Consumer Financial Services LAW REPORT

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Focusing on Significant Caselaw and Emerging Trends

Volume 14, Issue 17 March 2, 2011

Fair Debt

Debt collectors' communications to debtors' attorneys OK under FDCPA

Finally, it's clear: The Fair Debt Collection Practices Act allows debt collectors to communicate freely with consumers' lawyers regarding debt collection activities. Concluding that there's a difference between a consumer and his attorney as defined by the FDCPA, the 7th U.S. Circuit Court of Appeals recently became the first appellate court to consider the issue, holding that 15 USC §1692c as a whole permits debt collectors to communicate with consumers' attorneys and not run afoul of the FDCPA. (*Tinsley v. Integrity Financial Partners, Inc.*, No. 10-2045 (7th Cir. 02/11/11).)

Christopher Tinsley, being dunned for a debt, hired an attorney who sent Integrity Financial Partners a letter stating that Tinsley refused to pay and lacked assets that the creditor could seize. The letter closed with "we request that you cease all further collection activities and direct all

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Fair Credit

CRA overcomes FCRA claims, procedures made reinvestigation moot

A purported identity theft victim's explanation came up more than a bit thin when he tried to identify a credit reporting agency's alleged willful violations of the Fair Credit Reporting Act when it reported negative information to his credit report. Given that lack of evidence and a by-the-book recitation of the CRA's reasonable procedures in place to assure maximum possible accuracy of reported information, a federal appellate court concluded that the CRA had avoided liability under the FCRA — even though it performed no reinvestigation of the consumer's disputed charges on his wireless telephone account. (*Birmingham v. Experian Information Solutions, Inc., et al.*, No. 09-4146 (10th Cir. 02/07/11).)

"[The plaintiff] has presented little evidence regarding what [the CRA] knew and when it knew it," wrote Circuit Judge Harris L. Hartz of the 10th U.S. Circuit Court of Appeals for the three-judge appellate panel.

Raymond Birmingham found that fraudulent charges had been made to one of his credit cards in December 2003. Birmingham filed a statement of identity theft with local police and reported the fraud to Experian, which placed a security alert on his file. The CRA also suggested that he

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Guest Commentary

Under the microscope: Back to the future of TILA

By Benjamin B. Klubes and Michelle L. Rogers*

Sparked by perceived increases in deceptive practices and widespread confusion about the nature and cost of credit, the Truth in Lending Act of 1968 emerged from much the same sentiment that this year prompted the passage of the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010. More than three decades later, Dodd-Frank breathes new life into TILA by adding several substantive consumer protection provisions, amending its disclosure requirements, and charging the newly created Consumer Financial Protection Bureau with its enforcement.

While it remains to be seen whether this regulatory overhaul will have its intended effect in enhancing meaningful disclosure and informed consumer decision-making, there is little doubt that Dodd-Frank will result in increased scrutiny that will have an immediate and lasting impact on the financial services industry.

Origins and requirements

TILA was the first of 14 consumer protection statutes passed by Congress in the decade between 1968 and 1978. Before TILA's enactment, there was little uniformity in the way creditors offered credit terms to consumers, which led to misinformation about products and cost. TILA sought to correct that by standardizing the terminology and expression of rates, and by establishing a uniform system of borrower disclosures.

It was not intended to instruct financial institutions what to charge or in what circumstances to make a loan. Rather, TILA's purpose was — and remains — to ensure that creditors disclose the true costs and terms of credit to enable borrowers to make informed credit decisions, as well as to increase competition by harmonizing the ways lenders calculate fees and interest rates.

To accomplish this task, TILA charged the Federal Reserve Board with promulgating implementing regulations, which are known as Regulation Z, codified at 12 C.F.R. § 226.1 *et seq.* Reg. Z adds teeth to TILA by providing Official Interpretation and Commentary on its meaning, application, and interpretation. In addition to spelling out technical requirements, Reg. Z also includes model forms that lenders may use to ensure that they make the required disclosures correctly.

In broad terms, TILA applies to creditors who regularly extend credit where that credit is primarily used for personal, family, or household purposes. TILA's two main provisions require clear and conspicuous disclosure of the loan's finance charge and its annual percentage rate.

Specifically, TILA requires that the finance charge be displayed as a dollar amount totaling interest and fees charged by the lender "as an incident to the extension of credit." The APR is displayed as a percentage rate approximating the amount of the finance charge when it is applied to the unpaid principal of the loan. Together, the finance charge and the APR are meant to disclose the total cost of credit to consumers and to facilitate comparison of what would otherwise be extremely confusing offers of credit between different lenders.

Where a lender does not make such disclosures properly, TILA allows the borrower to rescind the loan or to seek damages, subject to certain limitations. TILA also provides for criminal penalties for willful and knowing failures to comply that can result in fines, imprisonment, or both.

Expansion and evolution

TILA and Reg. Z have undergone numerous revisions over the years. Though it would be difficult to cover TILA's various amendments in such short space fully, it is fair to say that TILA's amendments often derive from one of three main goals: protecting consumers from abusive practices, managing creditor risk, and simplifying the statute as a whole.

TILA was first amended in 1970 to prohibit providing unsolicited credit cards to consumers. Additional amendments followed in the Fair Credit Billing Act of 1974, the Consumer Leasing Act of 1976, the Truth in Lending Simplification and Reform Act of 1980, the Fair Credit and Charge Card Disclosure Act of 1988, and the Home Equity Loan Consumer Protection Act of 1988.

The most significant of TILA's amendments included the 1994 addition of the Home Ownership and Equity Protection Act ("HOEPA"), which provides special protections for borrowers for certain high-cost home equity loans. HOEPA aimed to address growing concerns about predatory lenders targeting unsophisticated borrowers and encouraging them to use the equity in their homes as security for credit.

Moving beyond disclosures

Many of those loans came with high interest rates and fees, along with nontraditional (and less desirable) loan features, including balloon payments and prepayment penalties, all of which made it difficult for borrowers to repay the loan. Thus, HOEPA requires additional disclosures and prohibits certain features from high-cost loan agreements. Relevant here, HOEPA signaled a departure from TILA's primary initial purpose — disclosure — by imposing substantive duties on lenders, in addition to further disclosure obligations.

In 1995, TILA was amended to limit lender liability for certain disclosure errors. The Economic Growth and Regu-

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TILA (continued from page 3)

latory Paperwork Reduction Act of 1996 amended TILA to simplify and improve disclosures. Such efforts continued when Reg. Z and official commentary were issued in 2007 to simplify the regulation and provide guidance on electronic disclosure delivery consistent with the Electronic Signatures in Global and National Commerce Act.

More recent amendments have returned to combating unfair and deceptive lending and servicing practices. These issues took center stage in July 2008, when Reg. Z was expanded with a newly defined category of "higher-priced mortgages." The changes focused on subprime loans but also applied new protections to other mortgage loans regardless of loan price, expanded the early delivery requirement to more transactions, and banned several advertising practices. The Housing and Economic Recovery Act of 2008, through the Mortgage Disclosure Improvement Act, amended TILA by broadening the Reg. Z revisions, expanding the reach and language of early disclosures.

Soon thereafter, in December 2008, the Board adopted two final rules pertaining to open-end credit, which changed disclosures required for applications, advertisements, new accounts, periodic statements, and change in terms notifications, and sought to protect consumer credit card accounts from unfair practices. The Credit Card Accountability Responsibility and Disclosure Act of 2009 established several provisions similar to the December 2008 TILA revisions, while also addressing practices and mandating disclosures that were not addressed in those rules.

The Higher Education Opportunity Act of 2008, via the Private Student Loan Transparency and Improvement Act, added requirements for creditors making private education loans. TILA and Reg. Z had regulated student loans under TILA's general consumer credit provisions, but the PSL Act expanded those protections by establishing a disclosure process for private education loans, restricting the use of an educational institution's identifying information to suggest that it endorses a loan, and expanding TILA to cover all student loans regardless of the amount financed.

Dodd-Frank's expansion of TILA

Congress and the Board have increasingly used TILA to affirmatively regulate creditor obligations beyond mere disclosure duties — a trend that has reached its pinnacle with Dodd-Frank. Dodd-Frank makes significant changes to both the substantive obligations and the form of the disclosures governed by TILA. While such changes remain consistent with the three main goals seen in TILA's amendments over the years — consumer protection, creditor risk management, and simplification — they will undoubtedly result in increased enforcement initiatives and litigation unlike any generated by prior amendments.

One overarching change is the shift in regulatory authority over TILA. Responsibility for enforcement, rulemaking, and administration will move from the Board to the newly created Consumer Financial Protection Bureau, which will soon take-up Dodd-Frank's requirement that it create a system of uniform disclosures.

One disclosure for all, other significant changes

For close to a decade, the Department of Housing and Urban Development, which administers the Real Estate Settlement Procedures Act, and the Board have tried and failed to integrate TILA's and RESPA's required disclosures into a single form. [*See Jonathan Cannon's article on RESPA in the Feb. 2 issue.*]

The CFPB is required to accomplish this task so that one form may be used for transactions "that [are] subject to both or either" of these statutes. On Sept. 21, 2010, officials from the Treasury and the CFPB hosted a forum to seek input about the form, suggesting that this will be one of the first changes to be implemented.

Dodd-Frank also imposes significant changes aimed at protecting consumers from abusive lending and servicing. For example, it creates a duty of care standard for mortgage originators that imposes licensing and qualification obligations, as well as requirements for loan documents.

It also prohibits steering incentives, which prevent originators from "steering" consumers into more expensive loans than others for which they qualify. These provisions also prevent an originator from being paid compensation that varies based on the terms of the loan other than the principal amount, including a yield spread premium. Additionally, originators will now be required to make a "reasonable and good faith determination" that the consumer has a "reasonable ability to repay the loan." Dodd-Frank also expands HOEPA and its restrictions.

Consumers are also provided expanded civil liability provisions. Borrowers may assert violations of the ability to repay requirement and the steering prohibitions as a defense to foreclosure or "any other action to collect the debt." Civil liability for TILA violations is also increased to no less than $200, and no more than $2,000 for consumer lease violations, and class action recovery is capped at the lesser of $1 million or 1 percent of the net worth of the creditor. At the same time, the statute of limitations for civil damages claims is raised from one year to three.

Creditors also receive the benefit of two new defenses, though they are narrow. The first provides that no creditor or assignee shall be liable to an obligor if the obligor is convicted of obtaining the loan at issue by actual fraud. The second provides a "cure" to assignees and creditors that allows them to avoid liability for TILA errors, if corrected within prescribed time periods and subject to specific restrictions.

Not surprisingly, substantial questions remain about the impact these changes will have. For example, given the strength of the consumer protection statutes, many wonder who will figure most prominently in enforcement initiatives: the CFPB, state attorneys general, or even private party litigants. Moreover, because many of the changes take a remedial, rather than proactive, approach to disclosure, some question the force they will have in enhancing the heart of TILA — helping consumers make informed and meaningful credit decisions.

Nonetheless, it is clear that Dodd-Frank's changes are significant, and that TILA will once again be a major tool in combating perceived abuses in the lending industry. ❑

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