health application to the Company. However, the application form and the schedule of benefits conflicted with the above language and could be interpreted to provide $100,000 coverage for Donnie James without written approval based on the health application. Another conflicting provision was apparent in the "Commencement of Coverage" and "Eligibility Requirement" sections. "The Commencement of Coverage" requirement stated that one who applied for coverage more than 31 days after the waiting period requirements must submit an individual health application to the Company. The "Eligibility Requirement" section, however, noted that there were no waiting period requirements for existing employees. Thus, Donnie James applied more than 31 days after the waiting period under the Commencement of Coverage requirement, but not under the Eligibility Requirement section.

As demonstrated, there were several conflicting provisions in the contract. Because there was more than one reasonable interpretation of the contract the court resolved the ambiguity in favor of the insured.

CONSUMER CREDIT

PLAINTIFF CAN SUE UNDER TILA EVEN THOUGH CREDITOR DID NOT SIGN CONTRACT

Bragg v. Bill Heard Chevrolet, Inc. 374 F.3d 1060 (11th Cir. 2004).

FACTS: On September 28, 2001, Bragg visited Bill Heard Chevrolet ("Heard") and decided to purchase a new 2002 Chevrolet Silverado truck. On that day, Bragg signed a Standard Purchase Contract ("Contract 1") and two standard Florida Simple Interest Vehicle Retail Installment Contracts ("RISC 1 and 2"). Heard did not sign these documents. Bragg also signed a Bailment Agreement for Vehicle Spot Delivery ("Bailment Agreement"). The Bailment Agreement explicitly incorporated the terms of the purchase contract. On October 1, 2001, Heard contacted Bragg and requested that he sign additional documents. Bragg signed two new Purchase Contracts ("Contracts 2 and 3") and two new RISCs ("RISCs 3 and 4"). All four of these contracts were backdated by Heard to the date of Bragg's first visit. On October 5, Heard assigned RISC 4 to Triad Financial Corporation, and Triad issued payment to Heard. This RISC was the only one signed by Heard.

On November 30, 2001, Bragg filed a class action suit against Heard in state court on five counts, including violations of the Truth in Lending Act ("TILA") and Regulation Z. Heard removed the case to federal district court and moved to dismiss all of Bragg's claims. After numerous motions and amended complaints the district court held that the first two RISCs were never consummated because the relevant agreements contained an unsatisfied condition precedent: specifically, neither party was "bound" until Bill Heard sold either of the RISCs to another lender, and hence no TILA violation occurred. Bragg appealed.

HOLDING: Reversed and remanded.

REASONING: The district court held that Bragg's obligations under the first and second RISCs never arose because they were contingent on Heard's obtaining financing. The court noted that the Purchase Contracts signed by Bragg set forth a condition precedent of financing approval. The Purchase Contracts provided that Heard would agree to sell the designated vehicle provided that the designated financial institution approved Bragg's request for a loan. In addition, the Bailment Agreement incorporated the terms of the Purchase Contracts and stated that it was "pending credit approval of buyer(s) by lending institution and completion of sales transaction."

Bragg contended that the district court erred in holding that no credit agreement was consummated. He maintained that consummation occurred not when title to the automobile passed or when a bilateral contract was formed, but rather when he signed the RISCs. Recently, the Fourth Circuit held that the TILA and consummation can encompass unfunded financing agreements. Nigh v. Koons Buick Pontiac GMC, Inc., 319 F.3d 119, 123 (4th Cir. 2003). When the consumer purchases credit, the consumer can be vulnerable to the lender in that the consumer can be bound to the lending contract at the option of the lender. Bryson of New York, 584 F.Supp. 1306 (S.D.N.Y.1984). Bragg also contended that the relevant Purchase Contracts and Bailment Agreement should not have been considered along with the RISCs because they were not "executed" within the meaning of the applicable Florida case law, as they were never signed by Heard. Bragg also maintained that those agreements were ambiguous, requiring construction against the drafter, Heard. In addition, the RISCs contained the following modification clause: "This contract contains the entire agreement between you and us relating to this contract. Any change to this contract must be in writing and we must sign it."

When the consumer purchases credit, the consumer can be vulnerable to the lender in that the consumer can be bound to the lending contract at the option of the lender.

Even assuming the RISCs contained a condition precedent, consummation does not occur only upon assignment of the loan. Under the district court's interpretation of Florida law and Regulation Z, a creditor can provide necessary TILA disclosures after the consumer signs a conditional financing agreement as long as the disclosures are made before the loan is assigned. However, disclosures that come after the consumer executes a RISC are of little consumer value. Thus, the district court's reading of Regulation Z is contrary to the central goal of TILA, which is to "provide meaningful disclosure of credit terms and awareness of cost to the consumer." 15 U.S.C. § 1601(a). Although statutory language should be interpreted according to the ordinary, plain meaning rule, the rule should not be inconsistent with the policies underlying the statute.

Therefore, in a financing agreement containing a condition precedent in which the seller and third party lender have exclusive control, consummation occurs when the consumer signs the contract. Thus, the plaintiff can sue under TILA even though the creditor did not sign the contract.

FAIR CREDIT REPORTING ACT PERMITS A CREDITOR TO MAKE A "CONDITIONAL" FIRM OFFER

Kennedy v. Chase Manhattan Bank USA, NA, 369 F.3d 833 (5th Cir. 2004).

FACTS: Richard and Sally Kennedy sued Chase Manhattan Bank USA, NA ("Chase") under the Fair Credit Reporting Act ("FCRA"). The Kennedys asserted that they received pre-qualified offers for credit card accounts from Chase and they believed they were approved for credit. Chase, however, obtained consumer credit reports from Experian and Transunion and notified the Kennedys that, based upon these reports, it would not open credit card accounts for the Kennedys.

A creditor must honor a firm offer of credit only if the consumer meets the criteria initially used to select that consumer for the offer.

The Kennedys contended that a condition of obtaining a credit report is that if the consumer meets the criteria established by the creditor prior to the selection of the consumer for the offer, the creditor must make a firm offer of credit to the consumer. They claimed that if the consumer accepts this offer, the creditor may obtain a second credit report to verify that the consumer continues to meet the selection criteria, but the creditor is not allowed to apply a new set of criteria to the second credit report in order to disqualify the consumer.

Chase responded that the FCRA was amended in 1997 to allow creditors to extend "conditional" firm offers to consumers. Chase stated that pursuant to Section 1681b(c), after the consumer responds to the credit offer the creditor is permitted to access the consumer's credit report to determine whether the consumer satisfies its previously determined criteria for credit worthiness. Chase contended that after reviewing the Kennedy's complete credit history, it determined that they did not satisfy its criteria for credit worthiness. The District Court dismissed the Kennedy's claims and the Kennedys appealed.

HOLDING: Affirmed.

REASONING: A creditor must honor a firm offer of credit only if the consumer meets the criteria initially used to select that consumer for the offer, based on information in the consumer report, the application, or other information bearing on credit worthiness. If a consumer responds to a pre-approved offer of credit, and authorizes the creditor to access the consumer's credit report, the creditor may then access the consumer's credit report to determine whether the consumer satisfies its previously established criteria for credit-worthiness. Thus, the Act permits a creditor to make a "conditional" firm offer of credit. The district court correctly determined that a firm offer of credit under the FCRA meant a firm offer if you meet certain criteria. The Kennedys' complaint failed to state a claim under the FCRA because the credit card accounts were conditioned on the consumer(s) satisfying specific criteria bearing on credit worthiness. Thus, the district court did not err by determining the Kennedys' complaint failed to state a claim.

TEXAS LAW DOES NOT REQUIRE HOME EQUITY LENDER TO PROVIDE BORROWER WITH A "SIGNED COPY" OF EACH DOCUMENT BORROWER SIGNED

Pelt v. U.S. Bank Trust Nat'l Ass'n, 359 F.3d 764 (5th Cir. 2004).

FACTS: Plaintiffs acquired a home equity loan from New Century Mortgage Corporation ("New Century"). Upon closing, New Century provided Plaintiffs with copies of the unsigned loan documents. One year later, Plaintiffs stopped making the loan payments and New Century filed for an expedited foreclosure to secure the lien on the loan. Plaintiffs brought suit against New Century, alleging that New Century violated Texas Constitution Article XVI, § 50(a)(6)(Q)(v), which requires the lender to provide the borrower with "copies of all documents signed at closing." Plaintiffs sought a declaratory judgment that the loan was invalid and a judgment ordering New Century to forfeit all principal and interest under the loan.

At trial, Plaintiffs presented evidence that, prior to the lawsuit they did not receive copies of eight of the documents they had signed in connection with the loan. New Century's evidence suggested that unsigned copies of all loan documents were provided to Plaintiffs on the day of the closing and that copies of the signed documents were made available to Plaintiffs shortly thereafter. After weighing the evidence, the jury returned a verdict against Plaintiffs. The district court then entered a judgment decreeing that the loan was valid and authorizing U.S. Bank Trust to foreclose on the property. Plaintiffs appealed claiming that the district court erroneously instructed the jury regarding the meaning of the language in Article XVI, § 50(a)(6)(Q)(v) of the Texas Constitution.

HOLDING: Affirmed.

REASONING: At trial the District judge charged the jury to find "whether Plaintiffs had 'prove[n] by a preponderance of the evidence that New Century, or someone on its behalf, failed to provide them a copy of all documents they signed related to the home equity loan at the time it was made." The jury sent a note back to the judge, asking for clarification on this matter, and the judge responded, "The Texas Constitution requires that 'a copy of all documents signed by the owner' be provided. It does not state that the owner be provided 'a signed copy.' It does require the owner to be provided with a copy of any document that he or she signed at the time the home equity loan was made. . . ."

The Texas State Supreme Court has stated numerous times that in construing the language of the Texas Constitution, courts must "'rely heavily on [the Texas Constitution's] literal text and must give effect to its plain language' to assure that constitutional provisions are given 'the effect their makers and adopters intended.'" Doody v. Ameriquest Mortgage Co., 49 S.W.3d 342, 344 (Tex. 2001). Section 50(a)(6)(Q)(v) states that a lender must provide to the borrower a "copy of all documents signed by the owner", it does not require, that the owner be provided "a signed copy" of each of these documents. Instead, the phrase "signed by the owner" simply identifies which of the numerous documents presented at the closing of the home equity loan must be copied and given to the borrower; only those that the borrower actually signs in connection with the loan. The provision does not require that the documents be photocopied only after they are signed. The court declared the jury instruction valid and the District Court's judgment was affirmed.

CAR DEALER SUED FOR FAILING TO NOTIFY PLAINTIFF OF CREDIT DENIAL

Treadway v. Gateway Chevrolet Oldsmobile, Inc., 362 F.3d 971 (7th Cir. 2004).

FACTS: In the fall of 2001, Tonja Treadway responded to a direct-mail solicitation from Gateway Chevrolet Oldsmobile ("Gateway"), which indicated that she was "pre-approved" for the financing of a new car. Treadway called the number on the letter and authorized a credit check. Gateway obtained a copy of Treadway's credit report, and based on her poor credit it decided not to seek financing on Treadway's behalf from any bank. Gateway, however, informed Treadway that it had found a bank that would provide financing, but she would need a co-signer. Treadway eventually decided to make the purchase, with her godmother Pearlie Smith serving as the intended cosigner. Gateway had the loan papers delivered directly to Smith's house, and Smith signed the loan papers without reading them. Later, when Smith began receiving statements requiring payment on the car note, Treadway and Smith realized that Smith had signed the loan agreement as the sole purchaser and owner of the car.

Treadway filed suit against Gateway under the Equal Credit Opportunity Act ("ECOA") and the Fair Credit Reporting Act ("FCRA"). The district court dismissed Treadway's FCRA claim holding that Gateway was not a "user" of credit reports as defined within the Act, and also granted a summary judgment motion by Gateway on the ECOA claim, holding that Treadway had not alleged an "adverse action" as required by the ECOA.

HOLDING: Reversed in part, affirmed in part.

REASONING: The ECOA requires creditors to furnish written notice of the specific reasons why an adverse action was taken against a consumer. 15 U.S.C. §§ 1691(d)(2) and (3). Noting that the ECOA defines "adverse action" as "a denial or revocation of credit," the Court held that Gateway's actions constituted an adverse action since it had effectively denied credit to Treadway by unilaterally deciding not to send Treadway's application to any lender. This interpretation was consistent with the dual purposes of discouraging discrimination and educating consumers, since neither could be accomplished in the absence of any notice at all.

The Court noted that the ECOA defines a "creditor" as "any person who regularly arranges for the extension, renewal, or continuation of credit…" and that there was no question that Gateway regularly arranged credit for its customers. Gateway would also be considered a "creditor" under regulations promulgated by the Federal Reserve Board (Regulation B) if it "regularly participate[d] in a credit decision, including setting the terms of credit." Because Gateway regularly decided whether or not to send credit applications to any lenders, frequently participated in the credit decision by restructuring the terms of the sale in order to meet the concerns of the creditor, and regularly set the annual percentage rate associated with the sale, the Court held that Gateway was a creditor within the meaning of the Act.

The ECOA requires creditors to furnish written notice of the specific reasons why an adverse action was taken against a consumer.

The FCRA also has notice requirements similar to those of the ECOA, providing that "if any person takes any adverse action with respect to any consumer that is based in whole or in part on any information contained in a consumer report, the person shall provide oral, written, or electronic notice of the adverse action to the consumer." With regard to Treadway's FCRA claim, the Court held that the district court erred in dismissing Treadway's claim on the ground that Gateway was not a "user," since there was no longer such a requirement in the Act, although the Court noted that even if such a requirement had still existed, Gateway was precisely the sort of party that would be expected to "use" credit reports under the Act. Despite this, the Court, held that dismissal was still appropriate because Treadway failed to allege an "adverse action" under the FCRA in her complaint, but the court did allow Treadway the opportunity to amend her complaint on remand to allege an "adverse action" under the FCRA.