RECENT DEVELOPMENTS

CONSUMER CREDIT

RIGHT OF RECESSION EXPIRES AFTER THREE YEARS

Lumpkin v. Deutsche Bank Nat'l Trust Co., 534 F. App'x 335 (6th Cir. 2013).

FACTS: Plaintiff, Croffort E. Lumpkin, Jr. ("Lumpkin"), purchased a home and borrowed against the property on May 18, 2007. Lumpkin stopped making payments on the loan in April 2009 and defaulted. In May 2009, Lumpkin's non-attorney agent sent a letter to the creditor demanding copies of all documents pertaining to the origination of the mortgage. In February 2010, the mortgage was assigned to Defendant, Deutsche Bank National Trust Company ("Deutsche Bank"), who initiated foreclosure and soon thereafter purchased the property at a sheriff's sale.

Lumpkin sued under the Truth in Lending Act ("TILA"), which allows a buyer to bring a claim for rescission if certain disclosures are not made. The district court granted summary judgment against Lumpkin, holding that the TILA claim was time-barred. Lumpkin appealed.

HOLDING: Affirmed.

REASONING: TILA allowed a seller to bring a claim for rescission if certain disclosures are not made. 15 U.S.C. §1635(a) gives the debtor the right to rescind for three business days from the later of either the date of the transaction or the date the required forms and disclosures are delivered. However, 15 U.S.C. §1635(f) states that there is an absolute three-year time limit in which a debtor may exercise his right of rescission, regardless of whether the required disclosures were delivered to the debtor. The Supreme Court explained in *Beach v. Ocwen Federal. Bank* that §1635(f) is silent on bringing an action, rather providing that the right of rescission expires at the end of the time period.

Regardless of when and whether Lumpkin notified the creditor, Lumpkin's right to file suit for rescission expired three years after the sale of the property

Lumpkin argued that his May 2009 letter exercised his right of recession a year before the statutory period ran. This appellate court agreed with the district court that the rescission did not occur for two reasons. First, the May 2009 letter made no mention of rescission or TILA, and consequently was not a notification of rescission. Second, Lumpkin misinterpreted the right of rescission under TILA. Regardless of when and whether Lumpkin notified the creditor, Lumpkin's right to file suit for rescission expired three years after the sale of the property in May 2010.

UNDER THE CREDIT REPAIR ORGANIZATIONS ACT, A PERSON NEED NOT ACTUALLY PROVIDE CREDIT REPAIR SERVICES

Stout v. FreeScore, L.L.C., 743 F.3d 680 (9th Cir. 2014).

FACTS: Appellant, Kevin Stout ("Stout"), sued Appellee, FreeScore, L.L.C. ("FreeScore"), alleging violations of the Credit Repair Organizations Act ("CROA"). Stout subscribed to services offered by FreeScore and paid a monthly fee. Stout alleged that FreeScore utilized its website, commercials, and social media outlets to represent its services providing assistance in repairing an individual's credit. Stout also alleged that FreeScore is a "credit repair organization," as defined by the CROA.

FreeScore moved to dismiss the suit, and the trial court granted its motion. The court determined that FreeScore was not a credit repair organization in the context provided by the CROA, because it promised merely to provide consumers their credit scores, leaving it to consumers to separately repair their credit. Stout appealed.

HOLDING: Reversed and remanded.

REASONING: The court looked to the plain language of the CROA. A "credit repair organization" need only represent that it can or will sell, provide, or perform a service for the purpose of providing advice or assistance to a consumer with regard to improving a consumer's credit history or rating. FreeScore advertised not only its credit report services, but also its credit monitoring services as a tool for repairing damaged credit. The court looked to the overall impression the advertisements had on consumers and found that FreeScore fit within the CROA's definition of a "credit repair organization."

The court also held that FreeScore's disclaimer that it was not a "credit repair organization" did not defeat representations that it made about its services. To qualify as a "credit repair organization" under the CROA, a person or entity need not have literally provided credit repair services; instead, it is merely required to have given the "overall net impression" of offering advice or assistance aimed at improving consumer credit.

CREDIT CARD FEES ARE NOT UNCONSTITUTIONAL

In re Late Fee & Over-Limit Fee Litig., 741 F.3d 1022 (9th Cir. 2014).

FACTS: Appellants, a class of credit card holders ("Cardholders"), sued Appellees, a group of the largest credit card issuers ("Issuers"), on the constitutionality of overage fees and late fees. The Issuers charged uniformly over the credit limit or late monthly balance payment fees. The Cardholders alleged these charges exceeded the harm the Issuers suffered and were unconstitutional punitive damages.

The Issuers moved to dismiss the claim. The district court granted the motion, and the Cardholders appealed.

HOLDING: Affirmed.

REASONING: The court looked to the policy behind punitive damages. Punitive damages are not meant to compensate but are aimed principally at retribution and deterring harmful conduct. Punitive damages are authorized in contract actions to the extent the Constitution allows.

The court acknowledged the difference between the parties entering into private adhesive contracts with penalty clauses versus jury-determined punitive damage awards. The court emphasized that the penalty clauses at issue originated from the parties' private contracts, which may be oppressive and unjust based on the common law of contracts, but not based on constitutional principles. Therefore, the Cardholders' argument regarding the constitutionality of jury-awarded punitive damages did not apply.

F.T.C. HAS AUTHORITY OVER AMERICAN INDIAN TRIBE LENDING

F.T.C. v. AMG Servs., Inc., (D. Nev. 2014) (not designated for publication).

FACTS: Plaintiff, the Federal Trade Commission ("FTC"), sued Defendant, AMG Services, Inc. ("AMG"), for violations of the Federal Trade Commissions Act ("FTC Act"). The FTC alleged AMG engaged in deceptive acts by providing and collecting on short-term, high-interest payday loans to consumers. AMG argued that the FTC did not have the authority to regulate Indian Tribes, nor could the FTC regulate lending activities of the Tribal Chartered defendants. The FTC filed a motion for partial summary judgment to dismiss AMG's defenses, arguing that the FTC does have the authority to regulate Indian Tribe lending under the FTC Act.

The court concluded that the purpose of the FTC Act is to prevent and prosecute unfair and deceptive acts that affect commerce.

HOLDING: Granted.

REASONING: The court looked to sister jurisdictions' interpretations of federal statutes, finding most broad statutes, like the FTC Act, had been generally held applicable to Indian Tribes, unless they contained an express exemption. While AMG argued that they were exempt from the FTC Act as a sovereign tribal entity, the court determined that when a federal statute with general applicability was silent on tribal exemptions, it presumptively applied to tribes.

The court concluded that the purpose of the FTC Act is to prevent and prosecute unfair and deceptive acts that affect commerce. Because AMG's actions were deceptive lending practices, the FTC had authority to prosecute AMG under the FTC Act.

CIRCUIT COURT UPHOLDS FEDERAL RESERVE DEBIT-CARD TRANSACTION FEES

NACS v. Bd. of Governors of Fed. Reserve Sys.,____ F.3d ____ (D.C. Cir. 2014).

FACTS: To prevent debit-card fee transaction increases, Congress passed the Durbin Amendment as part of the 2010 Dodd-Frank Act, which modified the Electronic Funds Transfer Act ("EFTA"). The Durbin Amendment contains two key provisions.

First, Section 920(a), restricts the amount of interchange fees. Appellant, Board of Governors of the Federal Reserve System (the "Board"), was instructed to promulgate regulations to ensure reasonable and proportional interchange transaction fees. Further, the Board was to distinguish between incremental costs for authorization, clearance, and settlement ("ACS"). Second, §920(b) prohibits certain exclusivity and routing priority agreements. The Board was instructed to promulgate regulations preventing any issuer or network from restricting the election of processing networks by a merchant, so to drive down debit-card fees.

In its final rule, the Board increased the interchange fee limits for ACS costs to double the amount established in its proposed rule and selected a less restrictive anti-exclusivity networking option. Appellees, NACS, and other merchant groups, filed suit alleging that the final rule violated the plain terms of the Durbin Amendment. The district court granted summary judgment to NACS on the basis that the Board erred and failed to carry out Congress intent. The district court also vacated and remanded the interchange fee rule and the anti-exclusivity rule. The Board appealed.

HOLDING: Reversed and remanded.

REASONING: The Durbin Amendment is ambiguous as to whether the Board should consider only two categories of costs or include an implicit third category of costs. Applying the *Chevron* two-step deference standard, the court found that the Board's final rule was a reasonable interpretation of the Durbin Amendment.

The court then looked to whether the Board reasonably concluded that issuers could recover four specific types of costs challenged by the merchants: (1) "fixed" ACS costs; (2) network processing fees; (3) fraud losses; and (4) transaction-monitoring costs. The court found that allowing issuers to recover fixed ACS costs was reasonable because a distinction between fixed and variable costs is unworkable. The court also noted that permitting costs incurred in the course of effecting transactions was reasonable because it prevented issuers and networks from circumventing the interchange fee rules. Finally, the issuers' ability to recover fraud losses through the reasonable and proportional interchange fees was reasonable based on the board's policy considerations.

The court remanded the issue of transaction-monitoring costs because the appellate record was incomplete on this matter. The court, however, agreed that the Board had discretion to allow issuers to recover transaction-monitoring costs through the interchange fee regardless of compliance with fraud-prevention standards.

RIGHT OF RESCISSION EXPIRES UPON THE SALE OF PROPERTY

NOTICE OF RESCISSION IS NOT SUFFICIENT TO EXERCISE THE RIGHT OF RESCISSION

Hartman v. Smith, 734 F.3d 752 (8th Cir. 2013).

FACTS: Plaintiffs, Roger and Mavis Hartman ("Hartman"), received financing for construction of their house from Defendants, Brian and Jennifer Smith, ("Smith") in a complex and unconventional real estate financing arrangement. Hartman conveyed his house to Smith, who then placed a mortgage on the house and obtained a loan from co-Defendants, Prime Security Bank ("Prime"). Smith agreed to re-convey the house back to Hartman upon repayment of the loan. Hartman stopped making loan payments to Smith, and Smith stopped making the mortgage payments to Prime. Prime foreclosed on the house, and it was sold at a sheriff's sale. Following the sale, Hartman filed suit in district court seeking rescission of the loan agreement, pursuant to the Truth in Lending Act ("TILA").

The district court granted partial summary judgment in favor of both Smith and Prime. Hartman appealed and Prime cross-appealed.

HOLDING: Affirmed in part, reversed in part.

REASONING: Hartman argued that the district court erred in granting summary judgment to Prime on their TILA rescission claim. Prime asserted that Hartman's right to rescind under TILA was barred by statute because Hartman's actions did not commence until after the house had been sold. Under TILA, in any consumer credit transaction in which a security interest is retained in property used as the principal dwelling of the person to whom the credit is extended a consumer has the right to rescind a transaction by notifying the creditor. The court accepted Prime's argument that under §1635(a), an obligor's right of rescission expires three years after the date of consummation of the transaction or upon the sale of the property. Hartman's house was sold at the sheriff's sale, which extinguished Hartman's right of rescission.

Prime argued that Hartman needed to file a lawsuit in order to exercise the TILA statutory right of rescission. The court accepted this argument as well.. The court noted there is a circuit split as to whether the borrower must file a lawsuit to exercise the right to rescind or whether the borrower need only assert that right through a written notice. This court had recently agreed with the Ninth and Tenth Circuits that the borrower must assert rescission in a legal action to fully exercise the right of rescission. The court explained that Hartman's notice of rescission was not in and of itself sufficient to exercise the right. Because Hartman did not file suit for rescission prior to the foreclosure sale, they no longer had the right to seek rescission of the transactions.

In affirming in part and reversing in part, the court ruled in favor of Prime on both issues, granting Prime's motion for summary judgment.

DEBT COLLECTION

CREDITOR FOUND LIABLE UNDER FDCPA FOR USING A NAME OTHER THAN ITS OWN WHEN COLLECTING ITS DEBTS

Vincent v. The Money Store, 736 F.3d 88 (2nd Cir. 2013).

FACTS: Plaintiff, Vincent, defaulted on his mortgage. Defendant, The Money Store, serviced Vincent's loans. The Money Store contracted with a third party law firm to send Vincent notices; Vincent received a letter from the law firm informing him of his default. The letters were printed on the law firm's letterhead and stated that the law firm had been retained in order to collect The Money Store's debts. The letters, however, functioned only as notice of Vincent's default, as the letter further stated that all communications about the default must be made through The Money Store.

The FDCPA does not generally regulate creditors collecting their own accounts.

Vincent filed suit alleging that The Money Store violated the Fair Debt Collection Practices Act ("FDCPA") by hiring the law firm to send out collection letters falsely indicating that the law firm had been retained to collect its debts when, in fact, The Money Store was still collecting its own debts. The district court granted summary judgment in favor of The Money Store.

HOLDING: Vacated in part and remanded.

REASONING: The court explained that the FDCPA does not generally regulate creditors collecting their own accounts. However, when a creditor in the process of collecting its own debts hires a third party for the express purpose of representing to its debtors that the third party is collecting the creditor's debts, and the third party engages in no bona fide effort to collect those debts, the false name exception under 15 U.S.C. §1692a(6) exposes the creditor to FDCPA liability.

The court analyzed the three elements that must be satisfied before deeming a creditor a debt collector pursuant to the false name exception: (1) the creditor is collecting its own debts; (2) the creditor uses a name other than its own; and (3) the creditor's use of that name falsely indicates that a third person is collecting or attempting to collect the debts that the creditor is collecting.

The court found that there was no dispute as to the first element; The Money Store was collecting its own debts. As to the second element, the court found that The Money Store did use a name other than its own by sending breach letters which appeared to be attorney collection letters as indicated by the use of the law firm's name and letterhead.

The court adopted the "conduit test," which distinguishes a debt collector who undertakes collection activity separately from the creditor, and a third party merely acting as a conduit for a collections process controlled by the creditor. In the first instance, the creditor would not be liable as a bona fide attempt by the debt collector to collect the debt but in the second instance, the creditor would be liable under the FDCPA.

The court held that determining the nature of the debt collection activity was a question of fact, and the district court erred in granting The Money Store's motion for summary judgment. The court concluded that if the breach letters falsely indicated that the third party law firm was collecting or attempting to collect The Money Store's debts, The Money Store could be held liable under the FDCPA according to the false name exception. The court vacated the dismissal of the claims and remanded.

SUIT FILED AFTER STATUTE OF LIMITATIONS HAS RUN VIOLATES FDCPA

Phillips v. Asset Acceptance, L.L.C., 736 F.3d 1076 (7th Cir. 2013).

FACTS: Appellee, Asset Acceptance ("Asset"), a debt collector, sued appellant Gwendolyn Phillips ("Phillips"), for a debt arising from a contract for the sale of goods. Phillips countersued, claiming that the charges against her and others similarly situated were filed after the statute of limitations on the creditor's