BURR • FORMAN

DODD-FRANK NEWS

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The Dodd-Frank Wall Street Reform and Consumer Protection Act was enacted as a measure to promote financial stability and protection for consumers through increased regulation of nearly every aspect of the consumer finance industry. In the years since its enactment, the Dodd-Frank Act has led to significant industry reforms and the promulgation of numerous new laws and regulations. In an effort to stay apprised of these significant industry changes, Burr & Forman's Dodd-Frank Newsletter will serve as a periodic update of recent case law, news, and developments related to the Dodd-Frank Act.

---- RECENT CASES ----

CFPB Involvement in Litigation

Franklin v. Parking Revenue Recovery Services, Inc., No. 14-3774, 2014 WL 6685472 (7th Cir. Dec. 23, 2014).

Together with the Federal Trade Commission ("FTC"), the Consumer Financial Protection Bureau ("CFPB") recently filed an amicus brief in the case *Franklin v. Parking Revenue Recovery Services, Inc.*, which is currently on appeal before the U.S. Circuit Court of Appeals for the Seventh Circuit. In the brief, the FTC and CFPB request that the Seventh Circuit reverse the district court's finding that a fee charged for a parking violation in a publicly owned but privately operated parking lot is a "fine" rather than a "debt" subject to the FDCPA.

In June 2012, the plaintiffs parked their cars in a parking lot owned by a public commuter railroad but privately operated by CPS Chicago Parking, LLC. The lot charges $1.50 per day for parking. Believing the plaintiffs had not made their $1.50 payments after parking in the lot, CPS sent each plaintiff a notice of their violation seeking payment of $46.50.

The plaintiffs filed a class action lawsuit in the Northern District of Illinois, alleging that the defendants had violated the FDCPA through the following conduct:

> (1) attempting to collect an amount not expressly authorized by the agreement creating the debt or permitted by law;
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> (2) using false, deceptive, or misleading representations or means in connection with the collection of a debt; and
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> (3) requiring a consumer dispute of a debt to be in writing "to avoid the assumption of validity."

Franklin v. Parking Revenue Recovery Servs., Inc., No. 13 C 02578, 2014 WL 6685472, at *2 (N.D. Ill. Nov. 25, 2014). The defendants moved for summary judgment, arguing that the parking fees they attempted to collect are not "debts" subject to the authority of the FDCPA.

The court found that the $46.50 demanded of each plaintiff is properly categorized as a "fine," i.e., a penalty imposed for breaking a law or rule. *Id.* at *3. Since it did not result from a consensual transaction, it cannot be a "debt" for purposes of the FDCPA. *Id.* The court reasoned that a person who utilizes a private parking lot without making the payment demanded is akin to a thief, and "theft does not create a consensual transaction." *Id.* at *4. Compensation would be warranted in such a situation, but not for breach of a contract. Rather, a parking violation notice "imposes a penalty for violating the rules of the lot requiring payment to park." *Id.* at *4. It is not "seeking payment of a contracted-for amount." *Id.* Someone who violates the rules of the parking lot is obligated to pay the fee, not because they have entered into a consensual transaction, but because they have effectively stolen the services of another. *Id.*

The CFPB, along with the FTC, argues in its brief that a parking fee constitutes a "debt" under the FDCPA, because it is an "obligation or alleged obligation of a consumer to pay money arising out of a transaction" under 15 U.S.C. § 1692a(5). Brief of Amici Curiae Federal Trade Commission and Consumer Financial Protection Bureau at 3, *Franklin v. Parking Revenue Recovery Servs., Inc.,* No. 13 C 02578 (7th Cir. Dec. 11, 2015). A "debt," as defined by the FDCPA, includes "any" obligation to pay money to another, as long as that obligation "aris[es] out of a transaction." *Id.* at 3–4 (citing 15 U.S.C. § 1692a(5)).

The FDCPA, however, does not define what constitutes a "transaction." The CFPB and the FTC argue that a transaction exists as soon as a person uses the service of a parking lot offered to the public for a fee. Through the act of parking, the consumer has accepted the offer. The brief cites case law finding that acceptance or usage of services creates a transaction for purposes of the FDCPA. Thus, the CFPB and the FTC argue that the district court erred in finding that acceptance of service is insufficient to establish acceptance of the obligation to pay. By using the services of the parking lot, a person creates a transaction and accepts the obligation to pay. Such an obligation is a "debt" subject to the FDCPA. Improperly characterizing it as a "fine" cannot place it outside the reach of the FDCPA.

Strubel v. Comenity Bank, No. 15-528, 2015 WL 321859 (Feb. 24, 2015).

The CFPB recently filed an amicus brief in the case *Strubel v. Comenity Bank,* which is currently on appeal before the U.S. Court of Appeals for the Second Circuit. Plaintiff Abigail Strubel brought a class action suit against Comenity Bank, which issues Victoria's Secret credit cards. She alleged that, in issuing the Victoria's Secret-brand cards, Comenity Bank violated the Truth in Lending Act, 15 U.S.C. § 1601, et seq. ("TILA"), and one of its implementing regulations requiring the disclosure of certain information upon the issuance of a credit card to a consumer. The U.S. District Court for the Southern District of New York granted Comenity's motion for summary judgment, finding the plaintiff's claims "based primarily on minor stylistic differences between the Model Form and Comenity's notice to consumers." *Strubel v. Comenity Bank,* No. 13-CV-4462 PKC, 2015 WL 321859, at *1 (S.D.N.Y. Jan. 23, 2015). Strubel appealed to the Second Circuit. The CFPB filed an amicus brief after the court ordered the parties to file supplemental briefs addressing "the question of plaintiff's standing to bring her claims in light of 15 U.S.C. §§ 1640 and 1666i, along with any other relevant statutory provisions or principles of law."

In its amicus brief, the CFPB argues that whether a plaintiff has standing to pursue her statutory claims depends on whether she alleged facts that would place her within the class of plaintiffs protected by the statute. Brief for the Consumer Financial Protection Bureau as Amicus Curiae at 1, No. 15-528 (2d Cir. 12/31/15). The CFPB argues that the plaintiff, Strubel, has standing, because her claims fall within the cause of action created by § 1640(a). Section 1640(a) subjects creditors to liability for failing to comply with TILA's account-opening disclosures requirement. In 1980, Congress amended § 1640(a) to limit statutory damages to certain material violations, which includes violations of the account-opening disclosures requirement present in § 1637(a). The CFPB also argues that Congress has placed TILA's implementing regulations (Regulation Z, 12 C.F.R. Part 1026) on par with TILA, making violations of Regulation Z subject to § 1640(a) statutory damages.

The CFPB argues that the cause of action provided by § 1640(a) covers the plaintiff's claim that Comenity violated the disclosure requirement of § 1637(a)(7) and its implementing regulation. The plaintiff's one-count complaint explicitly quoted § 1637(a)(7) and alleged that Comenity made several omissions in its account-opening disclosures. Since § 1640(a) provides a remedy for violations of § 1637(a)(7), Strubel falls within the class of plaintiffs protected by the statute.

Additionally, the CFPB argues that Strubel's claim that Comenity violated the implementing regulation also gives her standing to seek statutory damages. Strubel's complaint cited the implementing regulation, 12 C.F.R. § 1026, and alleged that the notice provided by Comenity to Strubel was not substantially similar to the model form provided in the regulation. The CFPB argues that this allegation also places Strubel within the class of protected plaintiffs, because § 1637(a) explicitly requires

creditors to look to the regulation and the regulation in turn requires that disclosure statements be "substantially similar" to those found in the model form. Thus, the alleged violation of the implementing regulation also constitutes a violation of § 1637(a) that falls within the scope of statutory damages authorized by § 1640(a).

Finally, the CFPB argues that § 1666i does not impact the issue of standing in this case. This provision states that, in certain situations,

> [A] card issuer who has issued a credit card to a cardholder pursuant to an open end consumer credit plan shall be subject to all claims (other than tort claims) and defenses arising out of any transaction in which the credit card is used as a method of payment or extension of credit.

15 U.S.C. § 1666i. While the plaintiff alleges that the defendant did not properly disclose her rights under § 1666i, as it was required to do under § 1637(a)(7) and its implementing regulation, she does allege any violation of § 1666i itself. Therefore, the CFPB argues, § 1666i does not play a role in determining whether the plaintiff has statutory standing.

The Anti-Retaliation Provision of the Dodd-Frank Act

Azim v. Tortoise Capital Advisors, LLC, No. 13-2267-DDC-JPO, 2015 WL 6802540 (D. Kan. Nov. 5, 2015).

A Circuit split has recently emerged over the scope of the Dodd-Frank Act's anti-retaliation provision. However, when the issue—one of first impression in the District of Kansas and not yet addressed by the Tenth Circuit—was raised in *Azim v. Tortoise Capital Advisors,* the U.S. District Court for the District of Kansas declined to decide the issue.

The Dodd-Frank Act prohibits employers from retaliating against whistleblowers for certain lawful acts. The court identified tension between this anti-retaliation provision and the Dodd-Frank Act's definition of "whistleblower." The Dodd-Frank Act defines "whistleblower" as "any individual who provides . . . information relating to a violation of the securities laws *to the Commission,* in a manner established, by rule or regulation, by the commission." 15 U.S.C. § 78u–6(a)(6) (emphasis added). Subsection (iii) of the anti-retaliation provision, however, provides a remedy for those who make disclosures under "the Sarbanes-Oxley Act . . . and any other law, rule, or regulation subject to the jurisdiction of the Commission." 15 U.S.C. § 78u–6(h)(1)(A). This is problematic, because portions of the Sarbanes-Oxley Act mandate only internal reporting of securities violations. The tension has led to a split of authority over whether the Dodd-Frank Act's anti-retaliation provision only extends to those who have reported securities laws violations *to the SEC* or whether subsection (iii) allows its protections to apply more widely to those who report violations to other parties apart from the SEC.

Here, the defendant argued that plaintiff was not a "whistleblower," because he never reported any violation of the securities laws to the SEC. The court carefully outlined the split that has emerged among courts deciding whether plaintiffs must establish that they reported to the SEC in order to pursue anti-retaliation claims. The Fifth Circuit, the first to address the issue, takes the minority position that the "plain language and structure of the whistleblower-protection provision . . . unambiguously requires individuals to provide information relating to a violation of the securities laws to the SEC to qualify for protection from retaliation under [the Dodd-Frank Act." 2015 WL 6802540, at *13 (citing *Asadi v. G.E. Energy (USA), L.L.C.,* 720 F.3d 620, 628 (5th Cir. 2013)). The Second Circuit very recently took on the issue in *Berman v. Neo@Ogilvy LLC* and instead found that the Dodd-Frank Act's whistleblower protections have a broader scope. 801 F.3d 145 (2d Cir. 2015). In contrast to the Fifth Circuit, the Second Circuit found the statute's language ambiguous and so gave deference to the SEC rule that gives whistleblower protection to those who report violations to certain parties besides the SEC.

The court acknowledged that while neither the Tenth Circuit nor the District of Kansas has addressed the issue, two districts within the Tenth Circuit have done so. In *Wagner v. Bank of Am. Corp.,* the court took the minority position and found that the statute's plain language requires that a plaintiff establish that he or she is a "whistleblower" who made a complaint

to the SEC in order to make a retaliation claim. No. 12–cv–00381–RBJ, 2013 WL 3786643 (D.Colo. July 19, 2013). In *Genberg v. Proter,* the court instead found that the anti-retaliation provision makes an exception to the Dodd-Frank Act's definition of "whistleblower" and does not require a plaintiff to report to the SEC in order to qualify for protection. 935 F.Supp.2d 1094 (D.Colo.2013).

Here, however, the court found it did not need to decide whether the plaintiff was required to report to the SEC. First, the court found that the plaintiff failed to establish the first element required of a Dodd-Frank retaliation claim, i.e., that he had reported an alleged securities violation. The plaintiff here conceded he had not reported anything to the SEC, but argued he had made an internal report of a securities violation. The court, however, held that the plaintiff had failed to provide any admissible evidence that he had made any internal report of securities violations. The court rejected the plaintiff's argument that by complaining in an email to his former employer's human resources manager about "[r]ampant incompetence and mistakes" and "toxic management practices" he was referencing securities violations. While there was evidence the plaintiff complained of "harassment" and a "hostile work condition," the court found there was no evidence that the plaintiff had ever complained of, or reported, any securities violations. Additionally, the court found that the plaintiff had failed to establish the second element required of a Dodd-Frank retaliation claim by failing to establish any retaliation on the part of the former employer. Finally, the court found that the plaintiff had failed to establish the third and fourth elements of a retaliation claim, because he had not provided any evidence that he disclosed an alleged violation pursuant to a rule, law, or regulation subject to the SEC's jurisdiction or that disclosure was required or protected by such a rule, law, or regulation. Since the plaintiff failed to provide any evidence of internal reporting of alleged securities violations, and indeed, had not established any of the four elements required of an anti-retaliation claim, the court found that there was no need to address whether internal reporting would be sufficient to support a claim for whistleblower protection.

Lutzeier v. Citigroup Inc., No. 4:14CV183 RLW, 2015 WL 7306443, at *2 (E.D. Mo. Nov. 19, 2015).

In *Lutzeier v. Citigroup Inc.*, the court held that even though the plaintiff had not reported any securities laws violation to the SEC, he was nevertheless entitled to pursue Dodd-Frank remedies for the alleged retaliation that followed his reporting wrongdoing to his employer. The Eight Circuit has not yet addressed whether the Dodd-Frank Act's anti-retaliation provision is limited to those who fall under the Dodd-Frank Act's definition of "whistleblower" or whether it extends to those who did not report alleged violations to the SEC and so fall outside the "whistleblower" definition provided by the Act in 15 U.S.C. § 78u–6(a)(6). The *Lutzeier* court followed the reasoning used by the Second Circuit when it recently created a circuit split by finding that the anti-retaliation provision extends protection to those who fall outside the definition of "whistleblower."

In *Berman v. Neo@Ogilvy LLC,* the Second Circuit found ambiguity in subsection (iii) of the Dodd-Frank Act's anti-retaliation provision:

> When the conferees, at the last minute, inserted subdivision (iii) within subsection 21F(h)(l)(A), did they expect subdivision (iii) to be limited by the statutory definition of 'whistleblower' in subsection 21F(a)(6), or did they expect employees to be protected by subdivision (iii) whenever they report violations internally, without reporting to the Commission? The texts leave the matter unclear, and no legislative history even hints at an answer.

801 F.3d 145, 155 (2d Cir. 2015).

In a rule promulgated by the SEC in 2011, the Commission clarified the scope of the Dodd-Frank Act's anti-retaliation provision and interpreted it as extending protection beyond those who report securities laws violations to the SEC. 17 C.F.R. § 240.21F–2(b)(1). In a comment to the final rule, the SEC stated that subsection (iii) of the anti-retaliation provision "includes individuals who report to persons or governmental authorities

other than the Commission." SEC, Securities Whistleblower Incentives and Protections, 76 Fed. Reg. 34300–01, 34304 (June 13, 2011) (codified at 17 C.F.R. pts. 240–49). The *Berman* court also pointed to the release accompanying the issuance of the rule, where the SEC explained that "the statutory anti-retaliation protections [of the Dodd–Frank Act] apply to three different categories of whistleblowers, and the third category [described in subdivision (iii) of subsection 21F(h)(1)(A)] includes individuals who report to persons or governmental *authorities other than the Commission*." *Berman,* 801 F.3d at 148 (quoting Securities Whistleblower Incentives and Protections, Release No. 34–64545, 76 Fed.Reg. 34300–01, at *34304, 2011 WL 2293084 (F.R.) (June 13, 2011) (emphasis added)).

Having found the anti-retaliation provision in the statute ambiguous, the *Berman* court applied *Chevron* deference to the SEC's interpretation and found the plaintiff "entitled to pursue Dodd-Frank remedies for alleged retaliation after his report of wrongdoing to his employer, despite not having reported to the Commission before his termination." *Berman,* 801 F.3d at 155. The *Lutzeier* court also cited a pre-*Berman* decision to note that most district courts that have addressed the issue have also found the statute ambiguous and so defer to the SEC's final rule. *Id.* at *2 (citing *Khazin v. TD Ameritrade Holding Corp.,* No. CIV.A. 13-4149 SDW, 2014 WL 940703, at *5 (D.N.J. Mar. 11, 2014)).

Based on the Second Circuit's finding in *Berman v. Neo@Ogilvy LLC* and the SEC rule interpreting the Dodd-Frank Act's anti-retaliation provision, the *Lutzeier* court found the statute ambiguous and gave deference to the SEC's interpretive rule. In doing so, the *Lutzeier* court found that "an individual need not report to the Agency to qualify as a whistleblower." Here, the plaintiff did not make a report of alleged wrongdoing to the SEC, but instead allegedly suffered retaliation after internally reporting wrongdoing to his employer. The court held that, given the ambiguity of the Dodd-Frank Act's anti-retaliation provision and the expansive interpretation given to it by the SEC rule, the plaintiff was entitled to proceed with his claim for Dodd-Frank remedies.

Puffenbarger v. Engility Corp., No. 1:15-CV-188, 2015 WL 9686978 (E.D. Va. Dec. 31, 2015).

In *Puffenbarger v. Engility Corp.,* the court followed the reasoning of the Fifth Circuit and found that a person who does not fall within the Dodd-Frank Act's definition of "whistleblower" cannot seek remedies under the Dodd-Frank Act's provision for whistleblowers that experience retaliation from their employers. The plaintiff in *Puffenbarger v. Engility Corp.* alleged that she had suffered retaliation from her employer after internally reporting to her supervisor that their employer had given another employee an unauthorized cash payment. The Fourth Circuit has not yet addressed whether internal reporting of securities violations is sufficient to qualify a person as a "whistleblower" under § 78u–6 of the Dodd-Frank Act. Until September of 2015, no circuit court besides the Fifth Circuit had directly addressed the issue, but about three months before the *Puffenbarger* court took on the question, the Second Circuit issued an opinion that introduced a circuit split over the issue. *See Berman v. Neo@Ogilvy LLC,* 801 F.3d 145 (2d Cir. 2015). Nevertheless, the *Puffenbarger* court adopted the position first taken by the Fifth Circuit and a minority of other district courts, and found internal reporting of securities violations insufficient to establish a claim for whistleblower protection under the Dodd-Frank Act.

In so finding, the *Puffenbarger* court first pointed to the fact that the Dodd-Frank Act has expressly defined a "whistleblower" as "any individual who provides . . . information relating to a violation of the securities laws *to the Commission* [i.e., the SEC]." *Puffenbarger*, 2015 WL 9686978, at *8 (quoting 15 U.S.C. § 78u–6(a)(6) (emphasis added)). Additionally, the court reasoned, the Dodd-Frank Act's whistleblower protection exists to "encourage[] individuals to provide information relating to a violation of U.S. securities laws to the [SEC]" by protecting whistleblowers from retaliatory actions by employers. *Puffenbarger,* 2015 WL 9686978, at *8 (quoting *Asadi v. G.E. Energy (USA), L.L.C.,* 720 F.3d 620, 622–23 (5th Cir.2013)). The Dodd-Frank Act achieves this goal by protecting whistleblowers from employers retaliating to lawful actions taken by the whistleblower:

(i) in providing information to the Commission in accordance with this section;

(ii) in initiating, testifying in, or assisting in any investigation or judicial or administrative action of the Commission based upon or related to such information; or

(iii) in making disclosures that are required or protected under [THE SARBANES-OXLEY ACT], this chapter ..., and any other law, rule or regulation subject to the jurisdiction of the Commission.

Id. § 78u–6(h)(1)(A).

The court found that the SEC has adopted a definition of "whistleblower," for purposes of anti-retaliation claims, that conflicts with the plain language of the Dodd-Frank Act in § 78u–6(a)(6) by failing to require a whistleblower to provide the Commission with information regarding securities laws violations. For purposes of anti-retaliation claims, the SEC defines "whistleblower" as a person who reports protected information "in a manner described in" the Dodd-Frank Act's anti-retaliation provision, which includes a cross-reference to the Sarbanes-Oxley Act's reporting provisions. Such provisions of the Sarbanes-Oxley Act protect employees who internally report violations but do not share any information regarding those violations with the SEC. 17 C.F.R. § 240.21F-(2)(b)(ii).

The Fifth Circuit has held that the Dodd-Frank Act provides a clear definition of "whistleblower." Therefore, the SEC rule is not entitled to *Chevron* deference, because "the plain language of § 78u–6 limits protection under the Dodd-Frank whistleblower-protection provision to those individuals who provide 'information relating to a violation of the securities laws' to the SEC." *Puffenbarger,* 2015 WL 9686978, at *8 (quoting *Asadi,* 720 F.3d at 630). The *Puffenbarger* court recognized that the Second Circuit, and various district courts, has since found the meaning of "whistleblower" under the Dodd-Frank Act ambiguous enough to merit *Chevron* deference to the SEC rule. *Id.* Specifically, they find a tension exists between the definition of "whistleblower" found in § 78u–6(a)(6) and the protection provided by subsection (iii) of § 78u–6(h)(1)(A). *Id.* While the § 78u–6(a)(6) definition of "whistleblower" requires reporting to the SEC, subsection (iii) of § 78u–6(h)(1)(A) references actions that do not involve reporting to the SEC, such as internal reporting mandated by the Sarbanes-Oxley Act. *Id.*

Like the Fifth Circuit, the *Puffenbarger* court resolved the tension—or rather, held that no tension exists between the two—by finding that the three categories listed in subsections (i) through (iii) of § 78u–6(h)(1)(A) describe the types of lawful activities that may appear in a whistleblower-protection claim, but they do not define who qualifies as a whistleblower. Thus, someone who has taken the actions described in subsection (iii) of § 78u–6(h)(1)(A) must also take the action described in § 78u–6(a)(6) and report the violations to the SEC in order to qualify for protection as a "whistleblower" under the Dodd-Frank anti-retaliation provision. An individual may take actions referred to by subsection (iii) of § 78u–6(h)(1)(A), i.e., make disclosures that receive protection under the Sarbanes-Oxley Act, but nevertheless fail to qualify for whistleblower protection under the Dodd-Frank Act. The Dodd-Frank Act requires more. By limiting protection for the actions described in subsection (iii) of § 78u–6(h)(1)(A) to those who qualify as "whistleblowers" under the Dodd-Frank Act, i.e., report violations to the SEC, § 78u–6(h)(1)(A)(iii) is "not render[ed] . . . conflicting or superfluous." *Puffenbarger,* 2015 WL 9686978, at 9 (quoting Asadi, 720 F.3d at 626). It is just a limitation. To remove this limitation from the statute, the court found, would be to "excise unambiguous language from the statute." *Id.* at *9.

The *Puffenbarger* court ultimately found that, since the intent of Congress is made clear by the statute "directly and unambiguously limit[ing] whistleblower protection to individuals who report [violations] to the SEC, it is necessary to 'give effect to the unambiguously expressed intent of Congress,' and hence . . . reject the SEC's more expansive interpretation of the term 'whistleblower.'" *Puffenbarger,* 2015 WL 9686978, at *9 (quoting *Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc.,* 467 U.S. 837, 842–43, 104 S.Ct. 2778, 81 L.Ed.2d 694 (1984)). In this case

the plaintiff admittedly did not report anything to the SEC, and so did not qualify for whistleblower protection under the Dodd-Frank Act.

The court also noted that even if it were to apply the expansive SEC interpretation of "whistleblower," it would not affect the outcome in this case. In order to establish a prima facie case, under either interpretation, the plaintiff must first show by a preponderance of the evidence that she engaged in protected activity. Here, the court found that the plaintiff was not engaged in protected activity under the Sarbanes-Oxley Act when she reported the cash payment to her supervisor, and therefore did not qualify for whistleblower protection under the Sarbanes-Oxley Act. Even if the court were to adopt the SEC's interpretation and omit the SEC-reporting requirement, the plaintiff would still be required to show that she had engaged in activity protected under the Sarbanes-Oxley Act. Since the plaintiff failed to show that she had engaged in protected activity, she failed to establish a prima facie case under either the Second Circuit or Fifth Circuit interpretation of the Dodd-Frank Act.

RESPA

Clark v. Ocwen Loan Servicing, LLC, No. 1:15-CV-659, 2015 WL 6159447 (W.D. Mich. Oct. 20, 2015).

In *Clark v. Ocwen Loan Servicing, LLC,* plaintiff Harold Clark, whose property was sold in a sheriff's sale following his default on his mortgage obligations, filed an action against the mortgage servicer, Ocwen Loan Servicing, LLC, and against the holder of the mortgage, Wilmington Trust Company. The action claimed (1) wrongful foreclosure, (2) breach of contract, (3) fraudulent misrepresentation, (4) violation of the Real Estate Settlement Procedures Act ("RESPA"), 12 U.S.C. § 2601 et seq., and (5) negligence. No. 1:15-CV-659, 2015 WL 6159447 (W.D. Mich. Oct. 20, 2015). Following the defendant's motion to dismiss for failure to state a claim, the court dismissed the plaintiff's claims for wrongful foreclosure, breach of contract, fraudulent misrepresentation, and negligence, but did not dismiss the plaintiff's RESPA claim.

Clark's complaint alleges that he obtained the mortgage on September 25, 2006. After the mortgage was assigned from Mortgage Electronic Registration Services, Inc., to Wilmington Trust Company, the mortgage servicing rights were transferred to Ocwen. Years later Clark fell behind on his mortgage payments and contacted Ocwen to seek mortgage assistance. Following a financial interview, Ocwen informed him that he had pre-qualified for mortgage assistance. That same month Clark submitted a complete assistance application. Throughout the course of the following twelve months, he continued to provide Ocwen with updates to the information in his application. During the course of that year, Ocwen representatives repeatedly informed Clark that his application was complete and instructed him to wait for an answer from Ocwen. He did not receive an answer from Ocwen until several weeks after the sale of his property in a sheriff's sale. According to the letter he received in answer, Ocwen had denied his request, because "Your loan has undergone foreclosure and the property is currently being marketed for sale." *Clark,* 2015 WL 6159447, at *1. The letter included no mention as to whether Clark had been evaluated for "home retention options such as a Tier I and II mod, an ALTA Mod, a Mod 24, a capitalization mod, or a principal balance reduction mod as required by the HAMP guidelines." *Id.*

Clark based his wrongful foreclosure claim on Ocwen's failure to comply with state foreclosure law by failing to

> a. Properly notify Plaintiff . . . in writing of the pending foreclosure proceedings;
>
> b. Properly post notice of the foreclosure sale 4 times in the paper; and
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> c. Properly calculate the amount due and owing with all costs and fees as of the date of the Sheriff's sale held on 1/23/2015.

Id. at *2. The court found, however, that a plaintiff must do more than show the defendant's noncompliance with state foreclosure law; they must also establish that they have been "'prejudiced'

by the defendant's failure to comply with state law." *Id.* Clark argued that he was prejudiced by Ocwen failing to respond to his mortgage assistance request, and that if a loan modification option had been provided, it would have enabled him to prevent foreclosure. Since this argument concerns alleged problems with the loan modification process and not the foreclosure process, the court rejected the argument as grounds for challenging foreclosure. *Id.* at *3 (citing *Campbell v. Nationstar Mortg.,* 611 F. App'x 288, 294 (6th Cir. 2015) ("An alleged irregularity in the loan modification process . . . does not constitute an irregularity in the foreclosure proceeding.")). Thus, the court found Clark failed to state a claim for wrongful foreclosure.

The court quickly dispensed of Clark's breach of contract claim. Clark alleged that the note and mortgage on his property created a contractual relationship between him and Ocwen. He argued that by failing to mitigate damages, misleadingly informing him that he was prequalified for loss mitigation, failing to properly review his application, and failing to provide him with a loss mitigation plan prior to the sheriff's sale of his property, Ocwen breached an implied covenant of good faith and fair dealing. Michigan law, however, "does not recognize a cause of action for breach of the implied covenant of good faith and fair dealing." *Id.* at *3. Thus, the court found Clark failed to state a cause of action for breach of contract.

The court found Clark's fraudulent misrepresentation claim insufficiently detailed to survive the defendant's motion to dismiss. In order to properly allege fraud in the Sixth Circuit, a plaintiff must (1) "specify the statements that the plaintiff contends were fraudulent, (2) identify the speaker, (3) state where and when the statements were made, and (4) explain why the statements were fraudulent." *Id.* at *4. Here, Clark could not identify any specific statements and thus could not satisfy any of the other requirements that he provide certain details about those statements. The court refused to grant Clark more time to conduct discovery, reasoning that he should already be aware of the statements he relied upon and that the particularity requirement exists in part to prevent such "fishing expeditions." *Id.*

Even if Clark had sufficiently alleged his fraud claim, the court found that it would still be defeated by the statute of frauds applicable to financial institutions. *Id.* Misrepresentations to Clark regarding mortgage assistance and loss mitigation would constitute promises to make "financial accommodations." Under Michigan's statute of frauds, "an action may not be brought against a financial institution to enforce a promise to 'modify, or permit a delay in repayment or performance of a loan, . . . or other financial accommodation,'" unless the promise appears "'in writing and signed with an authorized signature by the party to be charged' with the promise." *Id.* Since Clark did not allege that any of the defendants' representations regarding loss mitigation or mortgage assistance were made in writing, he cannot pursue a fraudulent misrepresentation claim.

The court also dismissed Clark's negligence claim, finding that he failed to allege the first element of a negligence claim: that the defendant owed the plaintiff a duty. Clark argued that violation of federal law may serve as evidence of negligence. He could not provide, however, any federal law imposing a duty of care on mortgage servicers or the holders of mortgages. The court found that even though violations of federal law may serve as evidence of negligent conduct, it does not mean they also create a duty of care. The Sixth Circuit has rejected claims such as Clark's, as Michigan does not recognize a duty of care under the Home Affordable Modification Program ("HAMP") regulations. The court held that, having failed to allege a duty of care, Clark's complaint did not state a claim for negligence.

The only claim to survive the defendants' motion to dismiss is Clark's RESPA claim. Clark alleges that Ocwen violated various regulations promulgated pursuant to § 1022(b) of the Dodd-Frank Act, 12 U.S.C. § 5512(b), and RESPA. One of the regulations he cites requires loan servicers to maintain policies and procedures to "[p]roperly evaluat[e] loss mitigation applications." 12 C.F.R. § 1024.38(b)(2). A second requires that loan servicers make a good faith effort to make live contact with borrowers within 36 days of their delinquency and then promptly inform the borrowers of possible loss mitigation options. 12 C.F.R. 1024.39(a). He also cites regulations that prohibit loan servicers from foreclosing in certain

circumstances where the borrower submitted a complete loss mitigation application at least 37 days before the foreclosure sale and require servicers to promptly review the application and provide the borrower with written notice of the options available. 12 C.F.R. §§ 1024.41(g), (b)–(c).

Clark claims he submitted a complete loss mitigation application over 37 days before the foreclosure sale, but that the defendants did not review it or provide him with notice of the options available before they commenced the foreclosure of his property. Clark sought relief in the form of an order setting aside the sheriff's sale, requiring Ocwen to evaluate his loan modification options, and award "all damages to which he is entitled under RESPA, . . . emotional damages, elimination of all arrearage added to [p]laintiff's mortgage loan that resulted from [d]efendant's illegal activity, and costs and attorney fees." *Clark,* 2015 WL 6159447, at *5. The court found, however, that Clark's relief is limited to damages, as RESPA does not provide for injunctive relief. *Id.* at *6.

Ocwen argued that Clark insufficiently alleged actual damages resulting from its failure to comply with RESPA. *Id.* Courts in the Eastern District of Michigan have indeed dismissed similar RESPA claims for failing "to plead actual damages resulting from the defendant's actions." *Id.* They have required plaintiffs to allege specific damages resulting from RESPA violations or to allege "how" an alleged RESPA violation led to actual damages. *Id.* The court found these cases unpersuasive, as they fail to address Sixth Circuit cases that apply a less stringent standard. *Id. See, e.g., Mellentine v. Ameriquest Mortg. Co.,* 515 F. App'x 419, 424–25 (6th Cir.2013) (finding allegation that defendant failed to provide timely response to written request and that plaintiffs suffered "damages in an amount not yet ascertained, to be proven at trial" sufficient to state a claim under RESPA).

The defendants also argued that, since the loss of Clark's property resulted from his failure to fulfill his mortgage obligations and not from Ocwen's alleged failure to comply with RESPA, Clark cannot recover damages for the loss of his home. *Id.* at *7. The court reasoned that, even if the argument were true, Clark alleged other damages separate from the loss of his home. *Id.* The court pointed to the emotional damages claim recoverable under RESPA, the expenses Clark incurred in completing and updating his loss mitigation application that might qualify as damages, and the fact that Ocwen's alleged pattern of non-compliance might give rise to statutory damages. Thus, the court found the allegations in Clark's complaint sufficient to state a claim under RESPA.

---- IN THE NEWS ----

CFPB Amends Regulation Z Commentary

On November 27, 2015, the CFPB issued a final rule amending the official interpretations and commentary for the Truth in Lending Act ("TILA"). TILA's regulations require the dollar threshold for exempt consumer credit transactions to be adjusted annually based on increases in the Consumer Price Index for Urban Wage Earners and Clerical Workers. Because there was no increase in this index as of June 1, 2015, the exemption threshold remains at $54,600 through December 31, 2016.

The final rule became effective January 1, 2016.

To learn more, visit: www.federalregister.gov/articles/2015/11/27/2015-30091/truth-in-lending-regulation-z

CFPB Amends CLA Commentary

On November 27, 2015, the CFPB issued a final rule amending the official interpretations and commentary for the regulations implementing the Consumer Leasing Act ("CLA"). The CLA's regulations require the dollar threshold for exempt consumer leases to be adjusted annually based on increases in the Consumer Price Index for Urban Wage Earners and Clerical Workers. Because there was no increase in this index as of June 1, 2015, the exemption threshold remains at $54,600 through December 31, 2016.

The final rule became effective January 1, 2016.

To learn more, visit: www.federalregister.gov/articles/2015/11/27/2015-30071/consumer-leasing-regulation-m

Agencies Issue Final Rule on Appraisals for Higher-Priced Mortgage Loans

On November 27, 2015, the CFPB, OCC, and the Fed issued final rules amending the official interpretations for various regulations implementing section 129H of TILA, governing appraisal requirements for "higher-priced mortgage loans" and "higher-risk mortgages." The agencies' 2014 rules exempted transactions of $25,000 or less, and required that this amount be adjusted annually based on increases in the Consumer Price Index for Urban Wage Earners and Clerical Workers. Because there was no increase in this index as of June 1, 2015, the exemption threshold remains at $25,500 through December 31, 2016.

The final rule became effective January 1, 2016.

To learn more, visit: www.federalregister.gov/articles/2015/11/27/2015-30097/appraisals-for-higher-priced-mortgage-loans-exemption-threshold

CFPB Amends Commentary on Reg Z Asset-Size Exemption Threshold

On December 23, 2015, the CFPB issued a final rule amending the commentary to the asset-size exemption thresholds of Regulation Z, which implements TILA.

Specifically, the final rule preserves the asset-size threshold for certain creditors at $2 billion for certain escrow account requirements for higher-priced mortgage loans.

The final rule became effective January 1, 2016.

To learn more, visit: www.federalregister.gov/articles/2015/12/23/2015-32293/truth-in-lending-act-regulation-z-adjustment-to-asset-size-exemption-threshold

CFPB Amends Commentary on Reg C Asset-Size Exemption Threshold

On December 23, 2015, the CFPB issued a final rule amending the commentary to the asset-size exemption thresholds of Regulation C, which implements the Home Mortgage Disclosure Act.

Specifically, the final rule preserves the asset-size exemption for banks, savings associations and credit unions at $44 million.

The final rule became effective January 1, 2016.

To learn more, visit: www.federalregister.gov/articles/2015/12/23/2015-32285/home-mortgage-disclosure-regulation-c-adjustment-to-asset-size-exemption-threshold

CFPB Issues Corrections to Regulation Z and Interpretations

On December 24, 2015, the CFPB issued a final rule making certain technical corrections to Regulation Z and its official interpretations.

Specifically, the final rule republishes certain provisions that were inadvertently omitted from the Code of Federal Regulations under the TILA-RESPA Final Rule.

To learn more, visit: www.federalregister.gov/articles/2015/12/24/2015-32463/2013-integrated-mortgage-disclosures-rule-under-the-real-estate-settlement-procedures-act-regulation

CFPB Requests Feedback on HDMA Guidelines

The CFPB recently requested feedback on its guidelines regarding correction of erroneous data submitted to the agency pursuant to the Home Mortgage Disclosure Act.

HDMA regulations require lenders to resubmit data where errors exceed certain thresholds. These thresholds vary depending on the number of loans reported by an institution. The CFPB seeks feedback on issues such as whether it should continue to use these percentage thresholds, how the thresholds

should be computed, and whether thresholds should differ based on a lender's loan volume.

To read the request for information, visit: http://files.consumerfinance.gov/f/201601_cfpb_request-for-information-regarding-home-mortgage-disclosure-act-resubmission.pdf

CFPB Issues Warning Letters Regarding School-Sponsored Credit Cards

The CFPB recently sent warning letters to several colleges regarding inadequate disclosure of school-sponsored credit card agreements. The schools that received the letters did not comply with the CARD Act's requirement of making marketing agreements available to the public, either online or by request.

According to a recent study by the agency, four out of five schools failed to disclose their marketing agreements on their websites, and nearly two-third failed to provide such agreements upon request.

To learn more, visit: www.consumerfinance.gov/newsroom/cfpb-warns-colleges-about-secret-campus-credit-card-contracts/

To read the draft letter, visit: http://files.consumerfinance.gov/f/201512_cfpb_card-act_warning-letter.pdf

CFPB Develops Financial Well-Being Scale

The CFPB recently developed a financial well-being "scale," a questionnaire aimed at measuring a person's financial security and freedom of choice. According to the user guide, the scale is intended to "provide practitioners and researchers with a standard, reliable, and broadly available way to measure individual financial well-being."

The agency notes in the user guide that financial well-being includes having control over one's finances, the capacity to absorb a financial shock, being on track to meet financial goals, and being able to make choices that allow one to enjoy life.

To view the questionnaire, visit: http://files.consumerfinance.gov/f/201512_cfpb_financial-well-being-questionnaire-standard.pdf

To view the scoring worksheet, visit: http://files.consumerfinance.gov/f/201512_cfpb_financial-well-being-worksheet-standard.pdf

To read the user guide, visit: http://files.consumerfinance.gov/f/201512_cfpb_financial-well-being-user-guide-scale.pdf

CFPB Issues Report on CARD Act

The CFPB recently released a report discussing the impact of the CARD Act on the credit market. The report discusses how the CARD Act has prevented billions of dollars in late fees and over-limit fees, reduced the overall cost of credit, and increased available credit since the Act's inception.

To read the report, visit: http://files.consumerfinance.gov/f/201512_cfpb_report-the-consumer-credit-card-market.pdf

Federal Reserve Board Issues Final Rule on Emergency Lending

On November 30, 2015, the Federal Reserve Board issued a final rule regarding requirements for emergency lending under the Federal Reserve Act. The rule clarifies the definition of "broad-based eligibility" for programs and facilities providing emergency loans.

Specifically, the rule defines "broad-based" to mean a program or facility not designed for the purpose of aiding failing firms and in which at least five entities would be eligible to participate. The rule also broadens the definition of insolvent borrowers, to whom lenders are prohibited from issuing emergency loans under the Dodd-Frank Act.

To read the final rule, visit: www.federalreserve.gov/newsevents/press/bcreg/bcreg20151130a1.pdf

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No representation is made that the quality of services to be performed is greater than the quality of legal services performed by other lawyers.

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