with Truth in Lending Act
- **TILA/Miscellaneous** - Plaintiff may not properly state claim for liability under Fair Debt Collection Practices Act by alleging noncompliance with TILA

Kevin Large sued LVNV Funding, LLC, among others, for violating the Fair Debt Collection Practices Act by sending him a letter offering him “an opportunity to receive a pre-approved Visa card … and address [his] debt at the same time.” The letter offered to settle Large’s existing debt by transferring a lesser amount to a new Visa credit card. Large argued that the offer to settle his debt failed to disclose information required by the Truth in Lending Act and, therefore, violated the FDCPA. The defendants moved to dismiss the FDCPA claim. The U.S. District Court for the Western District of Michigan granted the motion. The court found that a plaintiff may not properly state a claim for liability under the FDCPA by alleging noncompliance with TILA, adding that the FDCPA is not properly used as an enforcement mechanism for TILA. The court also found that, even assuming a claim under the FDCPA could be stated by alleging a violation of TILA, Large’s complaint failed to plead facts supporting a TILA violation.
Randle v. AmeriCash Loans, LLC

- **TILA/Miscellaneous** – Authorization to debit deposit account by electronic funds transfer after default should have been disclosed as security interest

AmeriCash Loans, LLC made a short-term loan to Felicia Randle. The loan was subject to the Illinois Consumer Installment Loan Act. As part of the transaction, Randle signed an “Optional Pre-Authorization to Electronic Fund Transfer” agreement. The agreement authorized AmeriCash to automatically debit her bank account or issue a bank draft against her bank account if she failed to set up an automatic payment plan from her wages, if she paid by a check that was returned unpaid, or if she defaulted under the loan agreement. The agreement allowed Randle to revoke the authorization at any time by giving written notice to AmeriCash. AmeriCash provided her with all disclosures required under the Electronic Fund Transfer Act. Randle sued AmeriCash in Illinois state court. She claimed that AmeriCash violated the Truth in Lending Act and the ICILA because it failed to disclose the EFT authorization as a security interest under TILA. AmeriCash moved to dismiss the claim, and the trial court granted the motion.

Randle appealed to the Appellate Court of Illinois, which reversed the trial court decision. The appellate court decided that TILA requires a creditor to disclose any security interest taken in connection with a transaction. TILA defines a security interest as an interest that secures performance of a consumer credit transaction that is recognized by state or federal law. The appellate court decided that the authorization was a security interest under Illinois law because it provided the creditor with a means to collect a payment or the entire loan amount if the consumer failed to make payment as required under the loan agreement.

Frese v. Empire Financial Services

- **TILA/Assignee Liability** – Because rescission under Section 1635 is distinct remedy under TILA, assignees are liable for violations even if they are not apparent on face of disclosures
- **TILA/Rescission – When Applicable** – Borrower not required to plead ability to tender in order to state rescission claim

Susan Frese refinanced her mortgage loan with Empire Financial Services, but apparently was not informed that the loan would negatively amortize. After closing, Frese filed a Chapter 7 bankruptcy petition. Later, Frese and the trustee in her bankruptcy case sued Deutsche Bank National Trust Company, the assignee of her loan, among other defendants, for violating various federal and state laws. Deutsche Bank moved to dismiss the Truth in Lending Act rescission claim, which alleged that the plaintiffs did not receive all the required TILA disclosures. Deutsche Bank argued that it was not liable as an assignee under TILA because the plaintiffs did not allege facts showing a violation that was apparent on the face of any loan disclosures.

The U.S. District Court for the District of Columbia noted that Section 1641(c) of TILA states that “[a]ny consumer who has the right to rescind a transaction under section 1635 of this title may rescind the transaction as against any assignee of the obligation.” “Because rescission under § 1635 is [a] distinct remedy under TILA, assignees are liable for violations even if they are not ‘apparent on the face of the disclosures.’” Therefore, the court concluded that the plaintiffs stated a claim against Deutsche Bank if they properly stated a claim for rescission under Section 1635. The court rejected several other arguments by Deutsche Bank, noting that the plaintiffs did not need to plead an ability...
to tender in order to state a rescission claim. Accordingly, the court denied Deutsche Bank’s motion to dismiss.

_Hargis v. U.S. Bancorp_

- **RESPA/Unearned fees** – Purchase price of loan in secondary market is not unearned fee
- **TILA/Assignee Liability** – Assignee is only responsible for disclosure defects that are apparent on face of disclosures

This case is a purported class action involving Truth in Lending Act and Real Estate Settlement Procedures Act claims. The facts are not well stated in the decision. It appears that Bonnie Hargis hired JLB Corporation to assist her in refinancing her mortgage loan. JLB sent the application to U.S. Bancorp, which made an underwriting decision and agreed to buy the loan after JLB originated it. JLB made a loan to Hargis and sold the loan to U.S. Bancorp. When U.S. Bancorp acquired the loan, the purchase price included reimbursement for all of JLB’s closing costs except for the underwriting fee. At some point thereafter, Hargis apparently sued JLB in state court. The case was dismissed. Hargis then apparently sued JLB and U.S. Bancorp in federal court, alleging that they violated Section 8 of RESPA as well as TILA. JLB moved to dismiss based on _res judicata_.

The U.S. District Court for the Eastern District of Missouri granted the motion. The court also took it upon itself to dismiss the case against U.S. Bancorp. The court decided that U.S. Bancorp did not violate Section 8 of RESPA. The court concluded that U.S. Bancorp purchased the loan in a secondary market transaction and it did not pay any kickback or unearned fee to JLB. The court then decided that even if the TILA disclosures were defective, U.S. Bancorp was not liable for those defects because it was an assignee of the loan, not the original creditor. The court explained that an assignee is liable under TILA only for errors that are apparent on the face of the TILA disclosures or that could be determined from the other documents assigned. The core of Hargis’s TILA claim was apparently that the TILA disclosures should have reflected the fact that U.S. Bancorp did not reimburse JLB for the underwriting fee when it purchased the loan.

_Harris v. Sand Canyon Corporation_

- **TILA/Statute of Limitations** – Statute of limitations is not subject to equitable tolling simply because creditor failed to deliver required disclosures
- **RESPA/Private Right of Action** – RESPA does not establish private right of action for disclosure violations
- **Class Action/Class Certification** – Class action is not appropriate for claims based on rescission, negligent misrepresentation, or unconscionability

Thomas and Wanda Harris entered into a subprime mortgage loan with Option One Mortgage Corporation. The loan was a variable rate loan. When the rate and payment adjusted, they could not afford the new payments, and they defaulted. Option One agreed to modify their loan, but they defaulted under the modified loan as well. The Harrises filed an action in state court alleging that Option One and H & R Block engaged in a fraudulent scheme to lure them into a subprime loan. They also alleged violations of the Truth in Lending Act and asked the court for statutory damages and rescission. Option One removed the case to federal court and moved for a judgment as a matter of law on three of the Harrises’ causes of action.
The U.S. District Court for the District of South Carolina dismissed the claim for statutory damages under TILA because the 1-year statute of limitations had expired. The Harrises argued that the statute of limitations should be equitably tolled because they did not receive any disclosures and did not understand what their loan was at consummation. The court rejected the argument, finding that the TILA statute of limitations is not subject to tolling simply because a creditor fails to provide a disclosure; the creditor must engage in some act that rises to the level of fraudulent concealment of information. In this case, Option One disclosed everything the Harrises needed to know about the loan in the promissory note. There was no fraudulent concealment. The Harrises alleged that Option One violated the Real Estate Settlement Procedures Act by failing to disclose settlement fees. The court rejected the argument, noting that RESPA does not provide a private cause of action for failure to disclose settlement charges.

The Harrises moved the court to certify a putative class action with them as representatives. The class claims included rescission under TILA, negligent misrepresentation, and unconscionability. The court refused to certify a class, noting that (1) class actions are not appropriate for rescission because not all members may want to rescind or be able to rescind, and (2) there are too many unique facts among individual borrowers for a class to work on a negligent misrepresentation or unconscionability claim.

Mauro v. Countrywide Home Loans, Inc.

- TILA/When Act Applies – Loan was not consumer-purpose loan where secured by investment property and proceeds used to make additional investments

This case arose out of a fraudulent Ponzi scheme run by a financial advisor. Maria Mauro had a long-standing relationship with Peter Dawson, who acted as her financial advisor. As part of his financial advice, he recommended that she refinance existing mortgage loans secured by two homes that Mauro owned and rented out. She did not reside at either property, but considered them investment properties. Mauro agreed to give the remaining proceeds from the loans to Dawson to invest on her behalf. Countrywide Home Loans, Inc. made the loans. Mauro transferred the proceeds to Dawson. Dawson was eventually arrested and convicted of grand larceny after bilking dozens of his clients (including Mauro) out of their life savings. Mauro filed an action against the lender, broker, and closing attorney in state court. The case was removed to federal court. Mauro alleged various violations of the Truth in Lending Act. She also asserted various fraud and breach of fiduciary duty claims under state law. Countrywide and the other defendants moved for summary judgment.

The U.S. District Court for the Eastern District of New York granted summary judgment on the TILA claim. The court decided that TILA did not apply to the transaction because the loan was a business purpose loan - it was secured by investment properties and the proceeds were applied to the borrower's investment portfolio. The court dismissed the remaining claims because there were no other issues that allowed a federal court to retain jurisdiction.

Ianuzzi v. American Mortgage Network, Inc.

- TILA/Miscellaneous – Consumer’s certification of receipt of disclosures was not sufficient to prove receipt where consumer filed an affidavit asserting that notices were not delivered
• **Fiduciary Duty** – Lender or broker is not fiduciary of borrower under New York law absent special circumstances

This case arose out of a fraudulent Ponzi scheme run by a financial advisor. Anthony and Theresa Ianuzzi had a long-standing relationship with Peter Dawson, who acted as their financial advisor. As part of his financial advice, he recommended that they obtain a reverse mortgage. They agreed. Dawson filled out an application for a conventional mortgage loan. He forged their signatures and submitted the application to a broker, Custom Capital Corp, who submitted the application to a lender, American Mortgage Network, Inc. The Ianuzzis claimed that they never saw the application and never received any application disclosures from the lender. The lender claimed that it mailed the disclosures directly to the Ianuzzis. The loan closed several days later at the office of the lender's lawyer. The Ianuzzis signed all the closing documents, including the note and mortgage, and all the required disclosure documents. However, they claimed that they did not receive copies of the closing package to take home. The lender wired the loan proceeds to the Ianuzzis' personal bank account. The Ianuzzis wrote a check from their bank account to deliver the proceeds to Dawson. Dawson was eventually arrested and convicted of grand larceny after bilking dozens of his clients (including the Ianuzzis) out of their life savings. The Ianuzzis filed an action against the lender and broker in state court. The case was later removed to federal court. The Ianuzzis alleged various violations of the Truth in Lending Act and asked for statutory damages and for a declaratory judgment allowing them to rescind the loan. They also asserted various fraud and breach of fiduciary duty claims under state law. American Mortgage and Custom Capital moved for summary judgment.

The U.S. District Court for the Eastern District of New York refused to grant summary judgment for American Mortgage on the TILA claims. American Mortgage argued that the Ianuzzis had signed an acknowledgment that they received the closing disclosures. American Mortgage also produced an affidavit from the closing attorney stating that he supplied unsigned copies of all the documents at the closing. The Ianuzzis countered with their own affidavit stating that they did not receive copies of any disclosures. The court found that TILA establishes a rebuttable presumption of receipt if the consumer signs an acknowledgment of receipt. However, the Ianuzzis’ affidavit was enough evidence to create an issue of fact on the question of whether they received the loan closing disclosures. The court also noted that the Ianuzzis had never acknowledged receipt of the application disclosures.

The court granted summary judgment to American Mortgage and Custom Capital on the breach of fiduciary duty claims. The court found that a person does not enter into a fiduciary relationship with a borrower under New York law simply because that person is a lender or a broker. The Ianuzzis failed to plead any facts suggesting that the relationships they had with American Mortgage or Custom Capital ever evolved into one that could give rise to fiduciary duties.

*Baker v. Aegis Wholesale Corporation*

• **TILA/Relation to State Law Claims** – TILA did not preempt fraudulent omissions and unfair competition law claims in connection with option ARMs

Virgil Baker and the other plaintiffs entered into option adjustable rate mortgage loans with Aegis Wholesale Corporation. Those loans were sold to Residential Funding Company, LLC or Countrywide Home Loans. The plaintiffs filed a class action against Aegis, RFC, and Countrywide, alleging fraudulent omissions and violation of the California Unfair Competition Law. Specifically, the plaintiffs alleged that the defendants failed to disclose that the initial teaser rate would increase dramatically after a month, that the monthly payment amounts listed in the Truth in Lending
Disclosure Statement for the first three to five years were insufficient to pay both principal and interest, and that negative amortization was certain to occur if the plaintiffs made the payments according to the payment schedule. The defendants moved to dismiss the complaint.

The U.S. District Court for the Northern District of California dismissed some of the plaintiffs’ fraudulent omissions claims as barred by the statute of limitations. The court refused to dismiss the remaining plaintiffs’ fraudulent omissions claims and the plaintiffs’ UCL claims on the grounds that they were preempted by the Truth in Lending Act, noting that “neither … claim conflict[s] with TILA’s provisions regarding the disclosure of information in connection with credit transactions.”

**Rubio v. Capital One Bank**  
2010 U.S. App. LEXIS 14968 (9th Cir. (C.D. Cal.) July 21, 2010)

- **Truth in Lending Act/Miscellaneous** – Creditor cannot describe APR as “fixed” in Schumer Box if APR can change
- **State Laws** – Claim exists under California’s Unfair Competition Law if creditor violates federal Truth in Lending Act

This case involved a credit card offer that described the APR as a fixed rate even though the APR could change. Capital One Bank mailed a prescreened offer for a consumer card to Raquel Rubio in 2004. The offer included a “Schumer Box” disclosure under the Truth in Lending Act. TILA requires the Schumer Box to list each APR that could be imposed in connection with the account. Capital One identified the APR in the Schumer Box as a fixed rate. In fact, Capital One could increase the APR if the consumer paid late, if the consumer exceeded the credit limit, or if a payment was returned for any reason. In addition, Capital One could increase the rate at any time under a general contractual right to change terms, subject to state and federal law notice requirements. Rubio opened the account in 2004. Rubio did not pay late and did not exceed the credit limit, and no payment she made had ever been returned. In 2007, Capital One increased the rate under its contractual right to change the terms on the account. Capital One told her she could avoid the increase in the APR if she closed the account and paid the balance in full. Rubio sued Capital One. She claimed that Capital One violated the Truth in Lending Act and the California Unfair Competition Law. She also claimed that Capital One breached the contract. The trial court dismissed each of these claims. Rubio appealed.

The U.S. Court of Appeals for the Ninth Circuit reversed the trial court rulings on the TILA and UCL claims. The appellate court found that Capital One violated TILA when it identified the APR in the Schumer Box as a fixed rate. The appellate court found that TILA requires all disclosures to be “clear and conspicuous.” A disclosure that is misleading is not “clear and conspicuous.” The appellate court found that Capital One’s use of the word “fixed” to describe the APR was misleading. The court based its conclusion on the results of consumer testing performed by the Federal Reserve Board after Rubio’s account was opened. The testing was conducted as part of a general overhaul of the open end disclosures. The Board found that consumers thought that a “fixed” rate could not change for any reason while the account was open.

Capital One argued that its use of the word “fixed” to describe the APR in the Schumer Box was consistent with the definition of a “fixed rate” under TILA. It pointed to the Official Staff Commentary to the regulation, which defines a variable rate to be a rate
that could change based on an index or a formula and a “fixed” rate as any rate that is not a variable rate. Capital One argued that even though the APR on Rubio’s account was subject to change, the changes in the rate could not result from the operation of an index or formula. As a result, the APR Capital One offered was “fixed” for TILA purposes, and Capital One was permitted to use the term “fixed” to describe the APR in the Schumer Box.

The appellate court disagreed. It found that the Board’s own consumer testing determined that when consumers see a rate marketed as a “fixed” rate, they are misled into believing that the rate will remain fixed as along as the account is open. The appellate court found that Capital One’s use of the word “fixed” to describe the APR when the APR was subject to change was misleading and did not meet the “clear and conspicuous” standard for TILA disclosures. The appellate court found that Capital One violated the UCL because it violated a TILA disclosure requirement and Rubio was harmed as a result. The appellate court found that Capital One did not breach its contract because the Schumer Box was not a contract. The actual account agreement allowed Capital One to change Rubio’s rate.

Curtis v. Option One Mortgage Corp.

- **TILA/Rescission – When Applicable** – Borrower must allege ability to tender loan proceeds, not real property securing loan, in order to state rescission claim under TILA

Deborah Curtis sued her mortgage lender, Option One Mortgage Corp., among others, for violating the Truth in Lending Act and sought to rescind her loan. The U.S. District Court for the Eastern District of California granted the defendants’ initial motion to dismiss for Curtis’s failure to allege that she was capable of tendering the loan proceeds. Curtis filed a second amended complaint, and several defendants again moved to dismiss. The court noted that a plaintiff cannot state a claim for rescission under TILA unless she alleges that she is financially capable of tendering the loan proceeds. In the second amended complaint, Curtis alleged that she was able and willing to tender the real property securing the loan, not the loan proceeds. The court concluded that tendering the real property securing the loan does not satisfy Section 1635(b) of TILA and, therefore, dismissed the rescission claim. The court found that the Ninth Circuit has defined “property” as used in Section 1635(b) as the loan proceeds and not the real property securing the loan. The court also found that Section 1635(b) implies the term “property” is whatever the obligor received from the creditor. Because the real property secures the loan, but is not the property actually received from the creditor, an obligor must tender what she actually received, which is the loan proceeds.

Nejo v. Wilshire Credit Corporation

- **TILA/Rescission-When Applicable** – Borrower’s allegation that she could tender monthly payments over next 30 years with interest at unilaterally selected annual rate did not satisfy rescission tender requirements of Section 1635(b)

Carla Nejo sued various entities involved with the refinancing of her mortgage loan for violating the Truth in Lending Act, seeking rescission, recoupment, and damages. Wilshire Credit Corporation and Steel Mountain Capital I, LLC moved to dismiss. The U.S. District Court for the Southern District of California dismissed the TILA rescission claim, finding that Nejo did not allege that she had the ability to tender the loan proceeds. The court stated that Nejo’s allegation that she could tender monthly payments over the next 30 years with interest at a unilaterally selected annual rate did
not satisfy the rescission tender requirements of Section 1635(b) of TILA. The court also dismissed the recoupment claim, finding that it was brought beyond the 1-year statute of limitations and not as a defense to an action to collect a debt. Finally, the court dismissed the damages claim as barred by the statute of limitations. The court also declined to exercise supplemental jurisdiction over the state law claims.

**Woody v. Bank of America Corporation**  

- **TILA/Section 32 (HOEPA) Loans** – Borrower stated claim under HOEPA by alleging that lender failed to provide her with payment schedules for mortgage loan

  Tracy Woody sued her mortgage lender, Countrywide Home Loans, Inc., among others, after her home was foreclosed upon. Woody brought various federal and state law claims, but the U.S. District Court for the Eastern District of North Carolina allowed only the claim against Countrywide under the Truth in Lending Act, as amended by the Home Ownership and Equity Protection Act, to proceed. The court found that Woody stated a claim against Countrywide by alleging that it failed to provide her with “Payment Schedules” for her loan.

**Avelo Mortgage, LLC v. Jeffery**  

- **TILA/Rescission-When Applicable** – Remedy of rescission not appropriate where borrowers were unable to tender loan proceeds; court should have considered reforming mortgage

  Rodney and Lisa Jeffery timely exercised their right to rescind a mortgage refinance transaction after realizing that they did not receive the loan terms they had agreed to with the lender. Both the original lender and the lender’s assignee ignored the rescission and attempted to collect the mortgage payments. The assignee commenced foreclosure proceedings, and the Jefferys moved for summary judgment, arguing that they rescinded the loan within three days of consummation. The trial court granted the Jefferys’ motion, voided the assignee’s security interest, and allowed the assignee to proceed on the note. The Superior Court of New Jersey, Appellate Division, reversed and remanded, finding that rescission was not appropriate because the Jefferys did not return the loan proceeds and admitted that they were unable to do so. Instead, the appellate court found that the trial judge, on remand, should consider reforming the mortgage and note to reflect the offer the Jefferys accepted.

**Watkins v. SunTrust Mortgage, Inc.**  

- **TILA/Rescission-Material Disclosures** – Lender’s use of notice of right to cancel applicable to new credit transactions rather than notice applicable to refinance transactions did not violate TILA

  Edward Watkins alleged that SunTrust Mortgage, Inc. violated the Truth in Lending Act in connection with his refinancing transaction by giving him the Model Form H-8 notice of right to cancel, applicable to new credit transactions, rather than giving him the Model Form H-9 notice of right to cancel, applicable to refinancing transactions. Specifically, Watkins alleged that the form he was given did not give him notice of the effects of exercising the right to rescission “because the
rescission of a refinancing applies only to the additional credit extended over and above the amount owed on the original loan.”

The U.S. District Court for the Eastern District of Virginia dismissed the complaint. The court found that TILA does not require a creditor to use a particular form as long as it provides the borrower notice that the lender is retaining a security interest, that the borrower has a right to rescind the transaction, that explains how the borrower may rescind, that explains the effects of rescission, and that states the date the rescission period expires. The court found that, with respect to the effects of rescission, TILA is concerned with the voiding of the security interest, the refunding of any finance charges, and the return of the borrowed sums. In addition, notice of the broader implications of rescinding a new transaction versus a refinance transaction is not required by TILA or Regulation Z.

Siffel v. NFM, Inc.

- **TILA/Rescission-Material Disclosures** – Borrowers failed to rebut presumption that they each received two copies of notice of right to cancel

Timothy and Wendy Siffel contacted NFM, Inc., about refinancing their mortgage loan. NFM arranged a loan from Countrywide Home Loans, Inc. Despite assurances from NFM, the Siffels’ loan included a prepayment penalty. The Siffels decided not to rescind the loan after an NFM representative told them that the penalty would be waived if they later refinanced through NFM. The Siffels later sued NFM for fraud. The Siffels also sued Countrywide, claiming that Countrywide violated the Truth in Lending Act by failing to provide them with rescission notices. The Siffels also claimed that Countrywide violated the Equal Credit Opportunity Act by rejecting their loan application without providing an adverse action notice. The trial court granted the defendants’ motion for summary judgment. The Siffels appealed the grant of summary judgment in favor of Countrywide, claiming that it violated TILA by not providing each of them with two copies of the notice of right to cancel.

The U.S. Court of Appeals for the Third Circuit found that the loan agreement included a “Notice of Right to Cancel” section in which the Siffels acknowledged that they had each received two copies of the required notice. The appellate court noted that if the borrower signs an acknowledgement of receipt of the required notices, then there is a rebuttable presumption that the lender provided the notices. Timothy also testified that the loan agreement contained such an acknowledgement. Therefore, the appellate court affirmed the trial court’s decision, finding that the Siffels did not rebut the presumption that they received the required notices.

Gilbert v. Deutsche Bank Trust Company Americas

- **TILA/Rescission-When Period Ends** – Where suit to rescind is not filed within three years of consummation, rescission is unavailable even where notice is given during 3-year period

Rex and Daniela Gilbert sued the assignee of their mortgage loan, the master servicer, and the subservicer under the Truth in Lending Act for disclosure violations made by First National Arizona, the original lender. The defendants moved to dismiss the complaint. The U.S. District Court for the Eastern District of North Carolina granted the motion, finding that the extended 3-year right to rescind a refinance applies only to the additional credit extended over and above the amount owed on the original loan.”
rescind expired four months before the Gilberts filed suit to rescind. The court found that the Gilberts’ letter to the subservicer alleging TILA violations and requesting rescission, sent within the 3-year period, did not constitute the exercise of the right of rescission. Alternatively, the court noted that rescission was not available as against any of the defendants because the defendants were not “creditors” as defined in TILA.

**Waterstone Bank SSB v. Panenka**

- **TILA/Statutory Damages** – Court may deny statutory damages under TILA
- **TILA/ Rescission - Form of Notice** – Creditor is not required to use model rescission forms under TILA
- **TILA/Rescission - Effects** – Upon rescission of same-creditor refinancing, consumer is entitled to refund of that portion of interest that exceeds interest that would have been paid on previous loan, not to all payments made on the new loan

This case involves consumer claims raised in response to a foreclosure. Kimberly A. Panenka took out a mortgage loan secured by her home from Waterstone Bank SSB in 2003. She refinanced that loan with Waterstone twice, each time taking out new money. She defaulted on the most recent loan, and Waterstone foreclosed. Panenka asserted several affirmative defenses to the foreclosure, including defenses based on violations of the Truth in Lending Act. Panenka claimed that Waterstone understated the finance charge in her TILA disclosures and gave her notices of right to rescind that deviated from the model rescission forms published by the Federal Reserve Board. As a result, she argued that she had a right to rescind the loan and to statutory damages. Panenka argued that she was entitled to cancel the lien on her home. She also argued that she was entitled to receive a refund of all fees and payments she made on the new loan. Waterstone moved for summary judgment on the affirmative defenses. The trial court decided that Panenka was entitled to rescind because Waterstone had understated the finance charge, refused to award statutory damages, and found that Panenka was entitled to offset the portion of the interest payments under the new loan that exceeded the interest she would have paid under the prior loan. Panenka appealed.

The Court of Appeals of Wisconsin affirmed the trial court’s decision. The appellate court noted that, while the Board has published model rescission forms, creditors are not required to use them. The appellate court decided that the form Waterstone used complied with TILA even though it was not based on the available model form for same-creditor refinances. The appellate court found that Panenka was entitled to rescind her loan because Waterstone miscalculated the finance charge. However, she was not entitled to recover all of the payments she made on the new loan. Panenka was entitled only to a refund of the closing costs related to the new loan plus interest on the difference between the amount financed on the new loan and the amount she paid off on the previous loan. Panenka was not entitled to statutory damages as a matter of law. The appellate court found that TILA allows a court to exercise discretion on the amount of statutory damages and that a court may deny statutory damages.

**Brooks v. Community Lending, Inc.**

- **TILA/Relation to State Law Claims** – TILA did not preempt fraudulent omissions and unfair competition law claims in connection with option ARMs
State Laws – Court dismisses fraudulent omissions and unfair competition law claims in connection with option ARMs against second assignee where there was no allegation that assignee knew of material omissions

Marjorie Brooks filed a class action for, among other things, fraudulent omissions and unfair business practices in connection with her Option Adjustable Rate Mortgage. Brooks claimed that the defendants violated California law by not conspicuously disclosing the interest rate structure applicable to her loan and the certainty that negative amortization would occur if she made only the minimum payments. The defendants moved to dismiss the state law claims.

The U.S. District Court for the Northern District of California addressed the claims after determining that they were not preempted by the Truth in Lending Act because they were consistent with TILA’s substantive provisions. The court refused to dismiss the claims against the first assignee of Brooks’s loan and the party that securitized the loan in light of Brooks’s allegations that these parties “participated in creating, designing, and formulating the loan documents that [the original lender] used.” However, the court dismissed the claims against Wells Fargo, a subsequent assignee, where there was no “inference that Wells Fargo must have known that Community’s loan documents contained material omissions.”

Cheche v. Wittstat Title & Escrow Company, LLC

- TILA/Definition of “Creditor” – Neither assignee nor servicer of mortgage loan was “creditor” to whom obligation to give notice of right to cancel applied
- TILA/Rescission-When Applicable – Tender of loan proceeds must be “plausible” in order to survive motion to dismiss claim for rescission
- TILA/Miscellaneous – Plaintiff need not elect between right to rescind and right to seek damages for disclosure violations

Rita Cheche sued numerous parties in connection with a refinancing transaction in which she claimed she did not receive two copies of a notice of right to cancel as required under the Truth in Lending Act. Cheche sought damages for the disclosure violations as well as a declaratory judgment that she had validly rescinded the transaction. Wachovia Bank National Association, the assignee of her loan, and Specialized Loan Servicing, LLC, her loan servicer, moved to dismiss the claims against them.

The U.S. District Court for the Eastern District of Virginia granted the motion, finding that neither Wachovia nor SLS was a “creditor” to whom the obligation to give a notice of right to cancel applied. Moreover, the court found that Cheche failed to demonstrate that tender of the loan proceeds was “plausible” in the event she was permitted to rescind. The court, however, disagreed with the defendants that Cheche was required to choose between rescinding the transaction and receiving damages for the disclosure violations. The court granted Cheche leave to amend her complaint.

Danilyuk v. JP Morgan Chase Bank, N.A.

- Lender Liability – Borrowers stated rescission claim under Truth in Lending Act against bank that obtained borrowers’ loan after original lender was placed into receivership

Lyudvig and Yekaterina Danilyuk sued JP Morgan Chase Bank, N.A., among others, for various causes of action in connection with the refinancing of their mortgage loan with Washington Mutual
Bank. After the refinancing, Washington Mutual Bank was closed, and the Federal Deposit
Insurance Corporation was appointed as receiver for Washington Mutual. Afterwards, Chase
acquired by assignment certain assets from Washington Mutual including the note and deed of trust
from the Danilyuks’ loan. Chase moved to dismiss all the claims, arguing that under the purchase
and assumption agreement with the FDIC, it did not assume Washington Mutual’s potential liabilities
associated with claims of borrowers.

The U.S. District Court for the Western District of Washington found that the agreement
relieved Chase of all liability for borrowers’ claims relating to loans made by Washington Mutual
prior to September 25, 2008. In this case, the court dismissed the Danilyuks’ claims under the Truth
in Lending Act for damages, the Real Estate Settlement Procedures Act, and the Washington
Consumer Protection Act, and for breach of fiduciary duty, intentional infliction of emotional
distress, and unjust enrichment. However, the court refused to dismiss the TILA rescission claim
and injunctive relief claim. The Danilyuks alleged that the notices of the right to rescind did not
properly inform them of their rescission right and that they were entitled to rescission as a result.
The court found no evidence suggesting that the agreement barred the rescission claim.

Lee v. U.S. Bank

- **TILA/Rescission-When Period Ends** – Suit to rescind does not need to be filed
  within three years of consummation where notice is given during 3-year period
- **TILA/Rescission-When Applicable** – Allegation of ability to tender loan proceeds
  sufficient to withstand motion to dismiss TILA rescission claim
- **Federal Preemption** – Claim for concealing and misrepresenting loan terms, loaning
  money despite inability to repay, and providing inaccurate and misleading disclosures
  preempted by Home Owners’ Loan Act

Steven Lee sued U.S. Bank and SDL Service Company for rescission under the Truth in Lending
Act and California law, to stay the foreclosure sale of his home, for violations of California’s Unfair
Competition Law, and for wrongful foreclosure, fraud, concealment, misrepresentation, unjust
enrichment, and an accounting. The defendants moved to dismiss.

The defendants claimed that the TILA rescission claim was time barred because although Lee
sought to rescind the transaction within three years of the consummation date, he did not file suit
until after expiration of the 3-year period. The U.S. District Court for the Northern District of
California found that Lee’s timely written notice of rescission within the 3-year period was sufficient
and the fact that he did not file suit to rescind within the 3-year period was not fatal to his claim.
The defendants also claimed that the remedies of rescission, whether under TILA or California law,
or stay of foreclosure are not available because Lee has not proven that he has a present ability to
tender the loan balance. However, the court found that Lee’s allegation of his ability to tender was
sufficient to withstand a motion to dismiss the claims for rescission under TILA and California law
and the claims to stay the foreclosure sale.

The court dismissed the UCL claim for concealing and misrepresenting the loan terms, loaning
Lee money that he was unable to repay, and providing him with inaccurate and misleading TILA
disclosures, as preempted by the Home Owners’ Loan Act. The court dismissed the wrongful
foreclosure claim for failure to include the beneficiary’s address in the notice of foreclosure sale,
finding that Cal. Civ. Code § 2924f(b)(1) does not require a beneficiary’s street address where the
property to be sold has, as in this case, a street address. The court also dismissed the fraud,
concealment, misrepresentation, unjust enrichment, and accounting claims.
Sherzer v. Homestar Mortgage Services

- TILA/Rescission-When Period Ends – Suit to rescind does not need to be filed within three years of consummation where notice is given during 3-year period

Daniel and Geraldine Sherzer sued Homestar Mortgage Services, LLC and HSBC Bank USA to rescind their mortgage transaction under the Truth in Lending Act. Homestar and HSBC moved to dismiss the rescission claim on the grounds that it was barred because the suit to rescind was not filed within three years after consummation of the transaction. A magistrate judge recommended that the U.S. District Court for the Eastern District of Pennsylvania deny the motion. The court agreed with the magistrate judge that an action for rescission does not need to be brought within the 3-year statute of limitations as long as notice of rescission was given within the 3-year time period. The court noted that TILA is silent as to how long a consumer has to file suit to enforce rescission – two years or one year. In this case, because the Sherzers gave notice of rescission within three years of consummation and filed suit six months later, the court found that the rescission suit was timely under either period.

Gomez v. Calpacific Mortgage Consultants, Inc.

- TILA/Statute of Limitations – Equitable tolling of statute of limitations may be appropriate for Spanish-speaking borrower
- RESPA/Mortgage Servicing Inquiries – Court refuses to dismiss RESPA claim for failure to respond to qualified written request where servicer failed to respond to portions of request that related to servicing

Salome Gomez sued numerous defendants in connection with two purchase-money loans she obtained. E*Trade Bank, the second mortgage lender, moved to dismiss the complaint. E*Trade claimed that Gomez’s claims for damages for Truth in Lending Act violations were time barred. The U.S. District Court for the Southern District of California refused to dismiss this claim, noting that Gomez’s claim may be subject to equitable tolling where she claimed that she is primarily a Spanish speaker who did not discover the violation until her loan documents were reviewed by mortgage professionals. The court dismissed the claim for quiet title, noting that Gomez failed to allege her ability to tender the amount due on the loan. The court, however, refused to dismiss the claims for violation of the Real Estate Settlement Procedures Act where E*Trade failed to respond to the portions of Gomez’s qualified written request that related to servicing of the loan and provided no support for its claim that Gomez was required to attach the request to her complaint.

Gates v. Wachovia Mortgage, FSB

- TILA/Rescission-When Period Ends – Where suit to rescind is not filed within three years of consummation, rescission is unavailable even where notice is given during 3-year period

HC# 4833-8070-7848

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RESPA/Mortgage Servicing Inquiries – Court dismisses RESPA claim where letter requesting documents concerning ownership of note and mortgage, seeking rescission or modification, and requesting statement of all payments made did not constitute qualified written request

Lisa Gates sued her mortgage lender, Wachovia Mortgage, FSB, for failing to provide her with proper copies of the Notice of Right to Cancel at closing, in violation of the Truth in Lending Act, and failing to respond to her alleged qualified written request under the Real Estate Settlement Procedures Act. Gates also alleged a violation of California’s Rosenthal Fair Debt Collection Practices Act. Wachovia moved to dismiss, and the U.S. District Court for the Eastern District of California granted the motion as to Gates’s first amended complaint on all claims except the claim for damages for TILA violations. See Gates v. Wachovia Mortgage, FSB, 2010 U.S. Dist. LEXIS 14795 (E.D. Cal. February 19, 2010). Gates filed a second amended complaint, and Wachovia again moved to dismiss. The court granted the motion in part and denied it in part. The court reiterated its holding from its earlier decision that because Gates filed her complaint outside the applicable 3-year statute of limitations, Gates could not seek rescission but could seek damages for failure to respond to her letter notifying Wachovia of her intent to rescind. The court dismissed the RESPA claim, finding that Gates’s qualified written request did not allege any servicing errors but merely sought documents related to the ownership of the note and mortgage, sought rescission or modification, and requested a statement of all payments made. Finally, the court dismissed the RFDCPA claim as insufficiently pled.

Wilson v. JPMorgan Chase Bank, N.A.

- TILA-Reg. Z – Borrowers stated damages claim under Truth in Lending Act against bank that obtained borrowers’ loan after original lender was placed into receivership
- ECOA/Fair Lending – Request for signature of both parties to marriage for purpose of creating valid lien does not constitute discrimination under ECOA

Connie Wilson sued JPMorgan Chase Bank, N.A., among others, for various causes of action in connection with the refinancing of her and her husband’s mortgage loan with Washington Mutual Bank. After the refinancing, Washington Mutual Bank was closed, and the Federal Deposit Insurance Corporation was appointed as receiver for Washington Mutual. Afterwards, Chase acquired by assignment certain assets from Washington Mutual including the note and deed of trust from the Wilson’s loan. Chase moved to dismiss all the claims, arguing that under its purchase and assumption agreement with the FDIC, Chase did not assume Washington Mutual’s potential liabilities associated with claims of borrowers.

The U.S. District Court for the Eastern District of California found that the agreement relieved Chase of all liability for borrowers’ claims relating to loans made by Washington Mutual prior to September 25, 2008. However, Wilson alleged that Chase was still liable because Washington Mutual may have only purchased servicing rights to her loan from the original lender. The agreement provided that Chase would assume liabilities relating to all mortgage servicing rights and obligations of Washington Mutual. The court concluded that, at the motion to dismiss stage, it did not have evidence before it to determine whether Chase owned servicing rights or the beneficial interest in Wilson’s loan. The court also noted that Wilson alleged independent conduct by Chase, not just actions taken by Washington Mutual.

The court dismissed the Equal Credit Opportunity Act claim, which alleged that Wilson was discriminated against on the basis of her marital status when she was required to sign the deed of trust to secure the loan because she owned the property jointly with her husband. The court
concluded that the ECOA specifically provides that “[a] request for the signature of both parties to a marriage for the purpose of creating a valid lien … shall not constitute discrimination under this subchapter.” The court also concluded that Wilson failed to sufficiently plead her Fair Housing Act claim.

With respect to the Truth in Lending Act claims, the court concluded that Wilson’s rescission claim was time barred, but her damages claims was timely. However, the court noted that if Chase is in fact an assignee of the loan outside of servicing obligations, it could not be liable for the TILA damages claim because such a claim would be a borrower claim under the purchase and assumption and Chase did not assume potential liabilities associated with claims of borrowers under the agreement. Finally, the court dismissed the Real Estate Settlement Procedures Act, California Rosenthal Fair Debt Collection Practices Act, slander of credit, intentional infliction of emotional distress, and California Unfair Competition Law claims.

**Hendricksen v. Countrywide Home Loans**

- **TILA/Rescission – Material Disclosures** – Borrowers failed to rebut presumption that they received appropriate number of TILA disclosure statements at closing where there was evidence of written acknowledgements of receipt

Alf and Evelyn Hendricksen sued Countrywide Home Loans, Inc. and Mortgage Electronic Registration Systems, Inc. for violating the Real Estate Settlement Procedures Act and the Truth in Lending Act in connection with the refinancing of their mortgage loan. The defendants’ motion to dismiss was converted by the court into a motion for summary judgment. Specifically, the Hendricksens alleged that they did not receive the appropriate number of TILA disclosure statements at closing and, therefore, were entitled to the extended 3-year period to rescind their mortgage loan. The Hendricksens also alleged that the defendants did not respond to their request to rescind.

The U.S. District Court for the Western District of Virginia found that the defendants had satisfied their presumption of delivery of the disclosures. The Hendricksens had each signed a separate Notice of Right to Cancel at closing that contained an acknowledgement that each had received one copy of the federal TILA disclosure and two copies of the Notice of Right to Cancel. In addition, the Hendricksens each signed a copy of the TILA disclosure statement at closing that also contained an acknowledgement of receipt. The Hendricksens were unable to provide sufficient evidence to rebut this presumption of delivery, and mere speculation that they did not receive the required number of TILA disclosures did not create a genuine issue of material fact. Accordingly, the Hendricksens only had three days to rescind their loan transaction, and, therefore, their attempt to rescind nearly three years after the closing was not timely. The court granted the defendants’ motion for summary judgment on the TILA and RESPA claims.

**Woodson v. Countrywide Home Loans**

- **TILA/Miscellaneous** - With respect to rescission claim under TILA, allegation that plaintiff is prepared to tender loan proceeds is conclusory statement and fails to meet burden of establishing factual basis to support ability to tender
Jamie and Sabine Woodson sued Countrywide Home Loans, among others, for violating the Truth in Lending Act and state law, seeking rescission and damages, after their home was destroyed in a fire. Countrywide moved to dismiss.

The U.S. District Court for the Southern District of California found that the plaintiffs’ damages claim for failure to deliver all of the material disclosures required under TILA was barred by the 1-year statute of limitations. However, to the extent that the plaintiffs sought damages for Countrywide’s failure to rescind, the claim was not time barred. The 1-year statute of limitations with respect to the failure to rescind began to run 21 days after the plaintiffs’ notice of rescission was sent to Countrywide. The lawsuit was filed only four months later. Next, the court found that the rescission claim was timely because the plaintiffs filed their lawsuit within three years of the loan consummation date. Despite the timeliness of the rescission claim and the damages claim for failure to rescind, the court concluded that the TILA claims should be dismissed because the plaintiffs did not allege their ability to tender the loan proceeds. The court noted that an allegation that a plaintiff is prepared to tender is a conclusory statement and fails to meet the burden of alleging the factual basis of his or her entitlement to relief. Finally, the court dismissed the state law claims, refusing to exercise supplemental jurisdiction.

**McOmie-Gray v. Bank of America Home Loans**

- **TILA/Rescission – When Period Ends** – Plaintiff must file lawsuit within 3-year statute of repose in order to effectuate claim for rescission under TILA, not just provide notice of rescission within that time period

  Kathryn McOmie-Gray sued Bank of America Home Loans f/k/a Countrywide Home Loans, Inc. for violating the Truth in Lending Act and sought to rescind the loan. In a prior decision, the U.S. District Court for the Eastern District of California granted the defendant’s motion to dismiss, with leave to amend, for failure to allege an ability to tender the loan proceeds. See **McOmie-Gray v. Bank of America Home Loans**, 2010 U.S. Dist. LEXIS 22718 (E.D. Cal. March 10, 2010). McOmie-Gray filed an amended complaint, and the defendant moved to dismiss for failure to state a claim.

  McOmie-Gray obtained the mortgage loan on April 14, 2006, sent a notice of rescission to the defendant on January 18, 2009, and filed her lawsuit on August 27, 2009. The court considered whether Section 1635(f) of TILA requires that a plaintiff **file suit** within the 3-year rescission period or whether it requires providing a **notice** of rescission within that time period. The court concluded that a plaintiff must file suit within the 3-year statute of repose in order to effectuate a claim for rescission under TILA because the Supreme Court has held that Section 1635(f) completely extinguishes the right of rescission at the end of the 3-year period and thus bars any claims filed more than three years after the consummation of the transaction. Because McOmie-Gray’s right to rescind expired on April 14, 2009, and she filed her lawsuit on August 27, 2009, her rescission claim was time barred. Accordingly, the court granted the defendant’s motion to dismiss.

**McKinney v. Fulton Bank**

- **TILA/Rescission – When Applicable** – Fact that borrower identified new construction as her future principal dwelling on loan application did not rule out possibility that home she inhabited at time loan was consummated was her principal dwelling, and therefore entitled her to rescission with respect to that property
Luceil McKinney applied for a construction loan from Fulton Bank in order to build a home. She also obtained a second mortgage with the Bank on her current home. McKinney sued the Bank for violating the Truth in Lending Act, the Real Estate Settlement Procedures Act, the Maryland Consumer Protection Act, and state common law. The Bank moved to dismiss several claims.

The U.S District Court for the District of Maryland found that the TILA damages claim was barred by the applicable 1-year statute of limitations. Next, the Bank argued that McKinney’s right to rescind under TILA was not available with respect to the second mortgage on her current home because it was secured by property that was not her principal dwelling. The loan application specified that the newly constructed home would be her principal dwelling. The court noted that an individual’s principal dwelling may change once the new home is constructed, and the fact that McKinney identified the new construction as her future principal dwelling on the loan application did not rule out the possibility that the home she inhabited at the time the loan was consummated was her principal dwelling. Therefore, the court found that McKinney stated a claim for rescission under TILA and for quiet title.

The court dismissed the RESPA claims, finding that a private right of action did not exist with respect to those claims. The court also found that McKinney failed to state her MCPA claim with sufficient particularity to withstand a motion to dismiss. Finally, the court dismissed the negligence claim, noting the general rule that contractual relationships do not give rise to causes of action for negligence, and there was no evidence supporting a departure from that general rule.

**Burnham v. WMC Mortgage Corp.**

- **TILA/Rescission-Material Disclosures** – Consumer’s certification of receipt of Notice of Right to Cancel is not sufficient to prove receipt where consumer filed affidavit asserting that notices were not delivered
- **TILA/Definition of “Finance Charge”** – Consumer must show that fee is above market rate in order for fee to be considered unreasonable

The Burnhams entered into a loan with WMC Mortgage Corp. to refinance a loan secured by their home in June of 2006. In December of 2007, the Burnhams sued WMC for rescission of the loan. They argued that they were entitled to rescind for two reasons. First, the title fees were not bona fide and reasonable. Second, they did not receive two copies of their notices of right to rescind. WMC moved for summary judgment. The Burnhams alleged that the title fees were 13% above what the title company indicated that it charged. There was conflicting evidence as to whether that was actually the case or whether the fee was simply misdisclosed.

The U.S. District Court for the District of New Jersey decided that an allegation that the fee was 13% higher than what the title company might have charged was not sufficient to establish that the fee was unreasonable. The Burnhams failed to allege that the amount they paid was higher than the amount others paid for similar services. The court decided that WMC was entitled to summary judgment on this claim. However, the court was not willing to grant summary judgment on the question of whether the Burnhams received the proper number of notices of right to cancel. WMC produced copies of the notices of right to rescind. The copies included a certification signed by the Burnhams that acknowledged receipt of two copies of the notices. The Burnhams countered that evidence with an affidavit stating that they had not received the required notices. According to the court, the affidavit was sufficient evidence to rebut any inference that could be drawn from the certification.
Schwartzbaum v. Emigrant Mortgage Company

- **TILA/Section 32 (HOEPA) Loans** – Loan not covered by HOEPA where neither points and fees nor annual percentage rate satisfied HOEPA thresholds

Davi and Salvacion Schwartzbaum sued Emigrant Mortgage Company for various state and federal law violations. Emigrant moved to dismiss the complaint. A magistrate judge recommended that the motion be granted in part and denied in part. Emigrant objected to the magistrate judge’s recommendation that the Schwartzbaums’ Home Ownership and Equity Protection Act claims not be dismissed. Emigrant claimed that the Schwartzbaums’ loan was not subject to HOEPA under either the points and fees test or the annual percentage rate test. The U.S. District Court for the Southern District of New York agreed with Emigrant and dismissed the HOEPA claims. Construing the facts in the Schwartzbaums’ favor, the court concluded that the points and fees constituted, at most, 6.59% of the total loan amount, substantially less than the 8% threshold necessary for HOEPA to apply. Moreover, the court found that the annual percentage rate on the Schwartzbaums’ loan was approximately 5% more than the relevant Treasury security yield, much less than the more than 10% necessary for HOEPA to apply.

Hudson v. Bank of America, N.A.

- **TILA/Definition of “Finance Charge”** – Consumer must show that fee is above market rate in order for fee to be considered unreasonable
- **TILA/Rescission-When Applicable** – Denial of rescission proper where borrower did not produce plausible plan to repay remaining amount of debt

Stephan Hudson entered into a mortgage loan in December 2007. At some point in early 2009, he defaulted. In May of 2009, he sent a rescission notice to Bank of America, N.A. Bank of America did not respond. Bank of America foreclosed. Hudson sued Bank of America, arguing that he was entitled to rescind the loan under the Truth in Lending Act because the title fees charged at closing were unreasonable. He also argued that he was entitled to civil money damages under TILA because Bank of America did not respond to his notice of rescission. Bank of America moved to dismiss.

The U.S. District Court for the Eastern District of Virginia granted the motion. The court found that Hudson failed to allege facts to support the claim that the title fees were unreasonable. The simple allegation that he paid more than other people paid was not sufficient. The court also decided that Bank of America acted properly when it did not allow Hudson to rescind his loan because Hudson was unable to produce any plausible plan to repay the remaining amount of the debt.

Frazile v. EMC Mortgage Corporation
2010 U.S. App. LEXIS 51593 (11th Cir. (S.D. Fla.) June 11, 2010)

- **RESPA/No Private Right of Action** – RESPA does not provide private cause of action for failure to deliver good faith estimate disclosures
- **TILA/Statutory Damages** – Consumer is entitled to civil money damages for noteholder’s failure to respond to notice of rescission
Luce Frazile entered into a loan to refinance her mortgage. Shortly thereafter, she was having trouble making payments and entered into another refinancing, this time with EMC Mortgage Corporation. Two years later, she attempted to rescind the loan under the Truth in Lending Act. The noteholder did not respond. Several months later, she filed this action, claiming that EMC did not deliver a good faith estimate of closing costs as required under the Real Estate Settlement Procedures Act. She also asked the court to rescind her loan and to impose penalties on the noteholder under the Truth in Lending Act for failing to respond to her rescission notice. EMC moved to dismiss for failure to state a claim. The trial court granted those motions. Frazile appealed.

The U.S. Court of Appeals for the Eleventh Circuit affirmed the trial court’s decision on the RESPA claim. The appellate court found that RESPA does not provide a private cause of action for a lender’s failure to deliver a good faith estimate of closing costs. The appellate court, however, reversed the trial court’s decision on the TILA claims. The appellate court found that while more than one year had elapsed between the loan closing and Frazile’s lawsuit, less than a year had passed between Frazile’s attempt to rescind her loan and the lawsuit. If it turned out that the Frazile was entitled to rescind the loan under TILA, Frazile would also be entitled to civil money damages under TILA because she brought her lawsuit within the 1-year statute of limitations for civil money damages.

**Appling v. Wachovia Mortgage, FSB**


- **TILA/Miscellaneous – Disclosure of effect of making minimum payment on “pick-a-payment” loan was sufficient to inform borrower that negative amortization could occur**

Terry Appling sued numerous defendants, alleging violations of various state and federal laws in connection with his “pick-a-payment” mortgage loan. Appling sought a temporary restraining order and preliminary injunction to prevent a foreclosure sale of his home. The U.S. District Court for the Northern District of California granted Appling’s application for a TRO and set a hearing on his motion for preliminary injunction. The court vacated the TRO and denied the preliminary injunction, noting that although the balance of hardships tipped in favor of Appling, he was not likely to succeed on the merits of his claims for conversion, wrongful foreclosure, violations of the Truth in Lending Act, and violations of California’s Unfair Competition Law.

Appling’s claims for conversion and wrongful foreclosure were based on holdback funds that Appling deposited with his original lender, World Savings Bank, FA, to pay for certain work on the property as a condition of the loan. Appling claimed that Wachovia Mortgage, FSB, the current holder of the holdback funds, converted the funds and was not entitled to foreclose because the notice of default did not recognize the existence of the holdback funds. The court found that Appling was not likely to succeed on the merits of these claims based on Wachovia’s evidence that the holdback funds were applied to Appling’s loan balance with his knowledge. Appling claimed that the defendants violated TILA by not clearly and conspicuously disclosing the certainty of negative amortization if he made only the minimum payments shown in the payment schedule. The court found that the disclosure regarding the effect of making a minimum payment that was less than the interest only payment was sufficient to advise Appling that negative amortization would occur and that Appling was not likely to succeed on his TILA claim. Last, the court found that Appling was not likely to succeed on his UCL claim, predicated on inadequate TILA disclosures, because it appeared that the claim would be preempted by the Home Owners’ Loan Act.

**North Shore Auto Financing, Inc. v. Block**
Andrew Block bought a car from North Shore Auto Sales in 1996 and entered into a retail installment sales contract with North Shore Auto Financing, Inc., d/b/a Car Now Acceptance Corporation. At some point, Block stopped making payments. CNAC brought a collection action against Block. Block counterclaimed, alleging that NSAF failed to include the vendor’s single interest insurance premium as part of the finance charge in the Truth in Lending Disclosures. Block also claimed that the retail installment sales contract was usurious under Ohio’s Retail Installment Sales Act. The trial court decided that the premium was not a finance charge under the Truth in Lending Act and was not part of the finance charge under Ohio law. Block appealed.

The Court of Appeals of Ohio reversed the trial court ruling. The appellate court determined that TILA allows a creditor to exclude the cost of VSI from the finance charge if certain conditions are met. The creditor must disclose the amount of the premium, the fact that the consumer has the right to purchase the VSI from anyone the consumer wants, and the insurer may not have any subrogation rights back against the consumer. CNAC did not disclose that Block had the right to buy the VSI from third parties. CNAC explained that it left this provision out because the statement is untrue. No insurer will sell VSI directly to a consumer. Insurers will only sell this coverage to dealers and finance companies. The appellate court decided that TILA required CNAC to give the disclosure, even though CNAC knew the disclosure was untrue. The appellate court also found that CNAC failed to disclose the amount of the premium. CNAC disclosed the sum as an amount paid to insurers in the itemization of amount financed, but the appellate court stated that this way of disclosing the premium was incomplete and CNAC should have explained that the sum was used to pay for the VSI premium. As a result, the amount of the premium should have been included in the finance charge calculation in the TILA disclosures. The appellate court then determined that because the fee is a TILA finance charge, it is also part of the finance charge under Ohio’s RISA. As a result, the transaction was usurious.

**Trombley v. Bank of America Corp.**

- **TILA/Miscellaneous** – TILA does not require creditor to disclose that minimum payment does not include all fees that may be charged
- **Federal Preemption** – National Bank Act does not preempt duty of good faith and fair dealing

Bruce Trombley opened a credit card account with Bank of America Corp. In October of 2007, he made a payment on the account at a Bank of America branch on the due date. Bank of America did not credit the payment until the next day, and it charged a $39 late fee. In November of 2007, Trombley attempted to make a payment online on the due date. Bank of America informed him
that it would not credit the payment until the next day, and he would again be subject to a $39 late fee. Bank of America told Trombley he could avoid the late fee if he paid by phone. They charged a $15 phone pay fee for that service. He used the phone pay option. Trombley brought a putative class action against Bank of America. Bank of America moved for a judgment on the pleadings.

There were two claims at issue. First, Trombley argued that Bank of America violated the Truth in Lending Act. He asserted that Bank of America was required to disclose the fact that the “minimum payment amount” does not include all of the fees that a creditor might charge. Second, he argued that Bank of America violated the duty of good faith and fair dealing by failing to post the payments on the day they were received, without imposing additional fees or charges. The U.S. District Court for the District of Rhode Island dismissed the TILA claim. The court could not find anything in TILA that required the disclosure Trombley described. The court allowed the contract law claim to continue. Bank of America argued that the duty to act in good faith was preempted by the National Bank Act. The court disagreed. It found that the duty to act in good faith is part of a state’s general contract law and therefore not preempted.

DiVittorio v. HSBC Bank, USA, N.A., as Trustee on Behalf of Ace Security Corp.

- **TILA/Miscellaneous** – Borrower may waive Truth in Lending Act claims, including extended rescission rights, if such waiver is clear and conspicuous, and knowingly and voluntarily given

Angelo DiVittorio obtained an adjustable rate refinance loan from IndyMac Bank, FSB. The loan contained a feature that allowed the loan’s margin to decrease after DiVittorio made the first 22 payments on time. IndyMac calculated and disclosed the loan’s APR based on the assumption that DiVittorio would qualify for the decreased margin. DiVittorio defaulted on the loan and filed for bankruptcy. DiVittorio and Ocwen Loan Servicing, LLC, then the loan servicer, entered into a written modification agreement in which DiVittorio agreed to release Ocwen and the loan’s “investor” of all claims related to the loan. DiVittorio defaulted again under the modification agreement and sought to rescind the loan under the Truth in Lending Act. Ocwen denied DiVittorio’s rescission demand, and DiVittorio filed suit in the U.S. Bankruptcy Court for the District of Massachusetts. DiVittorio claimed that he was entitled to rescind the loan because IndyMac mis-disclosed the APR under the federal and Massachusetts’ version of the Truth in Lending Act.

Ocwen moved for summary judgment on DiVittorio’s complaint, arguing, among other things, that DiVittorio waived any rescission claims in his release. DiVittorio argued that waivers of claims under the federal and Massachusetts’ version of TILA are unenforceable. Specifically, DiVittorio argued that pre-dispute rescission claims may only be waived for bona fide financial emergencies as provided in TILA. Ocwen argued that TILA’s requirements for waiver apply only to waivers given prior to consummation of the loan. The court agreed with Ocwen and found that DiVittorio waived his rescission claims under his release. The court noted that neither Massachusetts state courts nor federal courts in the First Circuit have addressed the validity of federal and Massachusetts TILA waivers. However, the court explained that such waivers are enforceable where the waiver meets the clear and conspicuous standard in TILA and where the waiver is given knowingly and voluntarily. The court found that Ocwen’s release met all of the requirements for DiVittorio to effectively release his rescission claims.
**Falcocchia v. Saxon Mortgage, Inc.**  

- **TILA/Rescission-When Period Ends** — Right to rescind expires three years after transaction if suit to rescind not filed within 3-year period, even if notice to rescind given within 3-year period
- **TILA/Statutory Damages** — Court refused to dismiss damages claim for failure to respond to rescission notice that lacked allegation of homeowners’ ability to tender loan proceeds
- **RESPA/Mortgage Servicing Inquiries** — Demand to cancel foreclosure sale and rescind transaction did not constitute qualified written request

John and Rachael Falcocchia refinanced their home loan with a loan from Saxon Mortgage, Inc. After defaulting on the loan, the Falcocchias sued Saxon Mortgage, Saxon Mortgage Services, Inc., and Deutsche Bank Trust Company Americas for federal and state law violations in connection with the refinance transaction.

The Falcocchias alleged that because they did not receive a notice of right to cancel the transaction, as required under the Truth in Lending Act, their right to rescind was extended to three years. Although the U.S. District Court for the Eastern District of California agreed with the Falcocchias on this point, the court nevertheless dismissed this claim because the Falcocchias merely sent a notice to rescind within the 3-year period but did not file suit seeking rescission until after the 3-year period expired. Accordingly, the court found that the rescission claim was time barred. The Falcocchias also claimed that they were entitled to civil damages under TILA. The court refused to dismiss the claim for damages for failure to respond to the Falcocchias’ rescission notice, noting that the claim appeared to be timely because it was filed within one year of the alleged failure to respond to the rescission notice and the Falcocchias did not need to allege in their rescission notice an ability to tender the loan proceeds. The court, however, dismissed the Falcocchias’ damages claim for disclosure failures in connection with the loan, noting that these claims were barred by the 1-year statute of limitations.

The court also dismissed the Falcocchias’ claims for violations of the Real Estate Settlement Procedures Act by failing to respond to their qualified written request. The court noted that the letter the Falcocchias sent was merely a demand to cancel the pending foreclosure sale of their home and a request to rescind the loan for TILA violations and did not constitute a qualified written request under RESPA for information or to note account errors. The court refused to dismiss the Falcocchias’ state law claims for breach of contract, breach of the implied covenant of good faith and fair dealing, contractual rescission, negligence, violations of California Civil Code §§ 2924b and 2924f and California Business & Professions Code § 17200, and wrongful foreclosure.

**Bonanno v. Security Atlantic Mortgage Co., Inc.**  

- **RESPA/Miscellaneous** — RESPA does not require lender to make HUD-1 settlement statement available to borrower before closing
- **RESPA/Miscellaneous** — Consumer’s certification of receipt of HUD-1 sufficient to prove receipt absent specific contrary facts pled in complaint
- **TILA/Rescission-Material Disclosures** — Consumer’s certification of receipt of Notice of Right to Cancel sufficient to prove receipt absent specific contrary facts pled in complaint

Domenick Bonanno entered into a residential mortgage loan with Security Atlantic Mortgage Company. Bonanno defaulted on the loan, and the noteholder foreclosed. Bonanno sued Security
Atlantic and others for rescission of the loan and damages under the Truth in Lending Act and the Real Estate Settlement Procedures Act. Security Atlantic moved for summary judgment.

The U.S. District Court for the Eastern District of New York granted the motion. Bonanno argued that RESPA required Security Atlantic to make the HUD-1 Settlement Statement available for inspection at least one day before the settlement. The court found that RESPA requires the settlement agent, not the lender, to make the statement available before the closing. The court also found that RESPA does provide a remedy to a consumer who is not allowed an early look. The court granted summary judgment on this claim. Bonanno alleged that Security Atlantic did not provide him with a copy of the final HUD-1 Settlement Statement. The court found that the Settlement Statement included Bonanno’s signature below a statement certifying receipt of a copy. The court found that Bonanno had not alleged any facts in his complaint that suggested he had not received the copy. The court granted summary judgment on this claim. Bonanno claimed that Security Atlantic did not provide him with copies of his notice of right to cancel under TILA. The court found that Bonanno had signed an acknowledgement certifying that he received the copies, and did not allege any facts in his complaint that suggested he had not received the copies. The court granted summary judgment on this claim.

Rosenfield v. HSBC Bank, USA

- Foreclosure/Miscellaneous – Court rejects borrower’s request for preliminary injunction to stop foreclosure sale where borrower cannot show irreparable injury or likelihood of success
- Foreclosure/Miscellaneous – Foreclosure sale does not constitute irreparable injury in preliminary injunction context where borrower’s right of rescission has already expired and borrower retains right to redeem following sale
- Truth In Lending Act/Statute of Limitations – Court applies 1-year statute of limitations to claim for enforcement of rescission following defendant’s lack of response to timely notice of rescission
- Truth In Lending Act/Section 32 (HOEPA) Loans – Court determines whether loan is protected by HOEPA by applying Federal Reserve Board form H-15 Selected Interest Rate Table’s category “nominal 10” and not category “inflation indexed 11”
- Truth In Lending Act/Miscellaneous – Lender not required to include prepaid finance charge on Truth in Lending form itself when information is provided at closing in written Itemization of Amount Financed

Jean Rosenfield refinanced her mortgage and defaulted nearly two years later. In response, HSBC Bank, USA, as the current holder of the refinanced mortgage, began a non-judicial foreclosure of the property. Rosenfield then delivered a notice of intent to rescind the loan to the relevant parties, including HSBC, which did not respond to the notice. A state court then issued an order authorizing sale of the property, and Rosenfield filed a motion for temporary restraining order and preliminary injunction to stop the sale. HSBC and others removed the case to federal court and challenged Rosenfield’s motion. The U.S. District Court for the District of Colorado denied the motion, allowing the foreclosure sale to proceed.

A party seeking a preliminary injunction must show irreparable injury unless the injunction is ordered as well as substantial likelihood of success on the merits. The court rejected Rosenfield’s argument that the foreclosure sale would constitute irreparable injury to her. First, her right of rescission had already expired due to the passage of time, so the sale would not extinguish that right. In other words, the sale itself would not cause the possibly irreparable harm of the loss of the
rescission right. Second, the court explained that Rosenfield retained a right to redeem following a foreclosure sale, so the sale itself would not cause irreparable injury.

Although this finding was enough to dispense with Rosenfield’s motion, the court then assumed that the sale would cause irreparable injury and considered her likelihood of success on the merits. First, the court considered Rosenfield’s allegations of Truth in Lending Act violations. Rosenfield claimed that her mortgage violated the Act because her prepaid finance charge was not included in her Truth in Lending disclosure form. The prepaid finance charge information was provided on a written Itemization of Amount Financed that she received at closing. The court found that this approach was sufficient; lenders are not required to provide this information on the Truth in Lending disclosure form itself. Similarly, the court rejected Rosenfield’s argument that, in a closed-end credit transaction, the lender is required to disclose at closing the method of determining the finance charge and the balance upon which a finance charge will be imposed.

Second, the court considered Rosenfield’s argument that her loan qualified for protection under the Home Ownership and Equity Protection Act. If the loan were subject to HOEPA, Rosenfield claimed that the lender had failed to make required material disclosures and imposed a prohibited prepayment penalty. HSBC responded that Rosenfield’s loan was not a high-interest loan subject to HOEPA. The parties’ dispute on this issue was ultimately a dispute over the proper indexed rate to which Rosenfield’s rate should be compared. Rosenfield’s loan was a 30-year adjustable rate mortgage, and there is no clear index for comparison in the Federal Reserve Board’s form H-15 Selected Interest Rate Tables. Rosenfield argued that a 20-year inflation-indexed rate should apply. HSBC argued that a 30-year “nominal 10” constant maturity rate should apply. The court agreed with HSBC that the 30-year nominal rate applied. The court relied on commentary from the Federal Reserve Board supporting use of a rate closest to the loan’s maturity: a 30-year rate rather than a 20-year rate.

Third, the court considered whether the statute of limitations had run on Rosenfield’s ability to exercise her right of rescission. Rosenfield issued notices of her intent to rescind within the 3-year time period. HSBC did not respond to that notice within the required 20 days. However, the court found that borrowers have one year from the expiration of that 20-day response period in order to retain the rescission right. Rosenfield did not file her suit until more than one year after the expiration of that period. The court refused to toll this statute of limitations while Rosenfield pursued her claims under TILA. As a result, she lost her right to rescind.

**Kelly v. Capital One, N.A.**
2010 U.S. Dist. LEXIS 57424 (E.D. Wis. May 26, 2010)

- **TILA/Statute of Limitations** – Borrowers’ TILA claims were barred by 1-year statute of limitations, despite tolling of statute of limitations during pendency of related class action lawsuit

On January 16, 2007, the U.S. District Court for the Eastern District of Wisconsin certified a class consisting of individuals to whom Chevy Chase Bank, F.S.B. had provided documents that allegedly failed to comply with the Truth in Lending Act’s loan disclosure requirements and who requested rescission of their mortgage loans. On September 24, 2008, the Seventh Circuit reversed the decision, holding that TILA does not authorize class actions where the remedy sought is rescission of the mortgage loan. *See Andrews v. Chevy Chase Bank*, 545 F.3d 570, (7th Cir. (E.D. Wis.) September 24, 2008). The court never signed an order formally decertifying the class.

Keith and Margaret Kelly obtained a mortgage loan from Chevy Chase Bank, and, almost three years later, they attempted to rescind the loan. On April 25, 2008, Chevy Chase declined to rescind. The Kellys sued Capital One, N.A., the successor to Chevy Chase Bank, for violating TILA and
sought rescission of their loan. The district court ruled on the parties’ motions for summary judgment.

Capital One argued that the Kellys’ TILA claim was barred by the 1-year statute of limitations. The parties agreed that, in this case, the 1-year period began on April 25, 2008, the date that the defendant denied the Kellys’ request to rescind. The parties also agreed that the 1-year period was tolled between April 25, 2008 and the date the Andrews case lost its class action status. However, the parties disagreed about when the Andrews case lost its class action status. The court concluded that the Andrews case lost its class action status on September 24, 2008 when the Seventh Circuit reversed the class certification decision. Because the Kellys brought their TILA claims after the statute of limitations ran on September 24, 2009, the court dismissed them.

**Ofor v. Ocwen Loan Servicing, LLC**
2010 U.S. Dist. LEXIS 52367 (D. Minn. May 24, 2010)

- **TILA/Rescission-When Period Ends** – Rescission period not extended to three years where TILA disclosures were given to borrower’s wife, to whom borrower had given power of attorney to execute closing documents
- **TILA/Rescission-Material Disclosures** – Rescission period not extended to three years where TILA disclosures were given to borrower’s wife, to whom borrower had given power of attorney to execute closing documents
- **Mortgage** – Mortgage signed under improperly notarized power of attorney deemed valid where power, executed and signed by principal, did not need to be notarized under Minnesota law

Vincent Ofor refinanced his two home mortgages with two new home mortgages. The actual mortgage transaction documents, however, were signed by Ofor’s wife, Lisa, to whom Ofor had given his power of attorney. Ofor signed the power of attorney, and it was notarized after Ofor faxed it in connection with the closing. After Ofor defaulted on the mortgages, he sued numerous parties for federal and state law violations in connection with the refinance transactions.

First, Ofor argued that the mortgages were void because they were based on a power of attorney that was invalid because it was not properly notarized. The U.S. District Court for the District of Minnesota concluded that a power of attorney signed by the principal with a written signature, as Ofor’s power of attorney was, is validly executed when it is dated and signed by the principal and need not be notarized. Next, Ofor argued that he was entitled to a 3-year rescission period because of the defendants’ failure to give him required disclosures under the Truth in Lending Act and that the defendants’ wrongfully refused to cancel the mortgage after he rescinded the mortgage loans. The court disagreed, finding that because Lisa had the right to sign the documents, her receipt of the required TILA disclosures was imputed to him, and he could not claim that he did not receive the disclosures.
Dodd-Frank Wall Street Reform and Consumer Protection Act (Pub. L. 111-203)

Title XIV: “Mortgage Reform and Anti-Predatory Lending Act”
Subtitles A-C: Mortgage Originations
Summary of Key Provisions

Contents:

I. Timeline
II. Key Definitions & Concepts
   A. “Qualified mortgage”
   B. “Residential mortgage loan”
   C. “Mortgage originator”
III. Origination standards – originators (Subtitle A)
   A. Duty of care
   B. Originator compensation (including yield spread premiums)
   C. Steering
IV. Origination standards – loans (Subtitle B)
   A. Ability to Repay
   B. Prepayment penalties
   C. Other minimum standards
   D. Additional Disclosures
V. TIL Remedies – general amendments
VI. HOEPA – High cost loans (Subtitle C)
   A. Definition of “high cost loan” – key changes
   B. Substantive protections – key changes
   C. New creditor defense

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I. WHO’S DOING WHAT AND WHEN? WHAT REGULATORS WILL BE INVOLVED IN MORTGAGE RULES?

Effective Dates of Title XIV Subtitles A-C: Generally, a provision of Title XIV is to become effective when the final regulations implementing the provision are effective. If no regulation implementing a provision of the law has been issued by January 21, 2013, that provision becomes effective as of that date. §1400(c)(2),(3).

Outside time limits for mandatory rules: By law, the mandatory rules to be promulgated under Title XIV must be finalized no later than 18 months from the “designated transfer date” of July 21, 2011, or approximately January 21, 2013, with an effective date no later

1 The statute pegs the outside time at 18 months after the designated transfer date (now set for July 21, 2011), which would put it at January 21, 2013.
When will the rule-making start? The FRB has the authority to begin the rule-making process now, and has indicated it will do so.\(^2\) These rules are part of Truth in Lending Act amendments, and TIL rule-making will transfer to the CFPB on July 21, 2011.\(^3\) The rules, in whatever stage of development, will then become CFPB’s job. If they have been issued by the FRB as proposed rules for comment, they will be deemed to be CFPB proposals. § 1063(j). If rules have been published as final, but are not yet effective, they will become effective as a Bureau rule as of the date the Board set in the final rules. § Id.

NOTE: Throughout this outline, references to “FRB/CFPB” in the context of rule-making means FRB prior to July 21, 2011 (the designated transfer date), and the CFPB after that date.

II. KEY DEFINITIONS AND CONCEPTS

A. “Qualified mortgage” [“QM”] and “qualified residential mortgage” [“QRM”] -- mortgages with less risky features (as defined by statute and regulation) entitled to certain legal benefits intended to serve as incentives for the market to make sound loans. A key lesson of the crisis was that perverse market incentives encouraged the sale of mortgage loans that were intrinsically more at risk of default, irrespective of the borrower, and more expensive. Since these were more profitable (until they imploded), these more risky, more expensive loans “crowded out” safer, more sustainable loans from the supply side. The concept behind the “qualified mortgage” is to give the market incentives to make safer, more sustainable loans. It’s the “carrot” for sensible lending in the reform bill.

The concept appears in two different titles in Dodd-Frank, with different incentives in each title. In Title XIV, the mortgage reform title, a “qualified mortgage” as defined there gives lenders a presumption of compliance with the Act’s new ability-to-pay provision and certain other benefits. In Title IX, a “qualified residential mortgage” definition is established that will serve as an exception to the “risk-retention” provisions in the reforms to the asset-backed securitization process. (The risk-retention requirement is designed to require that the originators of MBS have some “skin in the game.” This flows from another lesson of the crisis: the model known as “originate to sell” [making loans to sell on to the secondary market] meant that originators and securitizers had no incentive to make soundly underwritten, sustainable loans, as the risk of default was\


\(^3\) Designated personnel from the FRB, as well as from other agencies whose consumer protection responsibilities will shift to the CFPB, will be transferred to the new Bureau. Dodd-Frank, Title X, Subt. F.
passed on to investors and diffused.) Table 1, below, summarizes the differences between the two in the statute.

1. Truth in Lending “Qualified mortgage” [“QM”] –

For purposes of compliance with the new Truth in Lending provisions, the Title XIV definition of “qualified mortgage” is the key.

“Qualified mortgages” --

- are entitled to a presumption of compliance with the new “ability to pay” requirement. Dodd-Frank §1411, adding 15 USC 1639C(a); (see IV-A, below).
- are permitted to charge prepayment penalties, with certain restrictions: (not all qualified mortgages are eligible to do so). (see IV-B, below);
- are a key part of the anti-steering provision. (regulations must prohibit originators from steering eligible consumers from “qualified mortgages” to non-qualified mortgages. Dodd-Frank §1403, adding 15 USC 1639B(c)(3)(B); (see III-C, below)

A “qualified mortgage” as defined by TIL meets these criteria:

- no negative amortization or deferred principal repayment (with specified exception);
- no balloon payment (with specified exception);
  - rules may allow balloon under prescribed conditions, including underwriting standards, and that the loan is made by a creditor that operates in rural or underserved areas, retains the loans in portfolio, and meets loan origination volume and asset size thresholds set by rule.
- verified and documented sources for repayment ability
- for fixed rate loans; underwriting on fully amortizing and PITI and assessments;
- for ARMs, underwriting at max rate during first 5 years, fully amortizing over the loan term, and PITI and assessments;
- complies with regulatory guidelines for DTI or alternative measure
- points and fees (defined) = 3% or less, with some carve-outs
  - HOEPA definition of points and fees, (§1602(aa)(4), as amended by Dodd-Frank §1431), (see VI-A, below)
  - “QM” definition excludes true rate-reducing discount points within prescribed limits
  - Regulations may adjust for smaller loans
- max. 30 year term, except as extended by rule
- for reverse mortgages covered by ability to repay rule, QM criteria to be set by rule.
- FRB/CFPB may revise, add to, or subtract from these criteria to assure that responsible, affordable credit is available in a manner consistent with purposes of new §§1639B and 1639C, to prevent evasion, or facilitate compliance.
  - HUD, VA, Dept. of Agriculture and Rural Housing Service have same mandate to issue rules defining “qualified mortgages” for specified

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4 Dodd-Frank §1412, adding new TIL §1639C(b)(2)(A).
mortgages that are insured, guaranteed or administered by each of those agencies, in consultation with FRB/CFPB.

2. SEC Act “Qualified Residential Mortgage” [“QRM”]

For purposes of understanding the larger securitization market incentives, the “skin in the game risk retention” definition will be perhaps even more important. Banking regulators and the SEC will jointly prescribe rules to require securitizers to retain at least 5% of the credit risk, with exceptions tied to “qualified residential mortgage” status.

NOTE: A full discussion of this requirement is beyond the scope of this summary: it is included here simply to alert the reader to the existence of two distinct definitions and uses of the concept in the mortgage market arising from Dodd-Frank reforms.

Table 1: “Qualified mortgage” (QM) and qualified residential mortgage” (QRM) – Comparison of Truth in Lending concept and SEC “skin in the game” risk-retention requirement for securitization

<table>
<thead>
<tr>
<th>Incentive benefit to “qualified mortgage” (QM) or “qualified residential mortgage” (QRM)</th>
<th>Truth in Lending: Dodd-Frank § 1412, adding 15 U.S.C. §1639C(b)(2)(A)</th>
<th>SEC: Dodd-Frank §941, amending 12 USC 78a et seq.</th>
</tr>
</thead>
<tbody>
<tr>
<td>1. QM entitled to rebuttable presumption that the loan meets the statutory “ability to repay” requirement of new 15 USC §1639C(a) (See IV-A-2, below). 2. Prepayment penalties permitted in prime, fixed rate QM. (See IV-B &amp; tbl 4, below) 3. Reduces potential exposure for liability for improper steering, (See III-C, below)</td>
<td>Regulations require at least 5% risk retention but QRM has full exception from that requirement.</td>
<td></td>
</tr>
<tr>
<td>Regulatory authority</td>
<td>FRB/CFPB is to implement by rule, and can “revise, add to, or subtract” from the statutory criteria, consistent with ensuring responsible, affordable credit is available, that purposes of new §§1639B and 1639C are achieved, to prevent evasion, and to facilitate compliance. (DF §1412, adding new 15 USC §1639C(b)(3)(B) Authority will transfer to CFPB 7-21-2011.</td>
<td>FRB, FDIC, OCC, SEC, HUD, and FHFA to jointly prescribe regulations defining QRM no later than 270 days from 7/21/10. Chairman of the Financial Stability Oversight Council (Sec. of the Treasury) to coordinate joint rule-makings.</td>
</tr>
<tr>
<td>Criteria defining a qualified mortgage</td>
<td>i. no negative amortization or deferred principal repayment (with specified exceptions(^5)); ii no balloon payment (with)</td>
<td>Above regulators to define “QRM,” taking into account underwriting and product features that historical loan performance</td>
</tr>
</tbody>
</table>

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\(^5\) The authorization for balloons is limited, e.g. applies only to creditors meeting specified criteria and must be held in portfolio. *Dodd-Frank §1412, adding new §1639C(b)(2)(E).*
B. “Residential Mortgage Loan” definition –

The mortgage origination provisions of Subtitles A and B (originator compensation, anti-steering, and ability to repay) apply to “residential mortgage loans,” – essentially closed-end consumer loans secured by a dwelling. (It does not have to be the consumer’s principal dwelling.) D-F §1401, adding TIL 15 USC §1602(cc)(5).

The elements of the definition are:

- a “consumer credit transaction,”6
- secured by a mortgage, deed of trust or other equivalent consensual security interest on a dwelling7 or on residential real property that includes a dwelling
- excludes HELOCs; and
- excludes time shares8 for certain purposes, including the ability to repay, originator compensation, and anti-steering provisions, new closed-end disclosures requirement by D-F §1419, the new Dodd-Frank requirement for periodic mortgage statements (D-F §1420), and the defense to foreclosure provision (D-F §1413)

Note: “Residential mortgage loan,” which includes refinances and closed-end home equity loans (but not open-end home equity loans), should not be confused with the existing TIL definition of “residential mortgage transaction, 15 USC

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6 See TIL definitions of “consumer” and “credit” 15 USC §1602(e), (h); Reg. Z, §226.2(a)(11), (12), (14).
7 “Dwelling” includes 1-4 family housing units, mobile or manufactured homes, trailers used as homes, and condos, etc. 15 USC §1602(v): Reg. Z, §226.2(a)(19)
8 The text excludes “extensions of credit relating to a plan” described in 11 USC §101(53D), which are time shares.
1602((w); Reg. Z, 226.2(a)(24), which encompasses only purchase-money mortgages.\(^9\) …should not be confused, but undoubtedly will be.

C. “Mortgage originator”

Provisions of Dodd-Frank apply to a broader class of originators than those that meet TIL’s more narrow definition of “creditor.”\(^10\) Brokers are covered – both third party brokers and those brokers involved in table-funded transactions that are nominally “creditors” for TIL purposes. Loan-originating employees of retail lenders also seem to be encompassed by the term.\(^11\) Dodd-Frank, §1401, adding 15 USC §1602(cc)(2).

1. Definition – General –

- Any person who, for direct or indirect compensation or gain, or in the expectation thereof, takes a “residential mortgage loan” application, assists a consumer in obtaining or applying for such a loan, or offers or negotiates the terms of such a loan, including those who advertise themselves as such;

- excludes administrative employees of an originator, and employees of manufactured home sellers, as long as they don’t take an application, advise a consumer on rates and terms, or offer or negotiate the mortgage terms.\(^12\)

- excludes licensed real estate brokers that “only perform real estate brokerage activities”, unless it is compensated by a lender, broker, other mortgage originator, or agent of any of those. (emphasis added). [i.e. real estate brokers who only sell houses and not the financing not captured, but if they sell the mortgage as well, to that extent, likely to be covered.\(^13\)]

- excludes entity (person, estate or trust) that provides seller-financing loans for 3 or fewer properties or less a year, provided that it is not the contractor, and each of the loans is fully amortizing, has a fixed rate for at least 5 years, and for which the seller has determined that the buyer has a reasonable ability to repay; (The FRB/CFPB may prescribe other criteria.)

\(^9\) TIL’s rescission right, for example, does not apply to the purchase money “residential mortgage transaction”, but only to refinances, 15 USC §1635(e)(1), nor does HOEPA’s special provisions under current law, 15 USC §1602(aa)(1). See generally National Consumer Law Center, Truth in Lending §§ 6.2.6.1, 9.2.4.1 (6th Ed. 2007 and supp.), hereafter NCLC TIL. (Dodd-Frank removed the HELOC exception from the high-cost HOEPA definition. See VI-A, below.)

\(^10\) TIL’s definition of “creditor” is limited to the person to whom the obligation is “payable on its face.” 15 USC § 1602((f); Reg. Z, § 226.2(a)(17). This excludes the true lender in table funded transactions, as well as third-party brokers that do not make table-funded loans. See generally NCLC, Truth in Lending §2.3.5.

\(^11\) This is not explicit in Dodd-Frank. However, it is explicit in the new FRB compensation rules, §226.36(a)(1), as amended, and the Board says that its definition is consistent with Dodd-Frank §1401, “which defines ‘mortgage originator to include employees of a creditor, individual brokers and mortgage brokerage firms, including entities that close loans in their own names that are table-funded by a third-party.’” See FRB Final rule to protect mortgage borrowers from unfair, deceptive and abusive loan originator compensation practices, Supplemental Information, p .34-35, Docket R-1366 (August 16, 2010), available at http://www.federalreserve.gov/newsevents/press/bcreg/bcreg20100816d1.pdf; 75 Fed. Reg. 58509, 58518 (September 23, 2010).

\(^12\) Caveat: due to an excessive number of “nots” in Section 1401, adding new 1602(cc)(2)(B), the reader is advised to independently verify this characterization of the manufacturer home retailer employee provision.

\(^13\) That would be consistent with the partial exclusion for real estate agents from CFPB jurisdiction: their real-estate selling activities are exempt from CFPB, though their mortgage-selling activities are covered. D-F §1027(b).
Center for Responsible Lending

September, 2010

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- excludes servicers, servicer employees, agents and contractors, including in loan mod and work-out context;

2. “Creditors” as mortgage originators --

The application of the term “mortgage originator” to “creditors” as TIL defines them is more complicated.

- Creditors are subject to Dodd-Frank anti-steering provisions;
- “Creditors” are generally excluded from definition for purposes of the originator compensation provision, but this probably will be interpreted just to exclude transactions between creditors and secondary market purchasers, to which consumers are not a party;
- Creditors in table-funded transactions are subject to the compensation provisions, as well as anti-steering provision;
- Individual employees of “creditors” and mortgage broker firms are covered by the term, for purposes of the originator compensation provisions as well as anti-steering provision, provided the employee otherwise meets the general definition, see note 11.

III. ORIGINATION STANDARDS – ORIGINATORS: Duty Of Care, Originator Compensation And Steering – Subtitle A

A. Duty of Care – Dodd-Frank §1402, adding new 15 USC §1639B(b)

- Originators must be qualified and, if required by state law or SAFE Act, be registered and licensed;
- Must include the unique identifier (from SAFE Act) on all loan documents
- Subject to duties imposed by other applicable state and federal law.
- FRB/CFPB to promulgate rules requiring depository institutions to establish procedures to monitor compliance of this section and SAFE Act for its subsidiaries and employees.

B. Originator compensation (including yield-spread premiums) –

One major target of post-meltdown reforms was a common originator compensation model whereby lenders paid originators more for bringing in the riskier, more expensive loans. One of the theoretical underpinnings of the post-crisis reform was to re-orient market-incentives. In the case of originator compensation, the legislative result was simply to eliminate the perverse incentive to deliver unsustainable loans to the lender and onto the secondary market.

14 See 15 USC § 1602((f); Reg. Z, § 226.2(a)(17) for TIL definition of “creditor.”
15 Here, too, the FRB explains Dodd-Frank “creditor” exclusion from its originator compensation provisions to be consistent with its new rule, and explains the creditor exclusion (other than table-funded broker-creditors) to exclude “transactions that occur between creditors and secondary market purchasers, to which consumers are not a direct party....” See FRB Final rule to protect mortgage borrowers from unfair, deceptive and abusive loan originator compensation practices, Docket R-1366, supplemental information, p.35 (August 16, 2010), available at http://www.federalreserve.gov/newsevents/press/bcreg/bcreg20100816d1.pdf; 75 Fed. Reg. at 58518.
The FRB was nearing the end of a three-year long process of evaluating originator compensation issues as Dodd-Frank was enacted. The Board decided to proceed with a final rule, released August 16, 2010, to avoid a long delay in bringing some measure of reform to the market.16 These new rules were issued pursuant to the Board’s existing UDAP authority relating to mortgages under HOEPA, as well as its general rule-making authority under TIL.

This outline first looks at the Dodd-Frank provisions, then briefly compares them to the new FRB rules, which become effective with respect to applications received beginning April 1, 2011. See Table 2, below.

1. Dodd-Frank provisions regarding originator compensation incentives, including yield spread premiums. Dodd-Frank §1403, adding new 15 USC §1639B(c)

- Applies to “residential mortgage loans” (basically all closed-end residential mortgages, see II-B, above)
- Applies to both payors and payees -- no person can pay, and no originator can receive any direct or indirect compensation that varies with terms of loan, other than loan principal; new §1639B(c)(1)
  - The provision means that yield spread premiums or other compensation that would permit indirect and direct compensation to vary based on loan terms, other than principal, are subject to this ban, new §1639B(c)(4)(A)
- Dual source compensation prohibited, i.e. the originator cannot get compensation from both the consumer and any creditor or other third party who knows, or has reason to know of the consumer’s direct payment to the originator. (Exception for bona fide third-party charges that neither creditor nor originator or affiliates thereof will retain.); new §1639B(c)(2)(A);
- Allows for no-cost loans as exception, new §1639B(c)(2)(B), provided
  - the originator gets no compensation directly from the consumer, and
  - the consumer does not pay any upfront discount or origination points, or fees, other than bona fide third party charges not retained by the creditor, originator, or an affiliate thereof. (The FRB/CFPB may waive this rule or provide exemptions if it is in the interest of consumers and the public).

- What the provision does not do –
  - Limit the amount for which a creditor can sell a consummated loan to a subsequent purchaser, new §1639B(c)(4)(B); (see also II-C-2 and note 14, above.)
  - Restrict the consumer’s ability to finance compensation, including through the rate or principal, that is otherwise permitted under this section, new §1639B(c)(4)(c);
  - Prohibit volume-based compensation from the creditor to the originator, new §1639B(c)(4)(d).

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2. Remedies

- For originators other than creditors, remedies as allowable against creditors under 15 USC §1640 are available, subject to a maximum of the greater of actual damages or 3 times the total direct and indirect compensation, plus costs and attorneys fees, *Dodd-Frank § 1404, adding new §1639B(d).*
- For creditors, §1640 damages, including enhanced damages under §1640(a)(4); *Dodd-Frank §1416, amending §1640(a)(4).*
  - 3-year statute of limitations for these damages, *Dodd-Frank §1416, amending §1640(e)*
    - Defense to foreclosure against creditor, assignee or holder, or anyone acting on their behalf, by way of recoupment, irrespective of any time limit.
    - Maximum amount of recoupment damages capped at the amount that could have been received as an affirmative claim at expiration of 3-year statute of limitations. *Dodd-Frank §1413, adding new §1640(k).*

3. Comparison of Dodd-Frank originator compensation provisions to new Reg. Z §226.36(d), as amended 8/16/10, effective 4/1/2011

As noted above, the Board wished to avoid further delay, and so proceeded to release the HOEPA UDAP rules in final form, under its existing authority, though it will begin the process of harmonizing them with Dodd-Frank. The final rule was released August, 16, 2010, and is to become effective April 1, 2011. See 75 Fed. Reg. 58509 (Sept. 24, 2010), or [http://www.federalreserve.gov/newsevents/press/bcreg/bcreg20100816d1.pdf](http://www.federalreserve.gov/newsevents/press/bcreg/bcreg20100816d1.pdf)

A separate CRL outline summarizes the new FRB rule, but the table below compares the key provisions of Dodd-Frank and the current rule.

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17 Enhanced damages under §1640(a)(4) includes “an amount equal to the sum of all finance charges and fees paid by the consumer, unless the creditor demonstrates that the failure to comply is not “material.” If a foreclosure occurred in year 8, a consumer could conceivably have paid 7 or 8 years’ worth of interest. The purpose of the cap is to stop the clock on that paid interest component of enhanced damages at the 3 year mark.
### Table 2: Comparison of Dodd-Frank originator compensation and new FRB UDAP rule on originator compensation.

<table>
<thead>
<tr>
<th></th>
<th>Dodd-Frank §1403, adding new 15 USC §1639B(c)</th>
<th>Reg. Z, §226.36(d), as added 8/16/10, 75 Fed. Reg. 58509, 58534 (9/24/10).</th>
</tr>
</thead>
<tbody>
<tr>
<td>Timeline</td>
<td>Latest possible date for rules to be issued, or effective date if no rules, 18 months after transfer date (January 21, 2013).</td>
<td>Effective April 1, 2011</td>
</tr>
<tr>
<td>Covered transactions</td>
<td>Closed-end mortgages secured by a dwelling; (time-shares excluded)</td>
<td>Same</td>
</tr>
<tr>
<td>Definition of “originator”</td>
<td>Any person who, for direct or indirect compensation or gain, or in the expectation thereof, takes a residential mortgage application, assists a consumer in obtaining or applying for such a loan, or offers or negotiates the terms of such a loan, including those who advertise themselves as such; Creditors in table-funded transactions covered, and individual loan officer-employees of creditors (see note 13). Otherwise, creditors excluded; as are servicers</td>
<td>A person who arranges, negotiates or otherwise obtains credit for another for compensation or other monetary gain, or in expectation thereof. Covers creditors in table-funded transactions, and loan-originating employees of creditors that meet definition.</td>
</tr>
<tr>
<td>Applies to both “person” paying the compensation and originator receiving the compensation</td>
<td>yes</td>
<td>Yes</td>
</tr>
<tr>
<td>Nature of ban</td>
<td>Prohibits compensation based on terms of loan, other than principal</td>
<td>same; but further specifies that principal-based compensation must be a fixed percentage, though may be subject to maximum and minimum dollar amount</td>
</tr>
<tr>
<td>Dual-source compensation (i.e. combining direct payment from consumer with direct or indirect compensation from creditor or other person)</td>
<td>prohibited</td>
<td>Prohibited</td>
</tr>
<tr>
<td>Effect on increasing rate as means of paying upfront costs through the rate</td>
<td>Rate trade-off permitted in true no-cost loans, subject to ban on receiving payment from both consumer and creditor; must be</td>
<td>Subject to ban against receiving direct compensation from consumer and creditor, can pay some origination costs upfront</td>
</tr>
</tbody>
</table>

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18 Dodd-Frank does not mandate rules implementing the originator compensation provision. If no implementing rules are issued, the provision would become effective January 21, 2013. But there unquestionably will be rules, and they will specify the effective date.  
19 Exclusion is crafted as for creditors who fund the transaction at consummation out of their own resources, including a bona fide warehouse line of credit. Reg. Z, 226.36(a). Compensation paid to creditors for secondary market transactions are not covered. 75 Fed. Reg. at 58518.
no up-front costs (other than bona fide third party charges not retained by creditor, originator or affiliate) and some “back-end” through the rate

| Remedy                      | Non-creditor originators – §1640 damages as available against creditor, but subject to cap of greater of actual damages or 3x total originator compensation plus costs & attorneys fees; Creditors -- §1640 damages, including enhanced damages; Defense to foreclosure – damages available by way of recoupment, including against assignees and holder; amount of damages capped at amount available for affirmative claim (i.e. 3 years) | Regulatory enforcement Private enforcement under TIL unclear; possibly little, if any, available under current law. 20 |

C. Steering

In part driven by the perverse incentives rewarding originators for making riskier, more expensive loans, originators (both brokers and retail originators) steered applicants who qualified for safer, prime loans in the wrong direction.

Dodd-Frank mandates that anti-steering rules aimed at specified practices be issued. Dodd-Frank, §1403, adding new §1639B(c)(3).

Steering is also addressed in the FRB’s August 16, 2010 final rule. The FRB rule is summarized in a separate outline, but a brief comparison of the two is included below in Table 3.

**Note:** All creditors are subject to this provision. The partial exclusion for creditors applicable to the compensation provision does not apply to the anti-steering subparagraph, §1639B(c)(3). Dodd-Frank, §1401, adding new §1639(cc)(2)(F).

1. Dodd-Frank provision on mandatory anti-steering rules –

Dodd-Frank requires the FRB/CFPB to issue rules that prohibit --

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20 As a practical matter, this question will have implications only between April 1, 2011 and the effective date of the Dodd-Frank provisions regarding these issues, including the remedies. Where violations of applicable law constitute unfair or deceptive practices under state law, state UDAP claims may be available.
steering any consumer to a “residential mortgage loan”\textsuperscript{21} for which the consumer lacks a reasonable ability to pay (according to regulatory standards, see IV-A, below);

- steering to a loan that has predatory characteristics or effects (e.g. equity-stripping, excessive fees, or abusive terms);

- steering a credit-qualified consumer from a “qualified mortgage”\textsuperscript{22} to a non-qualified mortgage;

- engaging in abusive or unfair practices that promote disparities among equally credit-worthy consumers based on race, gender, ethnicity or age;

- mischaracterizing or suborning the mischaracterization of the applicant’s credit history, the loans available to the consumer, or the appraised value of the subject property;
  
  o note: mischaracterizing or suborning mischaracterization of an appraisal is repeated in the new appraisal provisions, \textit{Dodd-Frank} §1472, adding new \textit{TIL} §1639E(b)(2). That is among the appraisal rules requiring early interim rule-making within 90 days from enactment, or by late October.

- discouraging a qualified consumer from looking elsewhere for a cheaper loan if the originator is not able to offer that product.

2. Remedies

- For originators other than creditors, remedies allowable against creditors under 15 USC §1640, subject to a maximum of the greater of actual damages or 3 times the total direct and indirect compensation, plus costs and attorneys fees, \textit{Dodd-Frank} §1404, adding new §1639B(d).

- For creditors, actual and statutory damages under §1640 (enhanced damages under §1640(a)(4) are not available for steering violations.) (omitted from D-F §1416 amendment to §1640(a)(4));

- Defense to foreclosure by recoupment not available. (omitted from D-F §1413 addition of new §1640(k)).


The differences between the standards Dodd-Frank sets for the mandatory anti-steering rule and the new FRB anti-steering rule are pronounced. The FRB rule is narrower in substance, and includes a safe harbor based simply on what options are disclosed.

Table 3: Comparison of Dodd-Frank anti-steering and new FRB UDAP rule on steering.

<table>
<thead>
<tr>
<th></th>
<th>Dodd-Frank §1403, adding new 15 USC §1639B(c)(3)</th>
<th>FRB UDAP rule, Reg. Z §226.36(e) (August 26, 2010)</th>
</tr>
</thead>
<tbody>
<tr>
<td>Timeline</td>
<td>Outside limit for final mandatory implementing rule, January 21, 2013 (18 months after transfer)</td>
<td>Effective 4/1/2011</td>
</tr>
</tbody>
</table>

\textsuperscript{21} See II-B, above.

\textsuperscript{22} As defined by TIL, see II-A-1, above.
Covered transactions | Closed-end mortgages secured by a dwelling (time-shares excluded) | Same
--- | --- | ---
Covered persons | Any person who, for direct or indirect compensation or gain, or in the expectation thereof, takes a residential mortgage application, assists a consumer in obtaining or applying for such a loan, or offers or negotiates the terms of such a long, including those who advertise themselves as such. **Note:** There is no creditor exclusion to the anti-steering provision | A person who arranges, negotiates or otherwise obtains credit for another for compensation or other monetary gain, or in expectation thereof. Covers creditors in table-funded transactions, and loan originating employees of creditors, if the employee meets the general definition of a covered person.

Prohibited conduct | Rule-making required to prohibit > Steering any consumer to a “residential mortgage loan” for which the consumer lacks a reasonable ability to pay (according to regulatory standards, see IV-A, below) > has predatory characteristics or effects (e.g. equity-stripping, excessive fees, or abusive terms); > steering a credit-qualified consumer from a “qualified mortgage” to a non-qualified mortgage; > engaging in abusive or unfair practices that promote disparities among equally credit-worthy consumers based on race, gender, ethnicity or age; > mischaracterizing or suborning the mischaracterization of the applicant’s credit history, the loans available to the consumer, or the appraised value of the subject property; > discouraging a qualified consumer | > Originator may not steer consumer to a transaction based on fact that originator would receive greater compensation than other products the originator offered or could have offered. > “Steering” means “advising, counseling or otherwise influencing a consumer to accept that transaction.” > The transaction must have been consummated. No steering if the consumer does not get a loan from that originator. OSC §226.36(e)(1)-1.

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23 Exclusion is crafted as for creditors who fund the transaction at consummation out of their own resources, including a bona fide warehouse line of credit. Reg. Z, 226.36(a). For creditor-employee originators, who will be barred from receiving compensation based on loan terms under compensation rule, compliance with that provision satisfies the anti-steering rule if the loan consummated is with the creditor. If the employee forwards the application to another creditor, he or she must comply as a broker. OSC §226.36(e)—2(ii).

24 See II-B, above.

25 As defined by TIL, see II-A-1, above.
IV. ORIGINATION STANDARDS – LOANS: Ability To Repay And Other Minimum Standards -- Subtitle B

Though the banking industry often opposed consumer protection reform efforts by arguing that they might jeopardize the safety and soundness of the financial institutions, the crisis demonstrated quite the opposite. Cavalier, drastic and widespread abandonment of underwriting standards clearly demonstrated that the absence of such protections contributed to a serious threat to safety and soundness. Consequently, reform efforts included common sense measures to restore safer, more sustainable lending norms to the mortgage market, for the benefit of the financial sector, and the economy as a whole, as well as homeowners and home-buyers.

26 See note 20, above.
A. Ability to Repay (“ATR”) – Dodd-Frank §1411, adding new TIL, 15 USC §1639C

1. Standards – new §1639C(a)

- Applies to “residential mortgage loans” (basically all closed-end residential mortgages, see II-B, above)
- FRB/CFPB implementing regulations, orders and guidances cannot require underwriting standards for depositories (banks, thrifts and credit unions) that do not meet the minimum underwriting standards set by the federal banking regulators.27
- Creditor must make a “reasonable and good faith determination based on verified and documented information that, at the time the loan is consummated, the consumer has a reasonable ability to repay the loan, according to its terms, and all applicable taxes, insurance (including mortgage guarantee insurance) and assessments.
- Standards for evaluation are detailed, including taking into account multiple loans (e.g. look at combined ATR for 80/20s); verify income; and prescribed bases for calculating ATR on non-standard loans.
  o Some exemptions from income verification permitted for government-insured streamlined refinancing in certain conditions.

2. Rebuttable Presumption – new §1639C(b)

Creditors and assignees who are subject to liability may presume compliance with the ability to repay requirement if it is a “qualified mortgage” as defined by TIL under Dodd-Frank. (See Section II-A and Table 1, above, for Dodd-Frank’s TIL definition of “qualified mortgage.”)

3. Remedies

- §1640 damages, including enhanced damages – Dodd-Frank §1416, amending §1640(a)(4)
- Defense to foreclosure against creditor, assignee or holder, or anyone acting on their behalf, by way of recoupment irrespective of any time limit.
  o Amount of recoupment in defense is the amount the consumer would have been entitled to if timely brought as an affirmative claim under §1640, including the enhanced damages. The amount is capped at the amount that could have been received at expiration of 3-year statute of limitations.28 Dodd-Frank §1413, adding new §1640(k).

B. Prepayment penalties – Dodd-Frank §§1414 & 1431

27 The statute uses the term “prudential regulators”, defined in Title X, the Consumer Financial Protection Act, as the applicable federal banking agency – FRB, OCC, FDIC and NCUA. (Dodd-Frank abolished the OTS.) Dodd-Frank §1002(24).
28 Enhanced damages under §1640(a)(4) includes “an amount equal to the sum of all finance charges and fees paid by the consumer, unless the creditor demonstrates that the failure to comply is not material.” If a foreclosure occurred in year 8, a consumer could conceivably have paid 7 or 8 years’ worth of interest. The purpose of the cap is to stop the clock on that paid interest component of damages at the 3 year mark.
Prepayment penalties are targeted in the mortgage reform efforts because they impacted the mortgage market negatively in several ways: they were implicated in equity stripping; they locked borrowers into bad mortgages, making it too expensive to refinance into cheaper, less risky loans; and the industry’s preference for them led it to pay originators more for them, adding to borrower’s costs on both the front and back end. Not surprisingly, given these distortions, evidence also connects them to a higher risk of foreclosure.\(^{29}\)

The reform provisions take three forms:

- direct restrictions that allow prepayment penalties only on qualified mortgages that are also fixed-rate and non-subprime, and limit the amount and term;

- indirect restriction through including them in the definition of “fees and points.” The “fees and points” definition, which is used both for purposes of defining a “qualified mortgage” and in the revised HOEPA trigger, now includes prepayment penalties. See VI-A, below, for an explanation of how and when they are to be counted.)

- indirect restriction by tying a new, third independent alternative trigger tied to prepayment penalties only to the definition of a high cost mortgage. See VI, below.\(^{30}\)

To start with a bottom line summary: Prepayment penalties will be prohibited in closed-end loans (‘residential mortgage loans’\(^{31}\)), except for fixed rate “qualified mortgages” that are below a specified APR threshold. The HOEPA provisions will also act as indirect downward pressures on prepayment penalties on HELOCs, since the open-end exclusion from the “high-cost loan” definition has been repealed. When prepayment penalties are permitted on closed-end loans, an amount of up to 3% is allowed, but in practice, the amount is likely to be limited to 2%, (see VI-A-4, below.)

In those loans where they will be allowed, they cannot be imposed after 3 years, and are limited in amount to 3% for the first year,\(^{32}\) 2% for the second, and 1% for the third. The consumer must be offered an option of a loan product with no prepayment penalty.

Table 4, below, summarizes all the relevant prepayment penalty provisions in Title XIV.

<table>
<thead>
<tr>
<th></th>
<th>Dodd-Frank</th>
<th>Current HOEPA / FRB rules</th>
</tr>
</thead>
<tbody>
<tr>
<td>Definition of “fees &amp; points” (for “fees and points” includes: PPP not included in fees and</td>
<td></td>
<td></td>
</tr>
</tbody>
</table>


\(^{30}\) Consider this the 2 belts and suspenders approach to trying to address a problem. As is explained in Section VI, below, legislation to update HOEPA had been around for five years prior to the crisis, at least, and efforts were made to harmonize it with the later drafts as they developed. Some of it is not as neatly harmonized as others. But the message is clear and consistent – they should be fairly rare and small.

\(^{31}\) See II-B, above; “residential mortgage loans” excludes HELOCs and time shares.

\(^{32}\) But see VI-A-4, below, on a new independent high-cost loan prepayment penalty trigger.
<table>
<thead>
<tr>
<th><strong>purposes of HOEPA trigger and “qualified mortgage”)</strong></th>
<th>&gt; maximum amount of PPP that could be charged under terms of loan being made, and &gt; prepayment penalties on refinance of previous loan made or currently held by same creditor or affiliate, D-F Sec. 1431, amending 1602(aa)(4)(E)&amp;(F) [HOEPA]; Sec. 1412, new 1639C(b)(2)(C)(i) [“qualified mortgage”]</th>
<th>points definition</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>High-cost mortgage definition independent alternative trigger</strong></td>
<td>Mortgage secured by a principal dwelling (other than reverse mortgage) is a “high cost loan” if the loan either permits a prepayment penalty after 3 years, or it exceeds more than 2% of the amount prepaid. D-F §1431, new §1602(aa)(1)(A)(iii).</td>
<td>NA</td>
</tr>
<tr>
<td><strong>“qualified mortgages” (TIL) – general rule</strong></td>
<td>&gt;3-2-1 permitted (3% in 1st year; 2% in 2d, 1% in 3rd), with none more than 3 years long; and &gt; consumer must be offered option of a loan with no prepayment penalty D-F Sec. 1414, new 1639C(c)(3)</td>
<td>NA</td>
</tr>
<tr>
<td><strong>Certain “qualified mortgages” subject to prepayment penalty ban</strong></td>
<td>Prohibited in “qualified mortgages” that are &gt; adjustable rate, or &gt; have APRs exceeding 1.5% over a designated index rate for first liens (2.5% for jumbo); and 3.5 or subordinate. D-F Sec. 1414, new 1639C(c)(1)(B)</td>
<td>NA</td>
</tr>
<tr>
<td><strong>“Non-qualified,” non-HOEPA</strong></td>
<td>Prohibited, D-F Sec. 1414, new</td>
<td>NA</td>
</tr>
</tbody>
</table>

33 Since there is a 3-year limit on prepayment penalties where there are permitted at all, this prong of the trigger may get rusty from non-use.

34 While 3% penalties in the first year are permitted for certain qualified mortgages, this provision is likely to discourage them.
closed-end residential mortgages | 1639C(c)(1) | (as defined by Reg. Z, §226.35(a))³⁵ – Permitted, if otherwise authorized by law, as follows:  
> 2 year maximum,  
> rate is fixed for at least 4 years, and  
> the penalty will not apply to same creditor or affiliate refi.  

“Higher cost” mortgages | Term not used in D-F, but see above – “qualified mortgages subject to ppp ban” | 

HOEPA (note: HELOCs are now subject to HOEPA, see VI-A-1, below) | Prohibited, D-F, Sec. 1432, repealing current 1639(c)(2) | Permitted, if otherwise authorized by law, as follows:  
> 2 year maximum,  
> at consummation, consumers verified DTI does not exceed 50%;  
> rate is fixed for at least 4 years; and  
> penalty will not apply to same-creditor or affiliate refinance.,  

C. Other Provisions – Dodd-Frank §1414

- Credit insurance financing ban --Financing single-premium credit insurance is banned in closed- and open-end mortgage loans secured by a principal dwelling, (monthly premiums permitted; credit unemployment permitted if reasonable premiums, no compensation to creditor or affiliate) -- adding new §1639C(d).
- Binding mandatory pre-dispute arbitration banned – apples to closed- and open-end mortgage loans secured by principal dwelling, and no waiver of claims permitted, adding new §1639C(e)
- Negative amortization – special warning disclosures required, and first-time borrowers must provide documentation of counseling from HUD-certified counselors. Applies to closed- and open-end mortgages, not limited to principal dwelling; excludes reverse mortgages, adding new §1639C(f)
- Notice of potential loss of anti-deficiency protection – notice of anti-deficiency protections and their importance required; if refinancing applied for that would result in loss of such protection, notice of that required, adding new §1639C(g)
- Notice of policy regarding partial payments – notice of policies about accepting partial payments, and, if accepted, how they will be applied, is required, adding new §1639C(h)
- Time shares –excluded from all §1639C provisions.

³⁵ The APR threshold is similar to the APR-triggered ban in Dodd-Frank for otherwise qualified mortgages. The current FRB “higher-cost” APR threshold is 1.5% over average prime offer rate for comparable terms for first liens, and 3.5% for subordinate.
E. Additional Disclosure Requirements

- **Hybrid ARMs** – 6 month advance notice of first reset, including good faith estimate of monthly payment after reset and list of alternatives; applies to hybrid ARMS on principal dwellings, *Dodd-Frank §1418, adding new 1638A*.
- **Additional initial disclosures** – for ARMs, initial PITI and fully indexed PITI; for closed-end residential loans, aggregate settlement costs, aggregate originator fees, total interest over life of loan as percentage of loan principal, *Dodd-Frank §1419, adding new §1638(a)(16)-(19)*.
- **Periodic statements required for closed-end mortgage loans** – including principal loan amount; current interest rate in effect, date of next reset, amount of any prepayment penalty, description of late fee, contact information, information about counseling agency, and other information as required by rule; not required if coupon book provided, *Dodd-Frank §1420, adding new §1638(f)*.

V. AMENDMENTS TO TIL REMEDIES -- General – *Dodd-Frank §1416*

A. Monetary damages – *amending §1640(a)*

- Minimum statutory damages raised to $200 and maximum raised to $2000, for non-mortgage loans and leases.
- Class action cap at lesser of 1% of net worth or $1 million (up from $500,000).

B. Statute of limitations, *amending §1640(e)*

- 3 year statute of limitations for violations of §§1639, 1639B, and 1639C

C. Additional creditor defense, *adding new §1640(l)*

- No creditor or assignee liable for damages or rescission if the obligor or any co-obligor “has been convicted of obtaining by actual fraud such residential mortgage loan.”

D. Additional state Attorney General Enforcement Authority – *Dodd-Frank §1422, amending §1640(e)*

- State AGs given authority to enforce HOEPA, the new provisions §§1639B and §1639C (originator standards including duty of care, compensation, anti-steering, ability to pay and other origination provisions described above.)

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36 Reading the statute would lead one to believe that this minimum/maximum applies only to Consumer Lease Act violations. However, that result was likely the result of drafting confusion in 1995 amendments, and the Supreme Court decision in *Koons Buick Pontiac, Inc. vs. Nigh*, 543 U.S. 50 (2004) means the maximum is likely to be applied to all non-mortgage credit. See NCLC *Truth in Lending* §8.6.2.2.
37 Dodd-Frank also creates a separate right-to-cure for high-cost loan HOEPA violations, see VI-C, below.
VI. HOEPA AMENDMENTS – Dodd-Frank Subtitle C, amending the Homeownership and Equity Protection Act of 1994 (regarding high-cost mortgages)\textsuperscript{38}

Legislative amendments to close loopholes in and otherwise modernize the 1994 Home Ownership and Equity Protection Act began in earnest in approximately 2005, while the bubble was still expanding.\textsuperscript{39} These efforts had not made much headway, until the crisis. Most of the debate in Dodd-Frank mortgage reform centered on the larger mortgage market, but Title XIV incorporated these longer-standing proposals as Subtitle C, refining them to further take lessons of the crisis into account and to harmonize with the larger-market reforms in the bill.

A. Key changes to HOEPA’s high-cost mortgage definition --

1. Base definition of a high-cost mortgage --

Any consumer loan secured by the consumer’s principal dwelling (except reverse mortgages), if it meets any one of three independent triggers: either a) the “fees and points” trigger or b) the “APR” trigger or c) a new prepayment penalty trigger. (Closed end, open-end and purchase money consumer loans secured by principal dwelling are now covered. Dodd-Frank §1431, amending §1602(aa)(1)(A).\textsuperscript{40})

2. Fees and points trigger

a. Fees and points trigger amount

- Total fees and points “payable in connection with the transaction”,\textsuperscript{41} not including bona fide third party charges not retained by the originator, creditor, or affiliate of either:
  - 5% or less for loans $20,000 or over
  - lesser of 8% or $1000 for loans under $20,000; FRB/CFPB may adjust dollar amount, Dodd-Frank §1431, amended §1602(aa)(1)(A)(ii).
- Adds rule for calculating the amount of total fees and points in HELOCs.

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\textsuperscript{38} This outlines only the significant changes in Dodd-Frank to the high-cost mortgage provisions. For a general explanation of HOEPA, including existing requirements, see NCLC Truth in Lending Chapter 9.

\textsuperscript{39} Compare, e.g. HF1182 (110\textsuperscript{th} Congress)

\textsuperscript{40} Existing HOEPA excludes purchase money mortgages (“residential mortgage transactions”) and open-end mortgage loans. These exclusions were dropped from the baseline definition.

\textsuperscript{41} Existing HOEPA refers to fees and points “payable by the consumer at or before closing.” That language served as the statutory basis for some of the arguments that yield spread premium payments to originators were not captured by the fees and points definition despite the fact that “all compensation paid to mortgage brokers” was specifically listed. See generally NCLC Truth in Lending § 9.2.6.3.4
b. Fees and points definition additions & changes – Dodd-Frank §1431(a), (c), amending §1602(aa)(4)

- Special rules for mortgage insurance – amended §1602(aa)(1)(C):
  - excludes premiums provided by federal or state government agencies;
  - excludes any premium paid after closing;
  - excludes private, upfront MPI, if not in excess of National Housing Act premiums, is refundable on pro-rata basis and automatically issued on satisfaction of obligation.

- Specifies that mortgage brokers’ compensation includes yield spread premiums (all compensation to mortgage originator includes direct and indirect compensation paid by either consumer or creditor from any source), and includes payments to the broker/creditor in a table-funded transaction;

- Adds maximum prepayment penalties payable on the transaction at issue;

- Adds prepayment penalties incurred if the loan refines a prior loan made by or currently held by same creditor or affiliate;

- Codifies the Board’s previous addition of single-premium credit insurance;

- Excludes bona fide discount points in prescribed amounts and conditions, new §1602(dd).

3. APR Trigger

- 6.5% over average prime offer rate (defined) for first liens
- 8.5% over for subordinate liens, and for first liens on personal-property dwelling under $50,000
- Calculation for ARMs takes maximum rates into account
  - if rate varies solely with index, then consummation-date index plus maximum margin; any other kind of ARM, then maximum rate that can be charged
- FRB/CFPB has authority to adjust rate 6.5% threshold on firsts down to 6% and up to 10% for subordinates; down to 8% and up to 12% for subordinates.

4. Prepayment penalty trigger (new)\(^{42}\)

The new “high-cost mortgage” definition includes a third independent, alternative trigger keyed solely to prepayment penalties. If the loan documents permit either of the following with respect to prepayment penalties, a consumer loan secured by a principal residence is a “high-cost mortgage:”

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\(^{42}\) See notes 29-31 and accompanying text, and Table 4, to put this provision in context of Dodd-Frank and the evolution of this subtitle.
As noted earlier, elsewhere, Dodd-Frank banned prepayment penalties longer than 3 years when they are permitted at all in closed-end mortgages, so the first prong is a belt-and-suspenders approach to assuring that consumers are not exposed to long-term prepayment penalties. Three percent prepayment penalties are permitted for first-year refinances in certain “qualified mortgages” (see section IV-C, above), but any loan that does so becomes a “high-cost mortgage”…in which prepayment penalties will now be banned. All of which should discourage prepayment penalties of more than 2%, even where allowed.

**B. Changes and additions to substantive protections for high-cost loans – Dodd-Frank §§1432, 1433, amending §1639**

- Ban on financing points and fees,
- Ban on financing prepayment penalty due in same-creditor refi
- Ban on prepayment penalties and balloon loans
- Pre-loan counseling required
- Other provisions regarding recommending default, late fee limitations, limiting right of acceleration.
- Ban on trying to evade by way loan structured
- No deferral or modification fees permitted
- Restrictions on pay-off statement fees, and statement must be provided within 5 business days

**C. Changes to remedies for high-cost loan violations – Dodd-Frank §1433, adding new §1639(v)**

- New right to cure provision for creditor or assignee: if violation was in good faith, no liability if creditor or assignee either cured within 30 days of closing, or 60 days of creditor’s discovery or receipt of notice, and prior to institution of any action. Cure means to make appropriate restitution and make adjustments necessary to either bring the loan into compliance, or change the loan terms in a beneficial manner so that it is no longer a high-cost loan (consumer’s choice).
Mortgage Originator Compensation & Anti-Steering Rules –
New TIL UDAP rules address yield spread premiums and steering

Kathleen E. Keest
Senior Policy Counsel, Center for Responsible Lending

On August 16, 2010, the Federal Reserve Board released final rules governing mortgage originator compensation and steering practices. New Reg. Z, §§226.36(d) and (e) were adopted pursuant to the Board’s existing authority, including its authority to address unfair and deceptive mortgage practices.1

The Board began considering rules governing these practices in 2007. It initially proposed to address the problems through disclosures.2 However, focus group testing demonstrated that disclosures are not effective, so that part of the proposal was withdrawn from the final 2008 HOEPA UDAP rules and the FRB went back to the drawing board.3 This process was finally nearing completion when the Dodd-Frank Wall Street Reform and Consumer Protection Act, (Pub. L. 111-203) was enacted on July 21, 2010.

Dodd-Frank’s mortgage origination reform provisions also addressed originator compensation and steering,4 but the timelines in that Act are generous – the outside time limit for rules to be finalized is January, 21, 2013.5 Rather than delay reforms even longer, the Board released these final rules, setting the effective date for April 1, 2011.

The FRB will continue to evaluate what changes are necessary to harmonize these rules with Dodd-Frank’s standards, and further proposals will be published for comment. As of July 21, 2011, the responsibility for Truth in Lending and mortgage regulation, including these rules, will shift to the new Consumer Financial Protection Bureau.6

Substantively, the FRB’s final rule on originator compensation and Dodd-Frank’s requirements are similar. (Remedies under Dodd-Frank will change, however.) But the Board’s anti-steering rule is much narrower and weaker than the standards Dodd-Frank will require. Dodd-Frank’s requirements are not summarized in this FAQ, though Tables 1 and 2, below, compare key provisions of each.

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1 15 USC §§1604(a), 1639/
4 Dodd-Frank, Title XIV, Subtitle A.
5 The outside time is 18 months after the “designated transfer date,” (the date that consumer protection functions are transferred to the new Consumer Financial Protection Agency), which has subsequently been scheduled for July 21, 2011.
6 If the FRB has proposed, but not finalized rules as of that date, they will be deemed to be the CFPB’s proposed rules. Dodd-Frank §1063(j)
The text is available at 75 Fed. Reg. 58509 (September 24, 2010), or at http://www.federalreserve.gov/newsevents/press/bcreg/20100816d.htm

Questions that might be frequently asked

When will the rules become effective?
The rules apply to loan applications received by creditors after April 1, 2011.

Do these rules apply to all mortgages?
They apply to all “closed-end” consumer loans secured by a dwelling, including closed-end reverse mortgages. HELOCs (home equity lines of credit) and time-shares are not subject to these rules. The original Board proposal sought comment as to whether HELOCs should be covered. However, Dodd-Frank excludes HELOCs from its definition of “residential mortgage loans” that are subject to its rules, so the FRB rule does as well.7 (The Board will continue to evaluate whether broader coverage may be necessary.8)

Originator Compensation Rule – Reg. Z, §226.36(d)

Who is a “mortgage originator” under this rule?
- An originator is one who for gain arranges or negotiates mortgages, such as mortgage brokers.
  - It includes “table-funded” broker—“creditors.” Those “creditors” who do not fund the loans themselves9 and who assign the loans immediately to the real lender are “originators” whose compensation is governed by the rule.
  - It does not apply to the payments that creditors receive for selling a loan to a secondary market investor.
  - It includes individual employees of creditors, provided the employee otherwise meets this definition.

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7 Dodd-Frank, Section 1401, adds new § 15 USC (cc)(5), defining “residential mortgage loans” as closed-end loans secured by a mortgage, deed or trust or consensual security interest in a dwelling or on residential real estate that includes a dwelling. This should not be confused with the existing TIL definition of “residential mortgage transaction”, TIL, 15 USC §1602(w), which only encompasses acquisition money-mortgages, although it undoubtedly will be. Time shares are also excluded.
8 Supplemental Information, pp. 5-6; 75 Fed Reg. at 58510.
9 Funding the loans from the creditor’s own bona fide warehouse lines of credit counts as self-funding.
What kinds of originator compensation arrangements are prohibited?

- No person can pay, and no originator can receive, compensation based on terms of the loan, such as the interest rate, loan-to-value, or presence of a prepayment penalty. However, compensation based on the amount of the loan is permissible.
  - The compensation also cannot be based on factors that are proxies for terms and conditions. For example, though a borrower’s credit score is not a “term or condition”, if a creditor charges higher rates to persons with lower credit scores, the originator’s compensation cannot be based on the credit score.
  - “Compensation” includes any financial incentive, such as salaries, commissions, bonuses, merchandise or trip awards, etc.
  - “Compensation” does not include bona fide and reasonable amounts that are to be passed through to third parties.
    - If the originator retains some amount as a result of an unintentional over-estimate of a third party charge, it is not “compensation”, but if the excess is the result of a mark-up or “up-charge”, then the retained excess is “compensation.”

Do these provisions apply to direct compensation payments from the consumer to a broker?

No, these restrictions do not apply to direct consumer-to-broker payments. (But see next question: this is all the broker gets, so this fee could not be augmented by any payment from the creditor.)

Can an originator get compensation from both the consumer and the creditor or other third party?

No, the rule bans “dual source” compensation. An originator cannot get compensation from both the consumer and the creditor or other third party.

What kinds of originator compensation arrangements are permitted?

- Compensation based on the amount of the loan principal: It must be a fixed percentage of the loan amount, but that percentage may be subject to a minimum or maximum dollar amount. (For example, an originator may receive from 1% of the loan amount, subject to a minimum of $1000 and a maximum of $5000.)
- Higher rates may be charged to pay for all or part of upfront costs, including originator compensation.
  - This allows “some” upfront costs to be paid through the rate, permitting a combined “front & back-end” payment of origination costs.
    - Dodd-Frank specifically banned combined front-and back-end compensation for origination fees. It would allow only the more transparent, true “no-cost” loans to be paid through a higher rate;

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10 Note that the rule applies both to the person paying the compensation (other than a consumer) as well as to the “originator” receiving it.
i.e. origination costs may be paid through the rate only when no origination costs are charged up-front.\textsuperscript{11}

- An illustrative list of other permissible compensation arrangements includes: volume-based compensation, performance-based compensation, flat fee compensation, hourly fee-for actual services, payments based on the historical quality of originator’s applications.

\textit{Anti-Steering Rule – Reg. Z, §226.36(e)}

- Originator may not steer a consumer to a transaction based on the fact that the originator will get greater compensation from that transaction, unless it is in the consumer’s interest.
  - Dodd-Frank, while leaving the details to regulations, has a broader anti-steering prohibition. Originators must not steer consumers to loans for which they do not have a reasonable ability to pay, to loans with predatory characteristics, or (most critically) away from the safer, more sustainable “qualified mortgages” to non-qualified mortgages.\textsuperscript{12}
- The rule provides a “safe harbor” which constitutes compliance with the anti-steering rule. This “safe harbor” is based solely on the menu of options provided to the applicant.
  - The originator must obtain loan options from a “significant number” of the creditors with whom it regularly does business. (That is deemed to be 3 or more, unless it “regularly” does business with less than 3, in which case it must get options from its one or two lending partners.)
  - The options must be for each type of loan the borrower expresses an interest in – fixed, variable, or reverse. The originator must have a good faith belief that the borrower would likely qualify for the options.
  - The options presented must include ones with a) the lowest interest rate, b) the lowest interest rate on a standard mortgage without risky terms,\textsuperscript{13} and c) the lowest dollar amount for origination or discount points or fees

\textsuperscript{11} It would allow bona fide third-party costs to be charged upfront, but no other upfront costs or fees. The regulator could waive this “no-cost loan.” Dodd-Frank §1403, adding new TIL §1639B(c)(2)(B).
\textsuperscript{12} Dodd-Frank § 1403, adding new TIL §1639B(c)(3).
\textsuperscript{13} No negative amortization, prepayment penalty, interest-only payments, balloon-payments during first 7 years, demand feature, shared equity, or shared appreciation. (For reverse mortgages, the lowest rate without a prepayment penalty, or shared equity or shared appreciation.)
Table 1: Comparison of Dodd-Frank originator compensation and new FRB UDAP rule on originator compensation

<table>
<thead>
<tr>
<th></th>
<th>Dodd-Frank §1403, adding new 15 USC §1639B(c)</th>
<th>Reg. Z, §226.36(d), as added 8/16/10.</th>
</tr>
</thead>
<tbody>
<tr>
<td>Timeline</td>
<td>Latest possible date for rules to be issued, or effective date if no rules, 18 months after transfer date (January 21, 2013).</td>
<td>Effective April 1, 2011</td>
</tr>
<tr>
<td>Covered transactions</td>
<td>Closed-end mortgages secured by a dwelling; (time-shares excluded)</td>
<td>Same</td>
</tr>
<tr>
<td>Definition of “originator”</td>
<td>Any person who, for direct or indirect compensation or gain, or in the expectation thereof, takes a residential mortgage application, assists a consumer in obtaining or applying for such a loan, or offers or negotiates the terms of such a loan, including those who advertise themselves as such; Creditors in table-funded transactions covered, and individual loan officer-employees of creditors. Otherwise, creditors excluded; as are servicers</td>
<td>A person who arranges, negotiates or otherwise obtains credit for another for compensation or other monetary gain, or in expectation thereof. Covers creditors in table-funded transactions, and loan-originating employees of creditors that meet definition. Does not apply to payments received by creditors for selling loans on secondary market.</td>
</tr>
<tr>
<td>Applies to both “person” paying the compensation and originator receiving the compensation</td>
<td>Yes</td>
<td>Yes</td>
</tr>
<tr>
<td>Nature of ban</td>
<td>Prohibits compensation based on terms of loan, other than principal</td>
<td>same; but further specifies that principal-based compensation must be a fixed percentage, though may be subject to maximum and minimum dollar amount</td>
</tr>
<tr>
<td>Dual-source compensation (i.e. combining direct payment from consumer with direct or indirect compensation from creditor or other person)</td>
<td>Prohibited</td>
<td>Prohibited</td>
</tr>
<tr>
<td>Effect on increasing rate as means of paying upfront costs through the rate</td>
<td>Rate trade-off permitted in true no-cost loans, subject to ban on receiving payment from both</td>
<td>Subject to ban against receiving direct compensation from consumer and creditor, can pay</td>
</tr>
</tbody>
</table>

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14 Dodd-Frank does not mandate rules implementing the originator compensation provision. If no implementing rules are issued, the provision would become effective January 21, 2013. But there unquestionably will be rules, and they will specify the effective date.

15 This is not explicit in Dodd-Frank, but the Board says that its coverage is consistent with Dodd-Frank in this respect. See FRB Final Rule on originator compensation practices, supplemental information at 34-35.

16 Exclusion is crafted for creditors who fund the transaction at consummation out of their own resources, including a bona fide warehouse line of credit. Reg. Z, 226.36(a)
<table>
<thead>
<tr>
<th>Remedy</th>
<th>Non-creditor originators – §1640 damages as available against creditor, but subject to cap of greater of actual damages or 3x total originator compensation plus costs &amp; attorneys fees; Creditors -- §1640 damages, including enhanced damages; Defense to foreclosure – damages available by way of recoupment, including against assignees and holder; amount of damages capped at amount available for affirmative claim (i.e. 3 years)</th>
<th>Regulatory enforcement</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>as available against creditor, but subject to cap of greater of actual damages or 3x total originator compensation plus costs &amp; attorneys fees; Creditors -- §1640 damages, including enhanced damages; Defense to foreclosure – damages available by way of recoupment, including against assignees and holder; amount of damages capped at amount available for affirmative claim (i.e. 3 years)</td>
<td>Private enforcement under TIL unclear; possibly little, if any, available under current law.¹⁷</td>
</tr>
</tbody>
</table>

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¹⁷ As a practical matter, this question will have implications only between April 1, 2011 and the effective date of the Dodd-Frank provisions regarding these issues, including the remedies.
Table 2: Comparison of Dodd-Frank anti-steering and new FRB UDAP rule on steering.

<table>
<thead>
<tr>
<th></th>
<th>Dodd-Frank §1403, adding new 15 USC §1639B(c)(3)</th>
<th>FRB UDAP rule, Reg. Z §226.36(e) (August 26, 2010)</th>
</tr>
</thead>
<tbody>
<tr>
<td>Timeline</td>
<td>Outside limit for final mandatory implementing rule, January 21, 2013 (18 months after transfer date of July 21, 2011); outside limit for effective date, 12 months after final (outside limit, January 21, 2014) [unlikely to take all that time.]</td>
<td>Effective 4/1/2011</td>
</tr>
<tr>
<td>Covered transactions</td>
<td>Closed-end mortgages secured by a dwelling (time-shares excluded)</td>
<td>Same</td>
</tr>
<tr>
<td>Covered persons</td>
<td>Any person who, for direct or indirect compensation or gain, or in the expectation thereof, takes a residential mortgage application, assists a consumer in obtaining or applying for such a loan, or offers or negotiates the terms of such a long, including those who advertise themselves as such. <strong>Note:</strong> There is no creditor exclusion to the anti-steering provision.</td>
<td>A person who arranges, negotiates or otherwise obtains credit for another for compensation or other monetary gain, or in expectation thereof. Covers creditors in table-funded transactions, and loan originating employees of creditors, if the employee meets the general definition.</td>
</tr>
<tr>
<td>Prohibited conduct</td>
<td><strong>Rule-making required to prohibit</strong></td>
<td>&gt;Originator may not steer consumer to a transaction based on fact that originator would receive greater compensation than other products the originator offered or could have offered. &gt;“Steering” means “advising, counseling or otherwise influencing a consumer to accept that transaction.” &gt;The transaction must have been consummated. No steering if the consumer does not get a loan from that originator. Reg. Z §226.36(e)(1)-1.</td>
</tr>
</tbody>
</table>

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18 Exclusion is crafted for creditors who fund the transaction at consummation out of their own resources, including a bona fide warehouse line of credit. Reg. Z, 226.36(a). For creditor-employee originators, who will be barred from receiving compensation based on loan terms under compensation rule, compliance with that provision satisfies the anti-steering rule if the loan consummated is with the creditor. If the employee forwards the application to another creditor, he or she must comply as a broker. Reg. Z §226.36(e)—2(ii).  
19 See Dodd-Frank §1401, definition of “residential mortgage loan” and second question, above.  
20 As defined by TIL under Dodd-Frank, see Dodd-Frank §1412.
| **“Safe harbor”** | **None specified in statute** | **> originator must obtain loan options from “significant number” of creditors with which it regularly does business for each loan type in which consumer expresses interest; > options must include loans with lowest interest rate; lowest interest rate w/o riskier terms(as specified in rule); lowest dollar amount of origination costs; and > originator must have good faith belief the consumer likely qualifies for these options** |
| **Remedy** | **Non-creditor originators – §1640 damages as available against creditor, but subject to cap of greater of actual damages or 3x total originator compensation plus costs & attorneys fees; Creditors -- §1640 actual & statutory damages, costs & attorneys fees (no enhanced damages, and no special foreclosure defense)** | **Regulatory enforcement – Private enforcement under TIL unclear**

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21 See note 17, above.
American Bar Association
Business Law Section
Consumer Financial Services Committee

Summary of Developments
Since the Annual Meeting of the

Housing Finance and RESPA Subcommittee

John Kromer
BuckleySandler LLP
Chair

Sanford Shatz
Attorney at Law
Vice-Chair

Winter Meeting
January 10, 2011

The Subcommittee would like to thank BuckleySandler LLP for permitting us to use materials from their weekly newsletter InfoBytes for this update, and the Subcommittee would like to thank xxx for the use of materials from their client updates.
FEDERAL ISSUES

President Signs Financial Regulatory Reform Into Law. On July 21, President Obama signed into law H.R. 4173, the Dodd-Frank Wall Street Reform and Consumer Protection Act (the Law). That passage completes the realization of a major overhaul of financial regulation, including a profound change to consumer financial services regulation. The final legislation includes all of the various pieces of the regulatory reform package initially presented to Congress by the Obama Administration over a year ago. Two titles in particular, Title X, which creates the Bureau of Consumer Financial Protection (BCFP), and Title XIV, which implements the Mortgage Reform and Anti-Predatory Lending Act, will have far-reaching effects on institutions engaged in consumer financial services. Aside from these two titles, the Law will enhance and overhaul the regulatory structure applicable to numerous different aspects of the financial system, including thrifts, industrial loan companies, and other non-bank banks, over-the-counter derivatives, securities brokers and dealers and other securities intermediaries, and rating agencies. The Law also creates a new structure to monitor and regulate systemic risk issues, including entities considered "too big to fail."

Federal Agencies Issue Final SAFE Act Rules; Letter Urges HUD to Issue SAFE Act Guidance. On July 28, federal agencies issued final rules regarding the registration of employees who act as mortgage loan originators (MLOs) at banks, savings associations, Farm Credit System institutions, credit unions, and certain of their subsidiaries (collectively, Banking Institutions), as required by the Secure and Fair Enforcement for Mortgage Licensing Act of 2008 (SAFE Act). The final rule was issued by the Office of the Comptroller of the Currency, Board of Governors of the Federal Reserve System, Federal Deposit Insurance Corporation, Office of Thrift Supervision, Farm Credit Administration, and National Credit Union Administration (the Federal Agencies). The SAFE Act requires MLOs employed by Banking Institutions to register with the Nationwide Mortgage Licensing System and Registry (NMLS&R). The Federal Agencies' final rule generally defines an MLO as an individual who (i) takes a residential mortgage loan application and (ii) offers or negotiates terms of a residential mortgage loan for compensation or gain. Notably, this definition of is more narrow than the definition of an MLO contained in the Dodd-Frank Wall Street Reform and Consumer Protection Act. The final rule excludes from its registration requirement both individuals engaged in mortgage loan modifications and assumptions as well as individuals who service mortgage loans, provided that such individuals do not also originate new loans. The final rule will be effective October 1, 2010; however, the Federal Agencies do not expect that the NMLS&R will be ready to accept MLO registration applications before January 28, 2011. MLO employees of Banking Institutions will have 180 days to register and obtain unique identifiers after the NMLS&R begins accepting MLO applications. For a copy of the final rule, please see http://www.federalreserve.gov/newsevents/press/bcreg/bcreg20100728a1.pdf. Additionally, on July 22, Representatives Barney Frank (D-MA) and Spencer Bachus (R-AL), the Chairman and Ranking Member of the House Financial Services Committee, issued a letter to the Secretary of the U.S. Department of Housing and Urban Development (HUD) urging HUD to issue guidance to states regarding implementation of the SAFE Act. The letter also urges HUD to provide guidance addressing the concerns of manufactured housing retailers and advocates a de minimis standard for registration and license requirements under the SAFE Act. For a copy of the letter, please see http://www.buckleysandlerr.com/Frank_July_22.pdf.

HUD Announces New Refinancing Program for "Underwater" Borrowers. On August 6, the U.S. Department of Housing and Urban Development announced details regarding the Federal Housing Administration (FHA) Short Refinance option, which provides a refinancing opportunity for responsible homeowners who are in negative equity positions. Beginning on September 7, 2010, FHA will offer eligible non-FHA borrowers the opportunity to refinance into a new FHA-insured mortgage. In order for a borrower to be eligible, (i) the existing first lien holder must write off at least ten percent of the unpaid principal, (ii) the borrower must be current on the mortgage to be refinanced and occupy the subject property, (iii) the borrower must meet standard FHA underwriting requirements and re-subordinate existing subordinated mortgages on the property, and (iv) the refinanced FHA-insured first lien must have a loan-to-value ratio of no more than 97.75%. Additional eligibility requirements are stated in HUD's mortgagee letter discussing the program, which is available at http://www.hud.gov/offices/ adm/hudclips/letters/mortgagee/files/10-23ml.pdf. For a copy of the press
FHA to Eliminate Unlimited Combined Loan-to-Value. On August 6, the U.S. Department of Housing and Urban Development (HUD) announced that the Federal Housing Administration (FHA) is eliminating the unlimited Combined Loan-to-Value (CLTV) as of September 7, 2010. Moving forward, with the exception of streamline refinance transactions, the combined amount of the FHA-insured first mortgage and any subordinate lien may not exceed the applicable FHA loan-to-value ratio and geographical maximum mortgage amount. For a copy of the mortgagee letter, please see http://www.hud.gov/offices/adm/hudclips/letters/mortgagee/files/10-24ml.pdf.

FTC issues proposed Mortgage Advertising Rules. The Federal Trade Commission issued a proposed rule would prohibit all material misrepresentations in advertising about consumer mortgages, allow civil penalties, and allow enforcement by the states. The Federal Register Notice is available at: http://www.ftc.gov/os/fedreg/2010/september/100922mortgageadvertising.pdf. The proposed rule lists 19 examples of misrepresentations about fees, costs, obligations, and other aspects of credit that would be violations. However, the proposed rule does not include any advertising disclosure requirements. The proposed rule would apply to: (1) mortgage lenders, brokers, and servicers; (2) real estate agents and brokers; (3) advertising agencies; (4) home builders; (5) lead generators; (6) rate aggregators; and (7) other entities under the FTC’s jurisdiction. As you may recall, currently under the FTC Act, the Commission may bring actions against those under its jurisdiction who engage in deceptive mortgage advertising, and seek injunctive relief against them. Under the proposed rule, the FTC would be able to bring actions against violators to seek civil penalties in addition to injunctions. The proposed rule would also allow the states to bring actions for civil penalties for violations of the rule. The FTC is seeking comments about the proposed rule’s costs and benefits, including whether any alternatives would adequately protect consumers at a lower cost. The FTC seeks public input on whether there are advertising disclosures that the Commission should include in the rule. The FTC also seeks public comment on whether the rule should include a provision that prohibits persons from providing substantial assistance to those who violate the rule.

CFPB Transfer Date Set for July 2011; Elizabeth Warren to Lead CFPB Formation Effort. On September 20, 2010, the Treasury Department announced that July 21, 2011 will be the "designated transfer date" on which certain authorities will be transferred to the Bureau of Consumer Financial Protection (the "CFPB") pursuant to the Dodd-Frank Wall Street Reform and Consumer Protection Act (the "Dodd-Frank Act").

On that date, among other things, the CFPB will:
· Receive its full authority to prescribe rules or issue orders pursuant to any federal consumer financial law (as defined in the Dodd-Frank Act);
· Officially receive staff transfers from the other agencies; and
· Become responsible for the supervision of depository institutions with assets of greater than $10 billion.

The Federal Register notice also states that, prior to July 21, 2011, the CFPB will begin conducting research on consumer financial products and services, develop its nationwide consumer complaint response center, and begin to plan implementation of its risk-based supervision of nondepository covered persons. In addition, the CFPB is planning a roundtable discussion to begin the process of merging Truth in Lending and RESPA disclosures.

The establishment of the "designated transfer date" also locks in the timeline for implementing the Dodd-Frank Act's mortgage reforms contained in Title XIV. For Title XIV provisions where regulations are required to implement the provision, the Board or CFPB must issue its final rules by January 21, 2013. The rules must take effect within one-year of issuance, meaning that compliance with all rules would be required at the latest by January 21, 2014. If the agencies fail to issue implementing regulations, the statutory language will take effect on January 21, 2013.
In addition to announcement of the designated transfer date, the President also appointed Professor Elizabeth Warren of Harvard Law School as Assistant to the President and Special Advisor to the Secretary of the Treasury on September 17 (as reported in InfoBytes, September 17, 2010). Professor Warren was widely regarded as a top candidate to be nominated as Director of the BCFP. Until she took the new position, she was the Chair of the Congressional Oversight Panel (COP) that Congress formed to oversee Treasury's TARP efforts. The COP has issued numerous reports under Professor Warren's leadership. One such report that may provide clues in regard her views and policy preferences is the COP report on the foreclosure crisis. See http://cop senate.gov/documents/cop-030609-report.pdf. At this point, no Director has been named and it is unclear when the President will formally nominate the Director. In the meantime, Ms. Warren will play the leading role within the administration in standing up the CFPB without having to be confirmed by the Senate.

The Federal Register notice announcing the designated transfer date can be found at: http://www.buckleysandler.com/Federal_Register_Notice_Designated_Transfer_Date.pdf

HUD Issues Volume 2 of its RESPA Roundup. On September 24, the Department of Housing and Urban Development (HUD) published volume 2 of its RESPA Roundup. In this volume, HUD reminded Veterans Administration (VA) lenders that loan applications for VA insured mortgage loans taken on or after October 1, 2010, must include an attachment to the HUD-1 itemizing (a) seller, lender, mortgage broker, or real estate agent/broker credits and (b) title services charges. Additionally, in this volume, HUD resolved questions regarding the disclosure of payments to subordinate lien holders on the HUD-1 by affirming its view that all payments made in connection with a RESPA-covered transaction must be disclosed on the HUD-1/1A Settlement Statement. For a copy of volume 2 of the RESPA Roundup, please see http://portal.hud.gov/portal/page/portal/ver-1/HUD/federal_housing_administration/docs/RESPARoundupv2.pdf.

STATE ISSUES

New York State Banking Department Adopts New Regulations to Regulate Mortgage Servicers. On August 10, the New York State Banking Department adopted regulations (Part 419 of the New York State Banking Department Superintendent's Regulations) pertaining to mortgage loan servicers. Among other things, the regulations:

- Require servicers to pursue appropriate loss mitigation efforts with homeowners to avoid preventable foreclosures and establish standards for the handling of such efforts;
- Require servicers to make quarterly reports to the New York State Banking Department;
- Impose certain duties on servicers, such as instituting a duty of fair dealing, requiring the prompt crediting of payments, limiting the amount of late fees that can be charged, and prohibiting servicers from placing insurance on mortgaged property without a borrower's knowledge; and
- Require servicers to create procedures to respond to borrower inquiries and complaints in a prompt and appropriate manner, clearly disclose payments made on taxes and insurance premiums, and provide borrowers with clear and accurate communications on their accounts.

The regulations become effective October 1, 2010. For a copy of the regulations, please see http://www.banking.state.ny.us/legal/ar419tx.htm.

Massachusetts Enacts Law Delaying Foreclosures, Restricting Evictions, Implementing Reverse Mortgage Counseling. On August 7, Massachusetts Governor Deval Patrick signed into law S.B. 2407, "An Act To Stabilize Massachusetts Neighborhoods" (the Act). Under the Act, before a creditor may foreclose on a residential mortgage, it must provide the borrower 150 days to cure any default, unless the creditor can certify that (i) it met with borrower in a good faith attempt to resolve the issue, or (ii) the borrower did not respond to the creditor's written communications within 60 days. If the creditor can make either certification, then the cure period is reduced to 90 days. Additionally, the Act requires reverse mortgage loan applicants to receive in-person counseling if the applicant's income is less than 50% of the area median income and the applicant has less than $120,000 in assets (excluding the home). Finally,
the Act prohibits creditors who have recently foreclosed on a residential property from evicting tenants without just cause, as defined by the Act, unless the creditor executes a binding purchase and sale agreement with a bona fide third party who will purchase the property. For a copy of the Act, please see http://www.mass.gov/legis/bills/senate/186/st02pdf/st02407.pdf.

Pennsylvania Issues Statement of Policy Regarding Mortgage Loan Modifications. Pennsylvania's Department of Banking added a statement of policy regarding mortgage loan modifications to the Pennsylvania Code, the Department of Banking Code and the state's Consumer Discount Company Act (CDCA). The statement of policy provides guidance to companies involved in negotiating mortgage loan modifications with consumers under the state's Mortgage Licensing Act and the CDCA; the Department noted that the intent behind the statement of policy was to protect consumers from potentially inexperienced or unscrupulous companies. Specifically, the statement of policy encourages companies to be approved as, or employed by, a government approved counselor. It also encourages companies to verify a borrower has received counseling services regarding mortgage loan modifications from government approved counselors. It requests companies inform borrowers of alternative options other than mortgage loan modifications. Finally, the statement of policy discourages companies from engaging in certain "improper activities" which include: (1) advising consumers to stop making regularly scheduled payments on an existing mortgage loans prior to a completed loan modification; (2) charging advance fees for a loan modification; or (3) negotiating a loan modification which the company knows or has reason to believe the borrower will not be able to afford. To see the statutory text, please see http://www.pacode.com/secure/data/010/chapter47/chap47toc.html.

FORECLOSURE AND MODIFICATION ISSUES

Fannie Mae Announces Changes to Servicing Guide. Fannie Mae recently announced several changes to its Servicing Guide in Announcement SVC-2010-06. The announcement requires (i) quality assurance program and training for default-related activities, (ii) written policies regarding inbound calls for customer service, collections, and foreclosure prevention, and (iii) the use of manned calls for outbound calls related to collections, workout solicitations, and follow-up (i.e., automated calls are insufficient for these activities). Servicers must implement these changes no later than January 1, 2011. Before that date, servicers must use "diligent efforts" to implement the changes; Fannie Mae may also direct servicers to comply with the changes at an earlier date. The announcement also notes several revisions to the Servicing Guide that became effective as of April 28, 2010, including (i) guidelines concerning the timing and types of letters and notices that must be sent to borrowers (e.g., payment reminders, foreclosure prevention solicitations, etc.), (ii) the methods and timing of the methods that servicers must use for contacting borrowers, (iii) procedures that must be followed prior to referral to foreclosure or sale of the property (e.g., alerting borrowers of payment changes resulting from adjustable-rate mortgage resets), and (iv) requirements pertaining to bankruptcy proceeding issues (e.g., promptly notifying Fannie Mae of borrower attempts to "cramdown" a Fannie Mae mortgage loan). For a copy of the announcement, please see https://www.efanniemae.com/sf/guides/ssg/sntrps/pdf/2010/svc1006.pdf. For a copy of the revised Servicing Guide sections, please see https://www.efanniemae.com/sf/guides/ssgcg/svc042810.pdf.

Revised FAQs on HAMP Supplemental Directives Available. On July 15, a revised Frequently Asked Questions (FAQs) document, directed at servicers participating in the Home Affordable Modification Program (HAMP), was released to clarify existing Supplemental Directives issued for HAMP. For a copy of the revised FAQs, please see https://www.hmpadmin.com/portal/docs/hmp_servicer/hampfaqs.pdf.

Maine Court Holds MERS Lacks Standing To Foreclose In Maine. On August 12, the Maine Supreme Judicial Court held that Mortgage Electronic Registration Systems, Inc. (MERS) - the "nominee" for the lender under the mortgage - was not the proper party to commence a foreclosure action against delinquent borrowers. MERS, Inc. v. Saunders, No. 09-640, 2010 ME 79 (ME Sup. Jud. Ct. Aug. 12, 2010). In this case, the plaintiffs executed a residential mortgage that named MERS as a nominee for the lender. After the plaintiffs defaulted on their loan, MERS filed a complaint seeking to foreclose. The plaintiffs opposed, arguing that MERS lacked standing because it could not show that it was the holder of the mortgage. The Supreme Judicial Court agreed, holding that, because MERS was a "nominee" for the lender and not a "mortgagee," it lacked standing to foreclose on the mortgage under Maine law. However, the court also held that the substitution of the bank for MERS during the foreclosure proceedings was
proper. Nonetheless, the court found that the lower court's grant of summary judgment on the foreclosure proceeding was improper because the record did not establish what property owned by the borrowers actually secured the mortgage. For a copy of the opinion, please see http://www.buckleysandler.com/MERS_v_Saunders.pdf.

**Fannie Mae Requires Pre-Filing Mediation for Florida Mortgage Loans.** On August 31, Fannie Mae issued Announcement SVC-2010-13, which requires servicers to participate in pre-filing mediation for certain Florida mortgage loans, using an attorney from Fannie Mae's Retained Attorney Network. Among other provisions, the new policy: (i) accelerates the timeline for referral to retained attorneys following delinquency, (ii) requires servicers to refer delinquent mortgages to retained attorneys for mediation before initiation of foreclosure proceedings, (iii) requires servicers to cooperate in and attend mediation proceedings, (iv) caps mediation and attorneys' fees, (v) provides for $3,000 incentive payments to borrowers who complete short sales or deeds-in-lieu of foreclosure as a result of mediation, and (vi) reserves Fannie Mae's right to assess compensatory fees on servicers for delays or failure to comply with the policy. The new policy will be implemented by January 1, 2011, but servicers must designate and send liaison team information, and retained attorneys must begin newly referred screening loans for mediation by September 15, 2010. For a copy of Announcement SVC-2010-13, please see https://www.efanniemae.com/sf/guides/ssg/annltrs/pdf/2010/svc1013.pdf.

**Fannie Mae Rolls Out Second Lien Modification Program Requirements.** On September 21, Fannie Mae set forth guidelines concerning its Second Lien Modification Program which was designed to work in conjunction with the Home Affordable Modification Program (HAMP). While there are a number of new detailed requirements, in general, under the new guidelines, when a borrower's first lien is modified under HAMP, the servicer of a Fannie Mae second-lien mortgage must offer to modify the borrower's second lien. In addition, if the first lien is modified under HAMP, any outstanding foreclosure actions on the borrower's second lien must be dismissed. For a full discussion of the Fannie Mae second lien HAMP program, please see https://www.efanniemae.com/sf/guides/ssg/annltrs/pdf/2010/svc1014.pdf.

**Cal App Says Judgment in Unlawful Detainer Action Bars Challenge to Foreclosure.** California appellate court recently affirmed a trial court's judgment against homeowners whose property had been sold in nonjudicial foreclosure and who had entered into a stipulated judgment in an eviction and unlawful detainer action. In so doing, the court held that the homeowner's attempt to bring this subsequent action against the purchaser, beneficiary and trustee as to the subject property was barred by the stipulated judgment, as the unlawful detainer judgment had a claim preclusive effect in the action challenging the validity of the purchaser's title. A copy of the opinion is available at: http://www.courtinfo.ca.gov/opinions/documents/B221470_PDF. When plaintiffs became delinquent on their refinance home mortgage loan, a notice of default was served and recorded on the property. The notice identified a different beneficiary and trustee from those that were identified in the original deed of trust, but no substitution had been served or recorded showing the new trustee/beneficiary. A substitution was recorded evidencing the change in trustee before the nonjudicial foreclosure sale, but there was no recording showing substitution of the beneficiary until two months after the new trustee conducted the nonjudicial foreclosure sale. The purchaser at the sale instituted an eviction and unlawful detainer action, and the former homeowners responded alleging that the foreclosure sale was invalid due to improper notice, as well as unspecified "irregularities in the sale." A stipulated judgment was entered in the unlawful detainer action, and the former homeowners then filed this action against the purchaser, the new trustee and the new beneficiary, asserting claims for, among other things: declaratory relief, quiet title and willful wrongful foreclosure. The trial court sustained defendants' demurrer without leave to amend and this appeal followed. The appellate court held that the demurrer was properly sustained without leave to amend, because the stipulated judgment in the unlawful detainer action barred this action. More specifically, the court held that the "stipulated judgment in the related unlawful detainer action brought by [purchaser] against plaintiffs was res judicata as to plaintiffs' claims in this action which all arose from the alleged invalidity of the foreclosure sale." Because the court ruled that this ground was "dispositive," it did not consider whether there were also defects in the foreclosure sale. The court acknowledged that a judgment arising from an unlawful detainer action generally is given limited res judicata effect, it pointed to the "qualified exception to the rule that title cannot be tried in unlawful detainer that is contained in Code of Civil Procedure section 1161a, which extends the summary eviction remedy..."
Assignment of Deed of Trust by MERS to Note Holder After Bankruptcy Held Valid. On September 20, the U.S. Bankruptcy Court for the Western District of Missouri upheld the validity of the transfer of a deed of trust by Mortgage Electronic Registration Systems, Inc. (MERS) to Aurora Loan Services, LLC (Aurora) after the borrower filed a Chapter 7 bankruptcy case. In In re: Tucker, No. 10-61004 (W.D. Mo. September 20, 2010). The trustee in bankruptcy raised two objections to Aurora's Motion for Relief from Automatic Stay (i) that the note (which was issued to New Century Mortgage Corporation (NCMC)) and the deed of trust (which was registered in the name of MERS as nominee for NCMC) were split as of the date of origination and remained split as of the date the Chapter 7 proceeding was filed and therefore the deed of trust was unenforceable; and (ii) that MERS assigned the deed of trust to Aurora after the bankruptcy was filed and thus violated the automatic stay. The court rejected both arguments. First, the court found that MERS, as nominee for the original lender, was acting as an agent of the original lender and its successors who were members of MERS. Aurora was a member of MERS, and Aurora was the holder of the note at the time of the bankruptcy. Under Missouri law, Aurora was the holder of both the note and the deed of trust that was in the name of its agent. Therefore, ownership of the note and deed of trust was not split, and Aurora was entitled to foreclose under the deed trust. Second, the assignment by MERS to Aurora of the deed of trust after bankruptcy was filed did not violate the automatic stay because no action was taken against the property. On the date of bankruptcy, MERS, as nominee for the note holder, held a valid lien on the property. Assignment of the deed of trust did not violate the stay because the lien was already perfected. Therefore, the court granted Aurora's Motion for Relief from the Automatic Stay. For a copy of the opinion, please see [http://www.buckleysandler.com/In_re_Tucker.pdf](http://www.buckleysandler.com/In_re_Tucker.pdf).

7th Cir Confirms Possession of Properly Indorsed Note Provides Standing to Foreclose, and Use of Lost-Note Affidavits, Under Illinois Law. In a dispute regarding damages following an incomplete sale of a mortgage loan, the U.S. Court of Appeals for the Seventh Circuit recently confirmed that the possession of a properly indorsed note provides standing to foreclose, and confirmed the use of lost-note affidavits, under Illinois law. A copy of the opinion is available at: [http://www.ca7.uscourts.gov/tmp/1O0W3Z5B.pdf](http://www.ca7.uscourts.gov/tmp/1O0W3Z5B.pdf). The purchaser/assignee of a mortgage loan tried to foreclose on a mortgage, but its action was dismissed in state court because it could not produce the original note. Because the assignee could not produce either an original or a copy of the underlying note in a subsequent foreclosure action, the property owners in that action contended that the assignee was not a mortgagee entitled to foreclose. The trial court agreed and entered a directed verdict against the assignee. The Illinois Appellate Court affirmed, concluding that the assignee "had not proved it was a noteholder because it never received the note from [the assignor] or otherwise possessed it and therefore was not entitled to foreclose upon the mortgage." This breach of contract lawsuit against the assignor followed. The district court entered summary judgment in favor of the assignor, this appeal followed, and the Seventh Circuit reversed. In reversing the district court, the Seventh Circuit addressed the following two questions: (1) whether the parties' agreement required the assignor to deliver the original or a copy of the note secured by the mortgage when it sold the mortgage; and (2) whether the assignor's failure to deliver an original or a copy of the note caused the assignee's foreclosure action to fail. As to the first question, the Court ruled that the district court mischaracterized the issue of whether the obligation to transfer physical possession of the note — or at least a copy — was part of the parties' agreement as a question of law, when really it is a question of fact. Consequently, the Court held that the assignee had met its burden of producing "enough evidence to convince a reasonable fact finder that the parties agreed [the assignor] would
transfer the original or a copy of the note." Accordingly summary judgment was improper, because "evaluating the weight of the evidence is a task for a jury, not a judge." As to the issue of causation, the Court held that "had [the assignor] delivered the original or a copy of the note, [the assignee] would in turn have been able to produce it in the foreclosure proceeding and thus fill the evidentiary void on which the Illinois trial and appellate courts rested their adverse decisions." The Court reached this conclusion because, pursuant to Illinois Mortgage Foreclosure Law, "[g]enerally speaking, only a mortgagee can foreclose on property, and a mortgagee must (at a minimum) be 'the holder of an indebtedness . . . secured by a mortgage'" and under the Uniform Commercial Code, adopted by Illinois, "a key requirement to being a holder is physical possession of the note secured by the mortgage." The Court rejected the assignor's arguments that the assignee did not use all reasonable means to mitigate its damages (e.g., requesting a lost-note affidavit) or that the assignee could have filed a personal-judgment action against the property owners. In so doing, the Court noted that "[a]lthough a few courts have allowed foreclosure to proceed based on a lost-note affidavit, the affidavits in these cases also attached a copy of the underlying original note" and "[w]e are not aware of any case in Illinois in which a lost-note affidavit by itself was enough to prove ownership of the underlying debt." The Court pointed out here that the assignor's argument was a "red herring," especially given that there was a gap in the chain of title in the matter.

Freddie Mac Requires Servicers to Review Policies Relating to Execution of Affidavits Used in Foreclosure Proceedings by October 18, 2010. On October 1, Freddie Mac issued an Industry Letter, requiring all Freddie Mac servicers to review their policies, procedures, and processes related to the execution of affidavits used in foreclosure proceedings by October 18, 2010. The review must include all Freddie Mac foreclosures that are either pending or within the applicable judgment review period for the relevant jurisdiction. Servicers must specifically determine whether (i) the servicer's policies, procedures, and processes are (and have been) adequate to ensure that signed affidavits are in compliance with applicable law (e.g., individuals signing the affidavits had personal knowledge of the facts, signatures were properly notarized, etc.), and (ii) the servicer's employees and/or third parties responsible for executing affidavits followed the servicer's policies, procedures, and processes. A servicer must immediately notify Freddie Mac if the review "creates any question" as to whether the servicer maintained adequate policies, procedures or processes and whether they were followed by employees and/or third parties; moreover, the servicer must remedy any deficiencies to ensure compliance with applicable law and Freddie Mac's servicing requirements. For a copy of the Industry Letter, please see http://www.freddiemac.com/sell/guide/bulletins/pdf/litr100110.pdf

Texas AG Identifies Suspect or Illegal "Robosigning" Activities. Among many other elected officials joining the media blitz regarding so-called "robosigning" activities, Texas Attorney General Greg Abbott's office sent a demand letter to 30 of the largest mortgage loan servicers, calling for an immediate halt on all foreclosures, all sales of properties previously foreclosed upon and all evictions of persons residing in previously foreclosed upon properties, until companies have completed a review of their processes, including whether employees or agents "robosigned" affidavits and other documents which were recorded in the State of Texas. The demand letter also requires the servicers to provide the Texas AG with among other things the names of affiants, a list of affected Texas foreclosures, and the remedial measures being taken. The Texas AG posted a sample of one of the letters on his website: http://www.oag.state.tx.us/newspubs/releases/2010/100510_sample_bank.pdf

The demand references the following conduct as suspect or illegal "robosigning" activities: (1) signing thousands of documents per month; (2) signing documents without reading them; (3) signing affidavits which falsely claim personal knowledge of facts; (4) signing affidavits which falsely claim the affiant reviewed the attached documents; (5) notarizing documents prior to signing by the signee; (6) notarizing documents when the signee was not present before the notary; and/or (7) filing documents with records attached that did not correctly reflect loan payments, charges and advances. The Texas AG also requires the servicers to suspend all foreclosures, all sales of properties previously foreclosed upon, and all evictions of persons residing in previously foreclosed upon properties, until the servicers:

1. Identify all employees or agents who "robosigned," as described above, affidavits and other documents which were recorded in the State of Texas;
2. Identify all foreclosures in the State of Texas in connection with which an affidavit or other document with the characteristics listed above was used as part of the foreclosure process;

3. Describe the measures taken by the servicer to ensure that affidavits and other documents are executed in compliance with Texas law;

4. Describe the measures taken by the servicer to comply with the Servicemembers Civil Relief Act in connection with foreclosures;

5. Identify all other loan servicers and/or MERS for whom the above described employees or agents signed affidavits;

6. Provide assurances that all of the servicers foreclosures of properties in the State of Texas which relied upon documents with the characteristics described above will be rectified and the procedures by which they will be rectified;

7. Provide assurances that all future Texas foreclosures by the servicer will be done with legally correct documentation; and

8. Identify all employees or agents who are or who signed as officers of other non-related entities.

Cal App Holds No Private Right of Action Under Cal. Civ. Code §§ 2923.52 and 2923.53. The Court of Appeal for the State of California, Fourth District, recently held that there is no private right of action for violation of Cal. Civ. Code §§ 2923.52 and 2923.53. A copy of the opinion is available at: http://www.courtinfo.ca.gov/opinions/documents/G043544.PDF. This matter involves a California foreclosure, where the lender purchased the collateral at sale. The borrowers filed a writ proceeding with the appellate court to stay the eviction pending further order. The borrowers attempted among other things to invalidate the foreclosure sale, alleging violations of Cal. Civ. Code §§ 2923.52 and 2923.53. As you may recall, California Civil Code section 2923.52 imposes a 90-day delay in the normal foreclosure process, and California Civil Code section 2923.53 allows for an exemption to that delay if lenders have loan modification programs that meet certain criteria. Enforcement of sections 2923.52 and 2923.53 is committed to regulatory agencies, which have implicit power to terminate the license of any company whose program is not in compliance. Section 2923.53, subdivision (h), makes enforcement a matter of losing a license. The Court held that, "[u]nlike section 2923.5 as construed by this court in Mabry v. Superior Court (2010) 185 Cal.App.4th 208 (Mabry), neither section 2923.52 or section 2923.53 provides any private right of action, even a very limited one as this court found in Mabry." In the words of the Court, "[n]ot only is there no express unmistakable private right to sue, there is a virtually unmistakable intent not to allow a private right to sue." The borrowers also sought to invalidate the foreclosure sale under Cal. Civ. Code § 2923.54. However, the Court noted that "Subdivision (b) of that statute is clear that: 'Failure to comply with Section 2923.52 or 2923.53 shall not invalidate any sale that would otherwise be valid under Section 2924f.'" The Court rejected the borrowers' argument that the statute does not apply to lenders who themselves buy the property at foreclosure, i.e., to lenders who cannot claim the status of bona fide purchasers, because any claim which the borrowers might have to invalidate the foreclosure sale based on sections 2923.52 and 2923.53 necessarily entails a private right of action which the statutes do not give them. Because the borrowers' claim for relief against the impending eviction rested entirely on alleged violations of statutes which the Court held do not afford them any private right of action, the stay of the eviction was discharged, and the borrowers' petition for the requested writ was denied.

FEDERAL COURTS

California Federal Court Holds Qualified Written Request Must Identify "Servicing Error." On June 28, in an unpublished opinion, the U.S. District Court for the Eastern District of California held that a mortgage borrower's letter to her loan servicer was not a "qualified written request" (QWR) within the meaning of the Real Estate Settlement Procedures Act (RESPA) because it did not pertain to a "servicing error." Gates v. Wachovia Mortgage, No. 09-cv-2464, 2010 WL 2606511 (E.D. Cal. June 28, 2010). In Gates, the plaintiff borrower obtained a mortgage loan from the defendant's predecessor. A year later, she sent
the defendant a letter (i) seeking information about who then owned the obligation, (ii) seeking a statement of payments made on the loan, and (iii) alleging that "the loan being serviced is defective." The borrower alleged that the letter constituted a QWR and that the servicer's failure to reply constituted a violation of RESPA. The court disagreed, holding that while the plaintiff's requests pertained to the loan, the letter was not a QWR because it did not identify a "servicing error" and did not put the servicer on notice of a servicing error. As a result, the court dismissed the plaintiff's RESPA claim with prejudice. For a copy of the opinion, please see http://www.buckleysandler.com/Gates_v_WM.pdf.

South Carolina Federal Court Holds No Private Right of Action under RESPA for Failure to Provide Information Booklet, GFE. On July 22, the U.S. District Court for the District of South Carolina held that there is no private right of action for an alleged failure to provide the information booklet and good faith estimate (GFE) required by the Real Estate Settlement Procedures Act (RESPA). Harris v. Sand Canyon Corp., No. 2:08-CV-3692, 2010 WL 2902771 (D.S.C. July 22, 2010). In Harris, the plaintiffs alleged, among other things, that the defendant mortgage company violated RESPA Section 2604(c) by failing to provide the plaintiff borrowers with an information booklet and GFE prior to the consummation of their mortgage loan transaction. The mortgage company moved for summary judgment, arguing that RESPA does not provide a private right of action for such claims. Acknowledging that the Fourth Circuit has not decided this question, the court joined other district courts within the Fourth Circuit, and other federal courts of appeal, to hold that there is no private right of action under RESPA Section 2604(c). The court reasoned that the section does not explicitly authorize a private right of action and that Congress had previously eliminated a private right of action under this section. For a copy of the opinion, please see http://www.buckleysandler.com/Harris_v_Sand_Canyon_Corp.pdf.

Pennsylvania Federal Court Finds Servicer Did Not Violate RESPA's Requirement to Respond to a Qualified Written Request. On August 9, the U.S. District Court for the Eastern District of Pennsylvania found that the defendant servicer's written response to a borrower's inquiry concerning a loan modification did not violate its duties under the Real Estate Settlement Procedures Act (RESPA). Vassalotti v. Wells Fargo Bank, N.A., 2010 WL 3168065, No. 08-5574 (E.D. Pa. Aug. 9, 2010). In this dispute, the plaintiff borrower, behind on her mortgage payments, entered into a loan modification agreement with the servicer whereby the servicer added the unpaid amounts due, including all applicable interest and fees, to the borrowers loan, thereby increasing its overall balance. The loan modification agreement did not cure the deficit in the borrower's escrow account which subsequently increased after the modification. The borrower fell behind on her escrow payments and wrote to the servicer, claiming that the escrow amount should have been wiped out as part of the loan modification agreement, as per her understanding. The servicer responded by letter and stated that the loan modification agreement "did not include your escrow shortage." The borrower, disagreeing with the servicer's interpretation of the modification agreement and brought suit, alleging, among other things, a violation of the RESPA for providing an incorrect, and accordingly, insufficient, response to plaintiffs written request concerning her loan modification. The court granted the servicer's motion to dismiss, holding that section 2605(e)(2)(B) of RESPA only requires that the loan servicer provide "a statement of the reasons for which the servicer believes the accounting is correct." As the court noted, "[a] reasonable explanation of the servicer's belief is sufficient, even if it is later determined that the belief is erroneous." Here, both parties disagreed as to whether the loan modification covered the escrow amount. However, the servicers response to the borrowers inquiry, while potentially inaccurate, did not violate RESPA's procedural requirements which mandate a servicer responds to a borrower's qualified written request. The borrower also brought claims under (1) the Fair Credit Reporting Act, for providing inaccurate information to the credit reporting agencies, and (2) Pennsylvania's Unfair Trade Practices and Consumer Protection Law for deceptive acts. The court found the borrower sufficiently plead these allegations and denied the servicer's motion to dismiss with respect to those counts. For a copy of the opinion, please see http://www.buckleysandler.com/Vassalotti_v_Wells_Fargo_Bank.pdf

STATE COURTS

Washington State Supreme Court Holds HOLA Does Not Preempt Allegation of Impermissible Reconveyance Fees. On June 24, the Washington Supreme Court held that the Home Owners' Loan Act (HOLA) and Office of Thrift Supervision (OTS) regulations do not preempt a borrower's claim challenging
fax and notary fees to secure the reconveyance of title when the claim is based on the terms of a deed of trust. McCurry v. Chevy Chase Bank, F.S.B., No. 81896-7, 2010 WL 2521772 (Wash. June 24, 2010). In McCurry, the borrowers, who sued on behalf of two similarly situated classes, conveyed a deed of trust to the lender. The payoff statement included a $20 fax fee and a $2 notary fee. The borrowers argued that the deed of trust did not permit such fees, thereby resulting in the lender's unjust enrichment, and that the charging of the fees violated the Washington Consumer Protection Act (WCPA). The lender moved to dismiss on the grounds that HOLA and OTS regulations preempted state laws that dictate the type and nature of loan-related fees a lender can charge. The Washington Supreme Court, sitting en banc, noted that whether the lender was precluded from charging fax and notary fees under the terms of the deed of trust was a matter of contract law. The court concluded that state contract law requires the parties to adhere to the terms of their contracts, and the effect this has on lending operations is "unintended, ancillary, and subordinate to the purpose of the contract law," and is therefore "incidental." As such, the court ruled in favor of the borrowers, finding that neither the WCPA nor state contract law was preempted by federal regulations. For a copy of the opinion and dissent, please see http://www.courts.wa.gov/opinions/pdf/818967.opn.pdf and http://www.courts.wa.gov/opinions/pdf/818967.no1.pdf.