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LITIGATION OF MORTGAGE CLAIMS

Selected Case Summaries from the First, Second,
Third and Fourth Circuits

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First Circuit

1) **Fidler v. Central Cooperative Bank (In re Fidler)**, 226 B.R. 734 (Bankr. D. Mass. 1998)

Debtor filed adversary proceedings seeking a declaration that the mortgage on the debtor's property had been rescinded due to violations of TILA and the Massachusetts Consumer Cost Disclosure Act (MCCEDA). The Court initially held that the debtor's TILA claims were not barred by the three-year statute of limitations because they were defensive claims of recoupment. Due to a holding by the U.S. Supreme Court in Beach v. Ocwen Federal Bank, 523 U.S. 410 (1998), the bankruptcy court was bound by the decision that the three year statute of limitations on TILA claims does extend to defensive claims of recoupment and the summary judgment award in favor of the Debtors was vacated, dismissing the TILA claims against the Lender. The court, however, found that the MCCEDA claims were still viable and not subject to the TILA statute of limitation. (Judge Hillman)

2) **Botelho v. Citicorp Mortgage Inc. (In re Botelho)**, 195 B.R. 558 (Bankr. D. Mass. 1996)

Debtor sought to rescind a loan transaction pursuant to TILA and Massachusetts Consumer Credit Cost Disclosure Act (MCCEDA) violations. Debtor filed Chapter 13 bankruptcy and listed the subject property as unsecured. The Lender filed a proof of claim and the debtor filed an adversary proceeding. The Lender sought to have the complaint dismissed based on the expiration of the applicable statute of limitations. The court denied the motion to dismiss and found that the rescission claim was available by recoupment and not subject to the statute of limitations. *The court's finding was subsequently overruled by Beach v. Ocwen Federal Bank, 523 U.S. 410 (1998).* (Judge Feeney)

3) **Lynch v. GMAC Mortgage Corporation of Iowa**, 170 B.R. 26 (Bankr. D. N.H. 1994)

Debtors sought to rescind loan transaction for alleged TILA violations. The court decided that while there were TILA violations, it would be inequitable to declare the lien on the property void and leave the Lender with an unsecured claim because the debtors were unable to tender the balance under the loan at the time of rescission. The court denied plaintiff's motion for summary judgment and decided to schedule an evidentiary hearing to determine how much of the Lender's claim remained after debtor's recoupment of the TILA damages. (Judge Vaughn)

4) **Whitley v. Rhodes Financial Services Inc.**, 177 B.R. 142 (Bankr. D. Mass. 1995)

Debtor sought to rescind a loan transaction under TILA. Debtor alleged that a brokerage commission should have been disclosed as a finance charge. The Court agreed and found that a valid rescission had occurred, the mortgage was void and at best, the lender had an unsecured claim. The claim was disallowed because a proof of claim was not filed. (Judge Feeney)

5) **New Maine National Bank v. Gendron**, 780 F. Supp. 52 (D. Me.1991)

Debtors attempted to rescind a loan transaction that granted Lender a mortgage on their property for alleged TILA violations, specifically the lack of a date on the notice of right to cancel loan, accepting confirmation of non-exercisal of right to cancel prior to expiration of rescission period and disbursing funds prior to expiration of right to cancel. Lender filed a complaint seeking a declaratory judgment that the debtors were not entitled to rescind the loan or in the alternative, that the debtors be required to tender the loan proceeds if rescission was available. Court decided

that TILA was violated but that equity demands that rescission be conditioned on tender of loan proceeds. (Judge Carter). See also In re Lynch 170 B.R. 26 (Bankr. D. Me. 1994).

6) **In re Rodriguez**, 278 B.R. 683 (Bankr. D. RI 2002)

Debtor sought rescission of mortgage loan citing violations of TILA and Home Owners Equal Protection Act (HOEPA). Court found that debtors did not receive two copies of the notice of their right to rescind and therefore, the lender violated TILA. The court also found that a prepayment penalty violated HOEPA. The Court ruled that the loan was rescinded and the balance due to the lender was reclassified as an unsecured claim subject to discharge in the bankruptcy case. (Judge Votolato)

7) **Myers v. Federal Home Loan Mortgage Co.**, 175 B.R. 122 (Bankr. D. Mass. 1994)

Lender filed a motion for summary judgment in Debtor's adversary proceeding against lender. The complaint alleged Lender's failure to provide a disclosure statement in conformity with MCCCDA, giving rise to the right to rescind. The court denied the motion for summary judgment, finding that the shorter TILA statute of limitation did not apply, that Massachusetts law applied and not TILA because while Freddie Mac was a federally chartered institution, it was not a creditor under TILA and finally, that Freddie Mac's liability, as an assignee, was not limited to facially defective disclosure statements. (Judge Hillman)

8) **Desrosiers v. Transamerica Fin. Corp. (In re Desrosiers)**, 212 BR 716 (Bankr. D. Mass. 1997)

(a) Res judicata barred adversary proceeding in which Chapter 13 debtors sought rescission of their mortgage and damages pursuant to Truth in Lending Act (TILA) and Massachusetts Consumer Credit Cost Disclosure Act (CCCDA). District court previously dismissed debtor-husband's counterclaim for failure to prosecute in lender's suit for declaratory judgment as to validity of rescission claims. Such judgment was judgment on the merits, claims raised in adversary proceeding were identical to those previously raised in counterclaim, and debtor-husband acted as debtor-wife's virtual representative in lender's suit. (b) Chapter 13 plan that did not propose any treatment for creditor's secured claim could not be confirmed. (Judge Boroff)

9) **Hart v. GMAC Mortgage Corp. (In re Hart)**, 246 B.R. 709 (Bankr. D. Mass. 2000)

Defendants moved for a directed verdict in plaintiff debtor's complaint against defendants for damages for improper attempts to collect plaintiff's mortgage debt. Defendant debt collector objected to the confirmation of plaintiff's first amended Chapter 13 bankruptcy plan. Plaintiff debtor filed a complaint against defendant mortgagor, stemming from alleged improper attempts to collect a mortgage debt. Plaintiff failed to make regular mortgage payments, and confusion arose over his obligations under a forbearance agreement, resulting primarily from defendant collector's internal information systems. The court held, inter alia, that defendant violated the Fair Debt Collection Practices Act (FDCPA). The court denied defendants' motion for a directed verdict and awarded plaintiff statutory damages for emotional distress, and for attorney's fees incurred in filing the Chapter 13 plan. (Judge Feeney)

10) **In re Maxwell**, 281 B.R. 101 (Bankr. D. Mass. 2002).

(a) The Court found Lender liable to Chapter 13 debtor under Fair Debt Collection Practices Act (FDCPA) for demanding payments that debtor did not owe (the servicer of the loan lacked a copy of the mortgage note and a payment history to prove delinquent amounts), and could not take advantage of safe harbor provided by FDCPA's bona fide error exception since it did not have any documentary support to make any computation at all. (b) Debtor's letter to servicer of her residential mortgage loan was in nature of qualified request for information under the Real Estate Settlement Procedures Act (RESPA), though borrower did not write letter herself and may not have understood it; (c) servicer's two violations of RESPA, without more, did not rise to level of "pattern or practice" of RESPA violations, within meaning of statutory damages provision; (d) four year statute of limitation under the Massachusetts Consumer Credit Cost Disclosure Act (MCCCDCA) did not bar recoupment claim (e) refinancing agreement was unconscionable because epitomized predatory lending practices and did not provide debtor with any additional cash. It simply reduced term of the loan and increased debtor's monthly payment. In addition such monthly payment did not fully amortize loan. Further the debtor's annual payment under the refinanced loan represented 98.5% of her and co-obligor's combined net incomes. (Judge Feeney)

11) **Mann v. Chase Manhattan Mortgage Corporation**, 316 F.3d (1st Cir. 2003)

The First Circuit affirmed the Rhode Island District Court's judgment dismissing the debtors' claim that the lender violated the automatic stay by continuing to record charges in its internal loan files for attorneys' fees and inspection fees incurred post-petition. The fees were not included in a proof of claim and the debtor was not billed for them. The court found that the post-petition bookkeeping entries by the Lender, which were not communicated to the debtor, were not the type of act protected by the automatic stay provision as the entries were not an act to obtain possession or control over the property of the estate.

12) **In re Fili**, 257 B.R. 370 (1st Cir. B.A.P. January 11, 2001)

The First Circuit Bankruptcy Appellate Panel has decided the issue of whether the terms of a confirmed Chapter 13 plan binds a creditor. The result is important as Massachusetts local bankruptcy rules allow for the confirmation of Chapter 13 plans, prior to the expiration of the claims bar date which is 90 days after the case is filed. In this case, the debtor used specific language in his plan and amended plan that provided the creditor's claim was "discharged". Both plans were properly served on the creditor. The creditor filed its proof of secured claim after the amended plan was confirmed. The B.A.P. upheld the Bankruptcy Court's disallowance of the claim on the grounds that confirmation of the plan was a *res judicata* bar of the creditor's claim. As long as the creditor gets proper notice of the bankruptcy and is served with the plan, the creditor must file its objection to the plan no later than the later of 30 days after the first date set for the §341 meeting or 30 days after service of a modified plan. See Massachusetts Local Bankruptcy Rules, Appendix I, Chapter 13 Rules, 13-8.

13) **In re Joyce E. Greene-Jackson**, Case No. 00-14423-JNF, April 4, 2001

In an unpublished opinion, Judge Joan Feeney overruled the debtor's objection to the creditor's claim where the creditor failed to object to confirmation of the plan. The debtor's counsel called the creditor in advance of filing the plan for an arrearage amount. He used the quoted amount in the plan. The creditor did not object to the plan and filed its timely claim a few days after confirmation for \$6,800 more than was stated in the plan. Judge Feeney failed to follow **Fili** in

this case because the claim amount was not determined. The result may have been different had the debtor attempted to completely discharge or bifurcate the creditor's claim or if the debtor had included specific language that in the absence of a written objection to confirmation, the amount stated would be accepted by the court.

14) **Fleet Mortgage Group, Inc., v. Kaneb, et al. (In re Kaneb)**, 196 F.3d 265 (1st Cir. 1999)
The First Circuit affirmed the BAP's decision holding that emotional distress may qualify as "actual damages" pursuant to § 362(h) for willful violation of the automatic stay and affirmed an award of damages to a debtor for emotional distress (\$25,000) and for attorneys fees and costs (\$18,220.68) incurred when the debtor's mortgagee commenced foreclosure proceedings in violation of the automatic stay and delayed 6-weeks in canceling the foreclosure proceedings. The debtor, an elderly gentlemen residing in a wealthy Florida gated community, suffered embarrassment and was shunned by his neighbors who learned of the pending foreclosure. The court did not accept Fleet's legal argument that willful violation of the stay means "flagrant or reckless disregard." The court adopted the more broadly recognized standard of action with knowledge of the stay and intending the actions that constitute the violation. (Judge Lipez)

15) **In re Plant**, 288 B.R. 635 (Bankr. D. Mass. 2003)
The Court decided that the debtor may require a mortgagee's counsel to file a fee application conforming to Fed. R. Bankr. P. 2016 as a condition to inclusion of attorney fees and expenses in the default cure amount of a lender's claim in a Chapter 13 case. However, if the debtor does make such a request to file a fee application, Lender's expense of preparation of the application and appearing in defense of it shifts to the debtor should the court find the fee application reasonable. See also In re Tricca, 196 B.R. 214 (Bankr. D. Mass. 1996), In re Center, 282 B.R. 561 (Bankr. N.H. 2002)

16) **Steele v. Ocwen Federal Bank**, 258 B.R. 319 (Bankr. D.N.H. 2001).
After completion of his Chapter 13 plan and discharge entered, debtor brought an adversary action against creditor alleging, inter alia, violations of state and Federal Fair Debt Collection Practices Act (FDCPA) based on default notices received, although debtor was current on all payments and there were no arrearages. Creditor filed a motion to dismiss the FDCPA and state claims, asserting lack of jurisdiction under 28 U.S.C.S. § 1334. The motion to dismiss the FDCPA and state fair debt collection claims was granted. The claims were not core proceedings as they were not created or determined by bankruptcy law. If debtor prevailed on the claims there would be no impact on the bankruptcy estate. Thus the claims did not fall under the court's "related to jurisdiction".

17) **Tavares v. Sprunk (In re Tavares)**, 298 B.R. 195 (Bankr. D. Mass. 2003)
Ruling on motion for summary judgment in Chapter 13 debtor's adversary proceeding to recover damages for alleged criminal usury and violations of state unfair and deceptive trade practices statute by lender. The debtor sought to have damages multiplied for acts allegedly done willfully or in bad faith. Court held that lender violated both the criminal usury and unfair trade practices statutes by charging interest and costs greater than 20% of the loan amount. However, summary judgment could not be granted regarding multiplied damages. Genuine issues of material fact remained about whether the lender acted willfully in violating the unfair trade practice statute, and whether the lender acted in bad faith by failing to respond to debtor's demand letter.

Applicability of multiplied damages depended upon the resolution of those issues. (Judge Feeney)

18) **McCormack v. Federal Home Loan Mortgage Corporation**, 203 B.R. 521 (Bankr. D. N.H. 1996)

The court imposed a punitive damage award in the amount of \$10,000.00 against the creditor for failing to remove a disallowed charge for attorneys' fee to the debtor's account on its books. (Judge Yacos).

Second Circuit

1) **Wells Fargo Bank Minnesota, N.A., as Trustee v. Guarnieri**, 308 B.R.122 (D. Conn. 2004)

The District Court affirmed the bankruptcy court's ruling that the Lender was not entitled to charge post-acceleration, pre-petition late charges in its Proof of Claim. The court's reasoning is that once a loan is accelerated, monthly payments are no longer due and thus, there can be no late charges. The court rejected Wells Fargo's argument that the filing of a bankruptcy petition de-accelerates the loan. (Judge Kravitz)

2) **Equity Mortgage Inc. v. Johnson**, 149 B.R. 284 (Bankr. D. Conn. 1993)

The debtor asserted setoffs on the amount owed to Lender in conjunction with a motion for relief from stay based on violations of TILA and RESPA. The court found that any claims would be barred by the doctrine of res judicata and that the previously litigated state court foreclosure judgment could not be collaterally attacked in the bankruptcy court. (Judge Krechevsky)

3) **In re Viencsek**, 273, B.R. 354 (Bankr. N. D. N.Y. 2002)

Debtor filed motions to strike mortgage servicer's proof of claim on theories that there is not a debt between debtor and servicer and that servicer is engaging in unauthorized practice of law. Debtor relied on In re Morgan, 225 B. R. 290 (Bankr. E.D. N.Y. 1998) which was vacated by the U.S. Dist. Ct. for the E.D.N.Y. and In re O'Dell, 251 B.R. 602 (Bankr. N.D. Ala. 2000) which was reversed by the U.S. Dist. Ct. for the N.D. Ala. Creditor mortgage servicer allowed to amend proof of claim to reflect holder of note and mortgage.

Third Circuit

1) **Sponaule v. First Union Mortgage Corp.**, 40 Fed. Appx. 715 (3rd Cir. 2002).

Appeals court affirmed district court ruling that Lender was not required to obtain court approval to assess attorneys' fees to debtor's account post-confirmation and there was no violation of FDCPA. (Judge Alito, McKee and Wallace)

2) **Dawson v. Dovenmuehle Mortgage Inc.**, 2002 U.S. Dist. LEXIS 5688 (E.D. Pa. 2002)

Debtor claims violations of FDCPA, breach of contract, unfair trade practices, misrepresentation and fraudulent misrepresentation after loan servicer sought to charge debtor's account with attorney fees in the amount of \$450.00 in connection with debtor's bankruptcy case. Debtor had been current on the loan at all times and Lender sought to charge fees for monitoring the bankruptcy case after filing a notice of appearance. No proof of claim was filed. Debtor claims that Lender was required to obtain court approval under 11 U.S.C §506 (b) before charging the

account with legal fees. The court determined that the lender could add the fee pursuant to the terms of the note and mortgage. The Lender moved to dismiss the complaint on all counts and was successful in dismissing the FCDPA count as the court determined it did not have jurisdiction under 11 U.S.C. §506 (b). (Judge Giles)

3) **Horizon Financial v. Norris (In re Norris)**, 138 B.R. 467 (E.D. Pa.1992)

Debtor objected to Lender's Proof of Claim because the claim sought excessive attorneys' fees and sought to have claim reduced due to alleged TILA violations. The bankruptcy court's finding was affirmed. The court had found that the TILA objection by the debtor was a defense in the nature of a recoupment to the proof of claim and the one year statute of limitations for affirmative TILA claims did not apply. The court found that there was a TILA violation because the disclosure statement inaccurately described the security interest created by the mortgage. (Judge Reed)

4) **Jones v. Progressive-Home Federal Savings and Loan Association (In re Jones)**, 122 B.R. 246 (W.D. Pa. 1990)

Defendant did not provide plaintiff with a written financial disclosure statement as required by Truth-in-Lending Act. Plaintiff debtor brought adversary proceeding objecting to lender's secured claim due to TILA violation. Bankruptcy court held that TILA claim was barred by statute of limitations, which was reversed by the appellate court, holding that the TILA claim was a recoupment defense to the Lender's proof of claim. Matter was remanded to the bankruptcy court. (Judge Bloch)

5) **Chambers v. Countrywide Home Loans, Inc. (In re Chambers)**, 2003 Bankr. LEXIS 1699 (Bankr. E.D. Pa. 2003)

Debtor's Chapter 13 plan specifically disclaimed any payment to a mortgagee, asserting that the mortgage lien it held on debtor's residence was to be avoided due to rescission under Truth in Lending Act. Debtor filed Adversary Proceeding against mortgagee, making similar claim to a counterclaim that was raised in a state court action filed by Countrywide, which was stayed due to the bankruptcy filing. Court held that even if debtor prevailed in adversary proceeding, her remedy would be a rescission of the mortgage and repayment of the amount advanced under the loan through the Chapter 13 plan. Due to lack of sufficient income, court concluded that there was no plan that could be filed that would be confirmable and that bankruptcy case and adversary proceeding should be dismissed. (Judge Sigmund)

6) **Barsky v. Commercial Credit Corporation (In re Barsky)**, 210 B.R. 683 (Bankr. E.D. PA 1997)

Plaintiff debtor in Chapter 13 bankruptcy proceedings filing action pursuant to Truth-in-Lending Act to rescind a mortgage loan transaction. Plaintiff alleged that defendant mortgage holder had failed to disclose a security interest in plaintiff's escrow advances for taxes and insurance, on the disclosure statement provided to debtor. The court held that although Truth-in-Lending Act bars claims for rescission more than three years after the loan was consummated, plaintiff could effect a rescission in a defensive, recoupment mode to defend against the secured party's efforts to foreclose on the security. However, the undisclosed security interest in escrow advances was an "incidental interest" in realty which need not be disclosed, and was not within the scope of a "material disclosure" under Truth-in-Lending Act which triggers the right to rescission. *See how Beach v. Ocwen abrogated this holding.* (Judge Scholl)

7) **Sheppard v. GMAC Mortgage Corp.**, 299 B.R. 753 (Bankr. E.D. Pa. 2003)

GMAC successfully challenged Debtor's rescission claim. Debtors entered into a Loan Modification agreement with Lender to stop foreclosure proceedings. Debtors subsequently attempted to rescind the loan modification agreement for TILA violations. The court determined that the modification agreement was not a "refinancing" under Regulation Z and that TILA disclosures were not required. (Judge Sigmund)

8) **Harvey v. EMC Mortgage Corporation**, 2003 Bankr LEXIS 642 (Bankr. E.D. Pa. 2003)

Harvey filed Chapter 13 and EMC filed a Proof of claim on a loan secured by a mortgage on Harvey's property. Harvey filed an adversary proceeding against EMC and LaSalle Bank citing violations including counts under TILA and RESPA. EMC was the servicing agent and filed a motion to dismiss. The court determined that EMC has no liability under TILA or RESPA and dismissed the suit as against EMC. LaSalle Bank would have to defend on the TILA and RESPA counts, which alleged lack of HOEPA disclosures and illegal kickbacks to brokers. (Judge Sigmund)

9) **Bell v. Parkway Mortgage Inc.**, 2004 Bankr. LEXIS 733 (Bankr. E.D. Pa. 2004)

Debtor filed adversary proceeding against Lender seeking rescission of loan transaction due to TILA and HOEPA violations. Court determined that loan did not fall within HOEPA as points and fees were less than 8% of loan transaction. However, the Court determined that TILA was violated due to lender's failure to provide copies of debtor's right to cancel the transaction and therefore the mortgage was void, leaving lender only with an unsecured claim in the bankruptcy proceeding.

10) **Crisomia v. Parkway Mortgage Inc.**, 2002 Bankr. LEXIS 1112 (Bankr. E.D. Pa. 2002)

Debtors obtained a loan to pay for home improvements and granted a mortgage on their home as security for repayment of the promissory note. The loan went into default and Lender started foreclosure proceedings. The debtors filed suit against the Lender and claimed a right to rescind the loan and subsequently filed Chapter 13 bankruptcy. The cases were consolidated and Debtors claimed violations of the disclosure requirements of HOEPA, violations of TILA and other counts for state law claims. The Lender moved for partial summary judgment on a statute of limitation defense. Court denied summary judgment but found that any TILA violations could ultimately only be raised defensively and any possible recovery would be limited to an offset against the Lender's Proof of Claim due to the running of the applicable statute of limitation. Also, the debtors had no right of rescission because the property was not their principal residence. (Judge Sigmund)

11) **Roberson v. Cityscape Corp.**, 262 B.R. 312 (Bankr. E.D. Pa. 2001)

Debtor filed an adversary proceeding seeking to rescind a loan in response to Lender's Proof of Claim. Among other counts, the debtor claimed TILA violations by failing to deliver all material disclosures and failing to clearly and accurately disclose the amount financed, the finance charge and the APR. The court dismissed the TILA claim and found that rescission was not available due to the running of the statute of limitations and that recoupment was not available due to the Supreme Court's holding in Beach v. Ocwen Federal Bank, 523 U.S. 410 (1998). Also, Pennsylvania state law did not extend the period available for recoupment as Massachusetts state

law did in In re Fidler. However, the debtor was permitted to amend her complaint to assert a claim for statutory damages under TILA defensively by way of recoupment as it had a different statute of limitations. (Judge Sigmund)

12) **Williams v. EMC Mortgage Corp.**, 276 B.R. 394 (Bankr. E.D. Pa. 2002)

Debtor sought to rescind a loan transaction that granted Lender a mortgage on her property. The basis for rescission was TILA violations. EMC filed a motion to dismiss based on the expiration of the statute of limitations for bringing the TILA claim. The debtor argued she could raise TILA defensively against the Proof of Claim. However, the Supreme Court in Beach v. Ocwen Federal Bank, 523 U.S. 410 (1998) held otherwise. Furthermore, Pennsylvania state law did not extend the statute of limitation. The motion to dismiss was granted. (Judge Carey)

13) **Barber v. Fairbanks Capital Corporation**, 266 B.R. 309 (Bankr. E.D. Pa. 2001)

Debtor, age 86, filed an adversary proceeding against Lender seeking to rescind a loan transaction that granted a mortgage on her property, alleging, among other counts, violations of TILA and HOEPA. In the reported case, Fairbanks did not seek dismissal of the TILA/HOEPA count. The loans were for home improvement contracts. (Judge Carey)

14) **Shaw v. Federal Mortgage and Investment Corp.**, 178 B.R. 380 (Bankr. D. N.J. 1994)

Debtors filed complaint to cancel a second mortgage and to disallow the creditor's proof of claim. The debtors claim lack of receipt of the notice of their right to cancel the transaction pursuant to TILA. The court decided that the applicable statute of limitations had expired and that the debtors were not entitled to rescind the loan on that basis. However, the court found that the remedy of rescission was available under a theory of recoupment. *The court's finding was subsequently overruled by Beach v. Ocwen Federal Bank, 523 U.S. 410 (1998).* (Judge Winfield)

15) **Williams v. Bank One, National Association**, 291 B.R. 636 (Bankr. E.D. Pa. 2003)

Debtor filed complaint seeking to rescind a loan, asserting violations of TILA in connection with a HOEPA loan transaction that granted Lender a mortgage on Debtor's property. Debtor did not receive her own copies of the Notice of Right to Cancel the loan and the disclosure statement. The Court found for the debtor and ordered the mortgage void and gave the Lender an unsecured claim in the bankruptcy estate. (Judge Sigmund)

16) **Lewis v. Delta Funding Corporation**, 290 B.R. 541 (Bankr. E.D. Pa. 2003)

Debtor sought rescission of a loan transaction that resulted in a mortgage on her property. Debtor's complaint contained, among other, counts for violating TILA, HOEPA and RESPA. Debtor contends that the early HOEPA disclosure notice did not contain information on a balloon payment that would exist at the end of the loan. The court held that the applicable law at the time of her transaction did not require conspicuous notice of a balloon payment. The court also found that it was not confusing for the lender to include on the disclosure notice the note rate or loan amount. There is no prohibition against including additional information in the HOEPA disclosure form. (Judge Carey)

17) **Ralls v. Bank of New York, as Trustee**, 230 B.R. 1999, (Bankr. E.D. Pa. 1999)

Debtor sought rescission of a loan transaction, alleging TILA violations, including failure to accurately disclose the amount financed, the finance charge, APR and the schedule of payments in the loan transaction. The court rejected the lender's defense that it had corrected the TILA errors or in the alternative, that the violations were unintentional, bona fide errors. The court held that the rescission was valid, ordered Lender to issue a mortgage satisfaction, reduced the lender's proof of claim and reclassified it as an unsecured claim. (Judge Scholl)

18) **Apaydin v. Citibank FSB**, 201 B.R. 716 (Bankr. E.D. Pa. 1996)

Debtor filed a motion for summary judgment in an adversary proceeding against Lender. The complaint alleged violations of TILA and sought the remedy of rescission and having the creditor's lien declared void and allowed the creditor to be treated as an unsecured creditor in the bankruptcy proceeding. The TILA violation included not receiving a notice of the "three day right to cancel" the loan transaction. The Court found that there was a violation of TILA but decided that the voiding of a mortgage under TILA is not the automatic result of a request for rescission. In the interest of not allowing the debtor to receive a windfall, the voiding of a mortgage may be conditioned on the debtor tendering back to the creditor the consideration underlying the transaction. The court decided to hold further hearings on determining the appropriate remedy and damages. (Judge Raslavich)

19) **Armstrong v. Nationwide Mortgage Plan/Trust**, 288 B.R. 404 (Bankr. E.D. Pa. 2003)

Debtor filed a multi-count complaint alleging violations of state and federal consumer lending laws in an adversary proceeding, following a proof of claim being filed by the lender. The debtor alleged TILA violations because the notices of her right to rescind did not contain dates. Also, there were conflicting contracts with differing payment terms. The court found that there were TILA violations and that Nationwide could not escape liability on an assignee theory. The court stated that the purpose of rescission is to undo a transaction and place the parties in the same position they would have occupied had the transactions not occurred. The court followed prior courts' holding that the rescission be conditioned on the return of the principal. (Judge Raslavich)

20) **Galloway v. Long Beach Mortgage**, 220 B.R. 236 (Bankr. E.D. Pa. 1998)

Debtor filed adversary complaint objecting to Lender's Proof of Claim. Two of the counts raised were that the pre-petition foreclosure fees and costs were unreasonable and not recoverable under the mortgage contract and TILA violations, failing to provide the itemization of the amount financed. The Court found that although the Lender's disclosure of the amount financed was nonconforming under the statute, statutory damages were not available this type of violation. The court reduced the amount of the proof of claim because the Lender could substantiate little of the fees listed in the proof of claim relating to the foreclosure. (Judge Sigmund)

21) **Williams v. Gelt Financial Corporation**, 232 B.R. 629 (Bankr. E.D. Pa. 1999)

Debtor sought rescission of two loan transactions that granted a mortgage on his property. Lender granted debtor two loans, the first of which was paid off by the second loan. The first transaction violated TILA because the HOEPA disclosures were not provided prior to closing. The debtor alleged further violations of TILA, specifically that the disclosures provided at closing, included a pre-payment penalty and failed to disclose that the lender was also obtaining a security interest in the debtor's household goods and possible rental income. While statutory

damages were available for the debtor, the court found that the debtor's right to rescind the first loan transaction did not exist because the Lender re-wrote the loan when it created the second transaction that satisfied the lien granted by the first mortgage. Further, the debtor had made no payments under the first mortgage so there were no funds to return to the debtor. The second transaction had its own TILA violations to deal with because the court found that the lender did not provide to the debtor copies of the disclosure statement or notice of the right to rescind. Rescission was permitted on the second loan transaction, awarding the debtor statutory damages, voiding of the lien with the Lender's claim becoming unsecured. The debtor had not objected to the proof of claim and thus the court stated that it would be inappropriate for it to determine the allowable amount of the Lender's proof of claim. (Judge Scholl)

22) **Murray v. First National Bank of Chicago, as Trustee**, 239 B.R. 728 (Bankr. E.D. Pa. 1999)

Debtor filed adversary proceeding alleging, among other counts, violations of HOEPA arising out of a loan transaction that resulted in a mortgage on debtor's property. The Lender conceded the TILA violation and the only matter before the court was a determination of the proper remedies. The Lender argued that it was not liable to the debtor because it was an assignee of the loan. The court rejected this argument because it was a HOEPA loan and the only avoidance of assignee liability is when the lender cannot determine that it was a HOEPA loan. The court listed the remedies generally available under TILA to debtors whose valid rescission of HOEPA loans were resisted by the lender. The remedies are 1) termination of the creditor's security interest 2) statutory damages for failing to properly respond to the rescission demand 3) penalty measured by at least recoupment against the remaining unsecured claim on account of the original TILA disclosure violations 4) elimination of all finance charges 5) where equitable to do so, elimination of debtor's entire obligation to creditor 6) recovery of all payments made and 7) recovery of reasonable attorneys' fees and costs. In this case, the Court eliminated the entire obligation to the Lender and awarded the debtor both statutory damages and actual damages. (Judge Scholl)

23) **Jackson v. US Bank National Association, as Trustee**, 245 B.R. 23 (Bankr. E.D. Pa. 2000)

Debtor filed a complaint, alleging violations of HOEPA and demanding rescission of the loan transaction. She claimed non-receipt of the pre-closing HOEPA disclosure notices. Initially the debtor wanted a loan to replace windows in her house for the cost of \$3300. The end result of the loan was a mortgage in the amount of \$19000.00. The court found that the debtor was entitled to rescind the loan. The court held that the damage calculation is controlled by 15 U.S.C. § 1641 (d) as discussed in Murray v. First National Bank of Chicago, as Trustee, 239 B.R. 728 (Bankr. E.D. PA 1999). The court allowed statutory damages, eliminated the underlying mortgage and the entire obligation, recovery of all payments made and recovery of reasonable attorneys' fees and costs. (Judge Scholl)

Fourth Circuit

1) **Ray v. Citifinancial, Inc.**, 228 F. Supp.2d 664 (D. Md. 2002)

Debtor's complaint alleged that creditor had violated TILA and HOEPA. The bankruptcy court found for the debtor on the HOEPA claim and awarded the Debtor statutory damages. The court further ordered the creditor's lien on the property be rescinded without requiring the debtor to

tender the principal net balance due on the loan. Creditor appealed the ruling not requiring tender of principal. The District Court reversed the bankruptcy court's ruling that did not condition rescission on tender of the remaining loan proceeds and remanded the case to the bankruptcy court. However, the district court found that the bankruptcy court did not have to order the tender of all the principal due and had to power to either reduce or eliminate the creditor's security interest, as circumstances of each individual case may warrant. (Judge Motz)

2) **Allright Mortgage Company v. Hill**, 213 B.R. 943 (D. Md. 1997)

District Court affirmed ruling by bankruptcy court that granted relief to Debtor under TILA, including rescission of the loan transaction and entitlement to certain damages by way of setoff. The bankruptcy court reduced the Lender's Proof of Claim from a secured claim of \$26,656.83 to an unsecured claim of \$3008.64. The violations included charging the debtor twice for an advance interest payment and failing to disclose that a broker fee was a finance charge. The decision also includes a discussion of the attorney fee award in the adversary case and the court's discretion in awarding amounts. (Judge Blake)

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