Using Federal & State Consumer Protection Law Theories in BANKRUPTCY

By Jean Braucher*

Introduction

Bankruptcy lawyers often overlook federal and state consumer law theories when representing consumer debtors. These theories increasingly appear in bankruptcy court decisions, but a huge potential exists for growth in this type of litigation. While the complexity and relative obscurity of consumer law make it challenging to invoke, especially in low, flat fee cases on behalf of individual consumers, there are significant potential gains in doing so. The remedies these theories provide include voiding a security interest, recovery of attorneys' fees, and damages. Thus, practitioners who represent debtors in consumer bankruptcy cases will best serve their clients if they are prepared to raise issues under the alphabet soup of federal and state consumer statutes -- TILA, HOEPA, RESPA, FDCPA, DTPA, and more.

The Truth in Lending Act (TILA)

Overview. The federal Truth in Lending Act (TILA), 15 U.S.C. § 1601 et seq., and the Federal Reserve Board's implementing Regulation Z, 12 C.F.R. § 226, set forth an intricate body of law with both disclosure and substantive features. Best known is TILA's requirement that the effective cost of credit be disclosed in a uniform way, as an annual percentage rate (APR). A comprehensive treatment of TILA is Elizabeth Renuart and Kathleen E. Keest, NCLC, Truth In Lending (5th ed. 2003 & Supp. 2004).

Right of Rescission. The most powerful individual remedy provided by TILA is rescission under § 1635(a). This section grants consumers a right of rescission in credit transactions in which a lien attaches to property used as the consumer's principal dwelling, except for a purchase money loan. § 1602(w). Thus, home equity and home improvement loans are examples of transactions that can be rescinded.

Three-Day Rescission Period & Extension to Three Years for Disclosure Violations. The right of rescission lasts for three days after consummation of the transaction or delivery of TILA disclosures, whichever occurs later. § 1635(a). Disbursement of loan funds or performance of services must be delayed until after the rescission period has expired. 12 C.F.R. § 226.15(a)(3), (c). The regulations spell out the content and timing of the notice of rescission right. 12 C.F.R. § 226.15(a)-(c). "Material disclosures" is a defined term, referring to the main disclosure requirements of TILA, including APR, finance charge, amount financed, total of payments, and several other disclosures. 15 U.S.C. § 1602(u). Also, each debtor must get two copies of a notice of right of rescission (a total of four copies for a couple) and one copy of material disclosures (two for a couple). 12 C.F.R. §§ 226.23(b)(1), 226.17(a). The date of expiration of the right of rescission must be filled in. *See Rodrigues v. U.S. Bank* (*In re Rodrigues*), 278 B.R. 683, 687 (Bankr. D.R.I. 2002).

If material TILA disclosures are not properly given, including notice of the right of rescission, the rescission right is extended to three years after consummation of the transaction. § 1635(a) and (f). *See In re Lombardi*, 195 B.R. 569,571-72 (Bankr. D.R.I. 1996) (holding Chapter 13 debtors had right of rescission for three years after failure of home improvement company to provide notice of rescission prior to performing improvements being financed).

Further Extension Under State Law. A line of cases permitting extended use of the rescission remedy by way of recoupment, that is as a defense to a creditor's claim, was undercut by *Beach v. Ocwen Fed. Bank*, 523 U.S. 410 (1998). The Supreme Court held that federal law does not provide for rescission in recoupment for longer than three

years after consummation of the transaction and also noted that equitable tolling does not apply because the three-year limit on rescission is a statute of repose, not a statute of limitations. *Ocwen* did not completely eliminate the possibility of extended rescission in recoupment, because it noted that state law might so provide. TILA § 1635(i)(3) states, "Nothing in this subsection [concerning rescission rights in foreclosure proceedings] affects a consumer's right of rescission in recoupment under State law." Extension of rescission rights beyond the three years provided by TILA thus depends on state law.

A Massachusetts bankruptcy case, *Fidler v. Cent. Coop. Bank* (*In re Fidler*), 226 B.R. 734 (Bankr. D. Mass. 1998), held that the Massachusetts Consumer Credit Cost Disclosure Act, Mass. Gen. Laws ch. 140D, § 1 et seq., permits rescission in recoupment beyond TILA's three-year extended period. The court was aided by a provision in the Massachusetts statute specifically reserving a consumer right of recoupment under state law. *See also Maxwell v. Fairbanks Capital Corp.* (*In re Maxwell*), 281 B.R. 101 (Bankr. D. Mass. 2002) (*accord* with *Fidler*).

A Pennsylvania bankruptcy court distinguished *Fidler* on the grounds that Pennsylvania law does not have language similar to that in Massachusetts. *See Roberson v. Cityscape Corp.* (*In re Roberson*), 262 B.R. 312 (Bankr. E.D. Pa. 2001) (holding that a Chapter 13 debtor in Pennsylvania could not make use of rescission in recoupment beyond the three-year period permitted under federal law). *See also Williams v. EMC Mortgage Co.* (*In re Williams*), 276 B.R. 394 (Bankr. E.D. Pa. 2002) (*accord* with *Roberson*).

Bona Fide Error Defense. *Rodrigues*, like most decisions under TILA, treats it as a strict liability statute. *See also Davison v. Bank One Home Loan Servs.*, 2003 WL 124542 (D. Kan. Jan. 13, 2003) (narrowly construing the unintentional bona fide error defense of 15 U.S.C. § 1640(c) and noting a failure of the lender to require closing agents to complete a checklist or to send the exact number of copies of the required disclosures to the closing agent). *But see ContiMortgage Corp. v. Delawder*, 2001 WL 884085 (Ohio Ct. App. July 30, 2001)(even though lender did not provide the required number of copies of the rescission form, the lender satisfied "the spirit if not the precise letter" of TILA regulations).

Repayment of Principal. TILA § 1635(b) sets forth a three-step rescission process. First, the debtor gives notice of rescission, the sufficiency of which sometimes is litigated. The effect of invoking rescission is that the debtor is relieved of liability for any finance or other charge, and the security interest becomes void. Second, the creditor must return any money paid or property given, including any downpayment. Third, the debtor must tender any property received or the value of it. This third requirement means the debtor has an obligation to return the loan principal. The final sentence of § 1635(b) throws the three-step process in considerable doubt stating, "The procedures prescribed by this subsection shall apply except when otherwise ordered by the court," giving courts considerable discretion concerning procedures.

Courts have taken a number of approaches to exercise their discretion concerning the rescission process. For example, four different judges in the Eastern District of Pennsylvania have taken at least three different approaches. The most creditor-oriented approach was in *Apaydin v. Citibank Fed. Sav. Bank* (*In re Apaydin*), 201 B.R. 716, 724 (Bankr. E.D. Pa. 1996) (conditioning debtor's right of rescission on tender of principal). *Accord Quenzer v. Advanta Mortgage Corp. USA*, 288 B.R. 884, 888 (D. Kan. 2003). A very different and debtor-oriented approach was taken in *Murray v. First Nat'l Bank of Chicago* (*In re Murray*), 239 B.R. 728, 735 (Bankr. E.D. Pa. 1999) (after rescission, the creditor's claim is unsecured and creditor is entitled only to its pro rata share of Chapter 13 payments).

A middle ground was taken in *Williams v. BankOne, N.A.* (*In re Williams*), 291 B.R. 636, 660 (Bankr. E.D. Pa. 2003) and *Bell v. Parkway Mortgage, Inc.* (*In re Bell*), 309 B.R. 139, 167 (Bankr. E.D. Pa. 2004). These cases held that the discretionary power of courts concerning rescission procedures does not give them the power to change the substantive statutory statement that rescission voids the security interest. Rather, the courts' discretion concerns procedures for each side to return what it has received. The *Williams* court ordered the debtor to submit a Chapter 13 plan separately classifying the creditor's unsecured claim and paying the principal over the life of the plan. The court also allowed the creditor to set off payments made by the debtor, which the creditor was obligated to return, against the principal balance owed by the debtor. Thus, the creditor did not have to return the payments in advance of principal repayment by the debtor. The *Williams* court distinguished Circuit court cases that approved the conditioning of rescission on tender of principal on the grounds that they did not arise in a bankruptcy context, stating that conditional rescission would inappropriately make a debtor forego the Chapter 13 right to satisfy claims over the life of the Chapter 13 plan.

Even where the court requires that principal be repaid in Chapter 13, the debtor receives a considerable benefit because the creditor must reduce the obligation by the amount of any downpayment or closing costs and credit insurance premiums paid and by the amount of finance charges. The obligation to pay only principal, and to do so over the life of a Chapter 13 plan as an unsecured claim, can provide enough of a break to let a debtor retain a home even after entering into a bad deal involving a home equity or home improvement loan.

Action for Damages. TILA § 1640(a) also provides for damage actions for violations of its requirements. A debtor may recover actual damages plus statutory damages from any creditor that violates TILA, not just a creditor subject to the rescission remedy. In an individual action relating to a closed-end credit transaction secured by real estate or a dwelling, statutory damages of not less than $200 and not greater than $2000 are recoverable. Where rescission is available, damages can be recovered as well. In the case of other consumer credit transactions, such as personal property loans, the statutory damages are twice the finance charge, with a minimum of $100 and a cap of $1000, despite "less-than-meticulous drafting" of a 1995 amendment that suggested there might be no limit. *See Koons Buick Pontiac GMC, Inc. v. Nigh*, 125 S. Ct. 460, 463 (2004).

The effect of invoking rescission is that the debtor is relieved of liability for any finance or other charge, and the security interest becomes void.

Statute of Limitations for Damage Actions; Claims in Recoupment Not Time-Barred. Actions for actual and statutory damages are subject to a one-year statute of limitations, measured from the occurrence of the violation. § 1640(e). This subsection explicitly provides that it "does not bar a person from asserting a violation of this title in an action to collect the debt which was brought more than one year from the date of the occurrence of the violation as a matter of defense by recoupment or set-off in such action, except as otherwise provided by State law."

Courts have recognized that debtors in bankruptcy can assert damage claims in recoupment by objecting to a creditor's proof of claim. *See In re Coxson*, 43 F.3d 189, 194 (5th Cir. 1995); *Roberson*, 262 B.R. at 322. If the creditor does not file a proof of claim, there is some uncertainty about whether a claim

in recoupment may be used, for example if the debtor files a proof of claim. *See* Renuart & Keest, *supra*, at § 7.2.5.4.3, main vol. at 446-48.

Equitable Tolling. Unlike with the three-year TILA limit on extended assertion of rescission rights discussed above, the statute of limitations for TILA damage actions can be equitably tolled. Fraudulent concealment of a TILA violation is a basis for tolling the one-year statute of limitations. *See Ellis v. General Motors Acceptance Corp.*, 160 F.3d 703, 708 (11th Cir. 1998) and *Ramadan v. Chase Manhattan Corp.*, 156 F.3d 499, 502 (3d Cir. 1998). Mere failure to make disclosures is not enough; the consumer must prove an act of concealment by the creditor and consumer diligence to discover the facts giving rise to a claim. *See Evans v. Rudy-Luther Toyota, Inc.*, 39 F. Supp. 2d 1177, 1184 (D. Minn. 1999).

Home Ownership and Equity Protection Act of 1994 (HOEPA)

Overview. In 1994, Congress amended TILA by adding the Home Ownership and Equity Protection Act (HOEPA), 15 U.S.C. § 1639 et seq., to require additional disclosures, add substantive protections, and provide expanded remedies from assignees in cases where consumers receive high cost, non-purchase money mortgages. HOEPA was designed to address "reverse redlining," the targeting of persons for "credit on unfair terms" based on income, race or ethnicity. S. Rep. No. 103-169, at 21 (1993).

Mortgages to Which HOEPA Applies. HOEPA applies to mortgages secured by the consumer's principal dwelling, other than a purchase-money residential mortgage transaction. As with the rescission right, examples of transactions subject to HOEPA are home equity and home improvement loans. HOEPA only

The federal Real Estate Settlement Procedures Act (RESPA) is designed to protect consumers from high settlement charges and certain other abusive practices.

applies when either an APR trigger or a points-and-fees trigger is met. 15 U.S.C. § 1602(aa). The APR trigger is a rate more than 10% higher than the yield on Treasury securities having a comparable period of maturity, and the points-and-fees trigger is a total figure, payable at or before closing, that exceeds the greater of 8% of the total loan amount or $400.

Additional Disclosures. Section 1639(a)-(b) requires special high cost mortgage disclosures not less than three business days prior to consummation of the transaction. These disclosures in essence warn the consumer of the high cost and the risk of losing one's home on default, and advise that the consumer is not required to complete the transaction. Failure to provide these special disclosures constitutes a "material violation" of TILA, § 1602(u), and gives rise to the right of rescission discussed under TILA above. § 1635(a). *See In re Williams*, 276 B.R. 394 (Bankr. E.D. Pa. 2002) (noting that HOEPA pre-consummation disclosures are material disclosures and also that each debtor is entitled to two copies of all material disclosures).

Additional Substantive Protections. The HOEPA amendments also place a number of substantive restrictions on covered mortgages, barring all of the following: prepayment penalties in certain instances, a higher interest rate after default, balloon payments, negative amortization (because periodic payments do not cover the full amount of interest due), prepayment of more than two periodic payments, and extension of credit without regard to the consumer's ability to repay (i.e., predatory lending that looks primarily to foreclosure to collect on the loan). §1639(c)-(h). HOEPA requires creditors to make payment to a contractor under a home improvement loan covered by its provisions either by an instrument jointly payable to the contractor and consumer or, at the consumer's option, into escrow. § 1639(i). The inclusion of a prohibited term constitutes a failure to deliver material disclosures and triggers the extended right of rescission under §1635(a). § 1639(j).

Expanded Assignee Liability. In addition to the right of rescission for failure to give additional disclosures or to meet the substantive protections described above, the HOEPA amendments make the assignee liable for all claims and defenses the consumer could assert against the original mortgagee. § 1641(d). *See also In re Rodrigues*, 278 B.R. at 688-90 (discussing expanded assignee liability, eliminating "holder-in-due-course protections" for assignees of high cost mortgages; also citing recent cases under HOEPA). For non-HOEPA consumer credit transactions, assignees are liable only for violations apparent on the face of the disclosure statement, except where the assignment was involuntary. § 1641(e). Section 1641(d) provides a defense only if the assignee demonstrates that a reasonable person exercising ordinary due diligence could not determine, based on the required documentation, the itemization of the amount financed and other disclosure of disbursements that the transaction was a HOEPA loan. *See Cooper v. First Gov't Mortgage & Investors Corp.*, 238 F. Supp. 2d 50, 56 (D.D.C. 2002) (discussing due diligence required as going beyond reviewing documentation to analysis of it and whatever further inquiry is reasonable). In addition, under § 1641(d), a HOEPA loan assignee is liable not only for TILA violations, but also for all claims the consumer could assert under other laws. *See Barber v. Fairbanks Capital Corp.*, 266 B.R. 309, 320 (Bankr. E.D. Pa. 2001) (assignee of HOEPA loan is subject not only to TILA claims and defenses but also is liable for state consumer law violations, such as UDAP statutes (discussed below), that debtor could have asserted against original mortgagee).

Real Estate Settlement Procedures Act (RESPA)

Overview. The federal Real Estate Settlement Procedures Act (RESPA) is designed to protect consumers from high settlement charges and certain other abusive practices. 12 U.S.C. §§ 2601-2617. Some of its key provisions require an advance estimate of settlement costs and bar kickbacks for referral of settlement services. §§ 2603 & 2607. RESPA initially applied to loans subject to a first lien on residential property of one to four units. In 1992, it was amended to apply to subordinate loans on such property as well. Pub. L. 102-550, § 908 (1992). Implementing regulations are contained in Regulation X, 24 C.F.R. § 3500.1 et seq., as well as in Regulation Z, 12 C.F.R. § 226.19. A detailed treatment of RESPA is presented in Kathleen E. Keest & Elizabeth Renuart, NCLC, The Cost of Credit (2d ed. 2000 & Supp. 2004 by Elizabeth Renuart & Carolyn L. Carter).

Advance Disclosures. In residential mortgage transactions, RESPA requires good faith estimates of required TILA disclosures before consummation or within three business days after the creditor receives the consumer's written application, whichever occurs earlier. *See* Regulation Z, 12 C.F.R. § 226.19(a). If the APR at consummation turns out to vary from the advance estimate beyond set tolerances (1/8 of 1% in transactions not involving irregular features such as varying payment periods or amounts), re-disclosure is required no later than consummation or settlement. §§ 226.19(b), 226.22(a). Generally, in variable-rate loans, a booklet on adjustable rate mortgages must be provided along with other detailed disclosures specified in the regulations. § 226.19(b).

Prohibitions on Kickbacks. RESPA prohibits mortgage transaction servicers from giving and creditors from accepting "any portion, split or percentage" of any charge made or received for settlement services "other than for services actually performed." 12 U.S.C. § 2607(b). This language requires both splitting of fees and that they be unearned. *See Mercado v. Calumet Fed. Sav. & Loan Ass'n*, 763 F.2d 269, 270-71 (7th Cir. 1985). Although HUD has issued a policy statement indicating that splitting of unearned fees is not essential to finding a violation, so that charging unearned fees could be a violation, at least two federal appeals courts have rejected the agency's interpretation. *See Echevarria v. Chicago Title & Trust Co.*, 256 F.3d 623, 628 (7th Cir. 2001); *Boulware v. Crossland Mortgage Corp.*, 291 F.3d 261, 265 (4th Cir. 2002). *But see Sosa v. Chase Manhattan Mortgage Corp.*, 348 F.3d 979, 982 (11th Cir. 2003) (rejecting the argument that two parties are needed to violate the prohibition on accepting unearned fees).

Even if not actionable under RESPA, high and partially unearned fees still are subject to challenge as unconscionable or under state UDAP statutes discussed below. A debtor can argue that it is an unfair and deceptive practice to represent a charge as for a specific purpose (e.g., credit report fee), when the actual cost of that item is much less.

Error Resolution Process. RESPA also requires servicers of covered mortgages to respond to written requests from the borrower or borrower's agent for information concerning the servicing of the loan, and to either make appropriate corrections or, after investigation, explain why the account is correct. 12 U.S.C. § 2605(e). A failure to comply with the response requirements gives rise to liability for actual damages, statutory damages of up to $1000 in case of a pattern or practice of noncompliance and, in successful actions, attorneys' fees and costs, with special class action provisions. *See In re Maxwell*, 281 B.R. at 122-23 (finding a RESPA violation in national servicing company's failure to respond as required but no "pattern or practice" to justify statutory damages when only two violations were shown).

Fair Debt Collection Practices Act (FDCPA)

Overview. The Fair Debt Collection Practices Act (FDCPA) addresses abusive practices by debt collectors. 15 U.S.C. §§ 1692-1692o. Given that consumer debtors often seek relief from debt collection when they file in bankruptcy, it is not surprising that FDCPA issues can arise in consumer bankruptcy cases.

Substantive Restrictions. The FDCPA generally prohibits harassment or abuse, such as threats of violence or profane language. 15 U.S.C. § 1692d. It also prohibits false or misleading representations and unfair or unconscionable practices in collection of debts. § 1692e. It is an unfair practice to attempt to collect any amount unless "expressly authorized" by agreement or by law. § 1692f(1).

Stopping Communications. Given that many debtors cite a desire to stop debt collectors' calls as a reason they seek bankruptcy, the FDCPA could in theory provide an alternative to bankruptcy for some judgment-proof debtors, particularly those troubled by one over-aggressive third-party debt collector. The FDCPA provides two ways to stop a debt collector's calls to a consumer.

The FDCPA cannot be used to stop direct collections from creditors because it is applicable only to third-party debt collectors.

First, if the consumer notifies a debt collector in writing that the consumer refuses to pay a debt or that the consumer wants the debt collector to cease further communication with the consumer, the debt collector may not communicate further after one last communication. § 1692c(c). Second, if a debt collector knows that the consumer is represented by an attorney and knows or can readily ascertain the attorney's name and address, the debt collector may not communicate with the consumer unless the attorney fails to respond within a reasonable period to a communication from the debt collector. § 1692c(a)(2).

The FDCPA cannot be used to stop direct collections from creditors (*see* next section) because it is applicable only to third-party debt collectors. Where the debtor is being hounded by many callers, including creditors themselves, filing in bankruptcy may be the best strategy because it provides the benefits of the automatic stay, backed by contempt remedies, against creditors as well as third-party debt collectors. Notifying third-party debt collectors to cease communications and then using the FDCPA to attempt to address violations in the form of further communications would be more cumbersome and would not affect direct collection by creditors.

Applicability to Third-Party Debt Collection, Including Attorneys. The FDCPA does not apply to creditors collecting debts on their own behalf, except if they use a name other than their own to do so. Rather, it applies to third-party debt collectors. The term "debt collector" is defined in § 1692a(6) to cover a person who is "collecting on behalf of another" and who "regularly" collects or attempts to collect debts. The Act leaves direct debt collection outside its scope, in the hope that reputational concerns will constrain entities in the business of making loans from using abusive practices.

Originally, the FDCPA explicitly excluded attorneys, but in 1986 Congress repealed the exclusion. The issue that remained was whether engaging in a litigation practice that involves collecting or attempting to collect debts from consumers on behalf of creditor clients makes a lawyer a debt collector. The Supreme Court settled this issue in *Heintz v. Jenkins*, 514 U.S. 291, 292 (1995), holding that an attorney who regularly uses litigation to collect consumer debts on behalf of a client is a debt collector, subject to the FDCPA. Thus, lawyers who bring suits on behalf of clients against consumers, seeking payment of debts (defined as obligations to pay money, arising out of consumer transactions), need to adopt practices to comply with the Act, such as its validation and verification requirements.

Validation and Verification. Many substantive violations of the FDCPA can be fact-intensive and thus prohibitively expensive to

establish, for example, if proof of the content of telephone calls is necessary. As a result, FDCPA actions are more feasible if they can use a debt collector's own letters.

Section 1692g requires that a debt collector send a written "validation" notice along with the debt collector's initial communication to the consumer or within five days after that. The notice must contain: the amount of the debt, the name of the creditor, a statement that unless the consumer disputes the validity of the debt within 30 days of receipt of the notice it will be assumed to be valid, information that verification of the debt will be obtained if the consumer disputes it, and a statement that upon the consumer's written request the debt collector will provide the name and address of the original creditor, if different from the current creditor. Also, § 1692g(b) prohibits a debt collector from proceeding to attempt to collect the debt after a consumer disputes it, until the creditor obtains and mails the consumer either a "verification" or a copy of a judgment. Debt collectors must convey the validation notice in a legible manner that will be noticed. *See Graziano v. Harrison*, 950 F.2d 107, 111 (3d Cir. 1991) ("the notice must be in print sufficiently large to be read, and must be sufficiently prominent to be noticed").

Remedies. Any debt collector that fails to comply with any provision of the FDCPA is liable to the consumer for any actual damages and also for up to $1,000 in statutory damages, as the court may allow in its discretion. 15 U.S.C. § 1692k(a)(1)-(2).

The Texas Deceptive Trade Practices Act provides a wide variety of claims, based generally on false, deceptive or misleading acts, unconscionability, and breach of warranty.

In the case of a successful action to enforce liability, the consumer may recover the costs of the action and a reasonable attorney's fee as determined by the court. § 1692k(a)(3). Actual damages, which can be sought in bankruptcy, include compensation for emotional distress; state law requirements for recovery of negligent or intentional infliction of emotional distress are inapplicable. *See Maxwell v. Fairbanks Capital Corp.* (*In re Maxwell*), 281 B.R. at 118 (noting that the appropriate standard for judging unfairness of debt collection practices is from the perspective of "the least sophisticated debtor," suggesting that damages for subjectively-experienced emotional distress could be recoverable even if that distress is greater than what an ordinary debtor might experience).

Statute of Limitations & Claims in Recoupment. Section 1692k(d) sets a one-year statute of limitations, measured from the date of the violation. This limitation, however, does not necessarily bar a consumer from using damages, including actual and statutory damages, costs and attorney's fees under the FDCPA, to reduce the amount of a creditor's claim against the debtor. *See In re Maxwell*, 281 B.R. at 120.

Bona Fide Error Defense. A debt collector gets the benefit of a bona fide error defense if it shows by a preponderance of the evidence that the violation was not intentional *and* resulted from an error "notwithstanding the maintenance of procedures reasonably adopted to avoid any such error." § 1692k(c). *See Smith v. Transworld Sys., Inc.*, 953 F. 2d 1025, 1034 (6th Cir. 1992); *In re Maxwell*, 281 B.R. at 119-120. The language of this FDCPA defense closely resembles that of the TILA bona fide error provision, so that authority under either provision might well serve as persuasive authority concerning the other.

Use of FDCPA in Bankruptcy When Violation of the Automatic Stay or the Discharge Injunction Is An Alternative Theory. The circuits are split on the relation between the FDCPA and the Bankruptcy Code's provisions for an automatic stay and then a discharge injunction. 11 U.S.C. §§ 362 and 524. The Seventh Circuit held that the Bankruptcy Code does not work an implied repeal of the FDCPA as applied to post-bankruptcy collection activities; the court pointed out that it is possible for people to comply with both and for courts to enforce both. *See Randolph v. IMBS, Inc.*, 368 F.3d 726 (7th Cir. 2004). The Seventh Circuit rejected the reasoning in *Walls v. Wells Fargo Bank*, 276 F.3d 502 (9th Cir. 2002), to the effect that Bankruptcy Code remedies, for willful violation of the automatic stay and for contempt for violation of either the automatic stay or discharge injunction, are exclusive against post-bankruptcy collection efforts. *Walls* was a class action and the reason for the FDCPA claim presumably was in significant part to seek statutory class action damages. 15 U.S.C.§ 1692k(a)(2)(B) (providing for each named plaintiff to recover up to $1,000 and for the other class members to recover as a group up to the lesser of $500,000 or 1% of the debt collector's net worth).

Another class action charging violation of the discharge injunction and the FDCPA involved Sears obtaining post-discharge redemption agreements from Chapter 7 debtors, in which they agreed to pay replacement value for household goods used as collateral for loans. *See Arruda v. Sears, Roebuck & Co.*, 310 F.3d 13 (1st Cir. 2002). The court found no violation of the discharge injunction, since Sears carefully worded its redemption agreement forms to characterize the amounts the debtors agreed to pay as constituting the "replacement value" of the collateral and to note that the agreements imposed no personal liability on debtors, instead providing "Sears only recourse is against its collateral" in the event of debtors' failure to comply with the agreements. The court also found Sears' attorneys did not violate the FDCPA in seeking the redemption agreements on Sears' behalf. The plaintiffs argued that the amounts agreed to far exceeded the market value of the collateral and also alleged that the cost of replevying the goods (such as a bicycle, gas range, sofa and some exercise equipment) outweighed any residual value that Sears realistically could hope to realize from a resale of the collateral. The court's reasoning focused on the point that the agreements did not collect on "debts," obligations to pay money, but rather allowed debtors to keep collateral by paying for release of Sears' *in rem* rights.

This reasoning raises the question whether debtors could prevail if they used a different theory, namely, violation of a state statute generally prohibiting unfair and deceptive practices. Such a theory, if recognized, could be used against the creditor itself, rather than only against third-party debt collectors. The argument would be that if the debtors had been fully informed, they would have chosen to refuse to redeem, on the assumption that Sears would not find it cost-effective to replevy household goods collateral.

Texas Deceptive Trade Practices Act (DTPA)

All 50 states and the District of Columbia have some

form of unfair and deceptive acts and practices (UDAP) statute. These statutes also are known as "little FTC Acts" because, like the Federal Trade Commission Act, they prohibit unfair and deceptive practices. In Texas, the relevant statute is the Texas Deceptive Trade Practices Act [DTPA], 17 Tex. Bus. & Com. Code §§17.41—17.63. This law provides a wide variety of claims, based generally on false, deceptive or misleading acts, unconscionability, and breach of warranty. More significantly, the DTPA provides for substantial damages, a low causation standard, the possibility of punitive damages, and mandatory attorney's fees for a prevailing consumer. For full discussion of this law, *see* Richard M. Alderman, The Lawyer's Guide to the Texas Deceptive Trade Practices Act, 2nd ed. (2003 and annual supp.). Debtors' lawyers in Texas are encouraged to use the DTPA in bankruptcy.

Conclusion

Because federal and state consumer protection law theories can be raised in Bankruptcy Court, more debtors' lawyers could routinely look for violations of these laws. For example, a Truth in Lending Act right to rescind a lien on a home sometimes can be the difference between a feasible and an infeasible Chapter 13 repayment plan. Debtors also may be entitled to attorneys' fees and damages under myriad consumer protection statutes, and these rights can give consumer debtors offsets and leverage to use in dealings with creditors in bankruptcy. Noncompliance with applicable consumer law is common, and many violations are apparent on the face of disclosures and letters generated by creditors and their debt collectors. Debtors' lawyers who make the investment in greater expertise in consumer law will have new tools to help their clients.

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