

Concurrent Session

Debtor Remedies for Creditor Wrongs: RESPA/FDCPA/TILA

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DEBTOR REMEDIES FOR CREDITOR WRONGS

TILA/RESPA

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DETROIT CONSUMER BANKRUPTCY CONFERENCE

INTRODUCTION

The purpose of these materials is to provide an outline of consumer claims under the Federal Truth in Lending (TILA) and Real Estate and Settlement Procedures Act (RESPA), especially as they relate to mortgages, and consumer bankruptcy cases.

With the crash in home prices, as a practical matter, TILA claims, at least as regards mortgages, are worthless to most consumers.

Many RESPA cases remain worth pursuing, and sample letters and pleadings are attached.

I. HOW DID WE GET HERE?

Here being: Most mortgage companies cannot provide a complete accurate accounting of all the payments into and out of a mortgage account, and hundreds of thousands of mortgage transactions violated one or more provisions of TILA.

We are in a worldwide economic crisis precipitated by the crash in mortgage backed securities issued in the United States.

For a graphic presentation of how these securities were set up, see the flow chart on the next page, used courtesy of consumer attorney Max Gardner of North Carolina.

A. Instead of two parties, mortgagor and mortgagee, multiple parties were involved in each transaction, allowing for the doctoring of information by one party to be concealed from the others, e.g. broker, appraiser, title company, all doing work the mortgage companies used to do.

B. Mortgage company reliance on mortgage brokers, who walk away from the closing with a check, retaining no financial interest in whether that mortgage is ever paid.

C. The mortgage servicer compensation structure provides more income to servicers for loans that are in default.

D. Most mortgages, and/or the servicing rights, were sold multiple times, complicating record keeping.

E. The agencies that rated the mortgage securities, Moodys, Standard & Poor's, among other errors, used historical default rates based on a market that had consisted of mortgages that were 20% down, amortized over 30 years at a fixed rate. These agencies also assumed **NO DECLINE IN HOME PRICES**.

F. This enabled these securities to be rated just under U.S. Government grade debt, which increased the demand for the securities, which encouraged the mortgage industry to create more debt, which they could immediately flip at a profit.

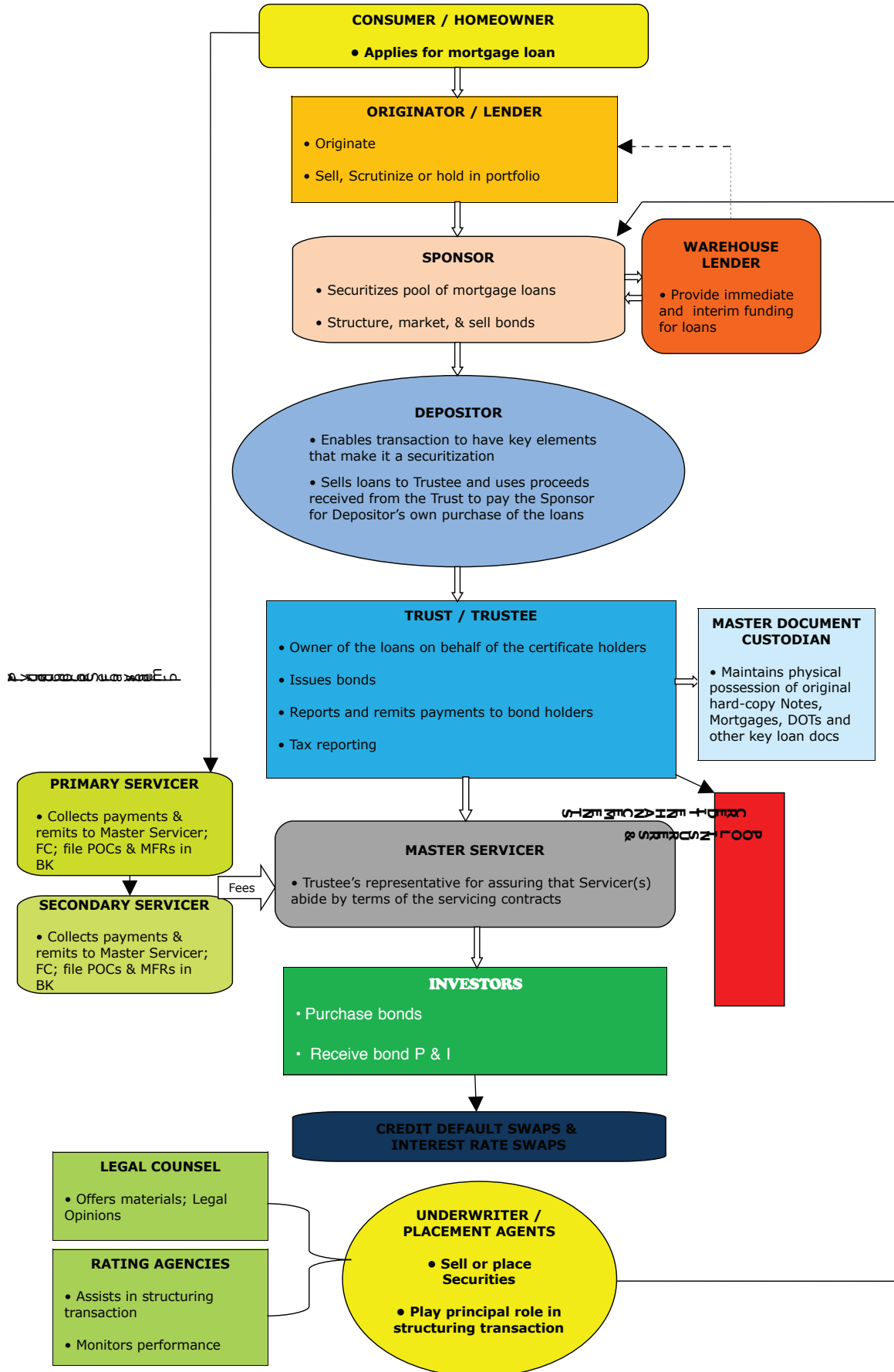
G. So, new products were invented: 80/20 loans, two mortgages at different rates so no down payment was needed, 125% loan to value mortgages, interest only, ARMS, no document "liar loans," a/k/a NINJA loans (No Income, No Job, no Assets,) and so on.

H. The bubble burst, prices go down, homeowners cannot refinance, teaser ARM rates expire, foreclosure and so on.

I. Most people want to keep their home, and when they fall behind on the payments, many look for irregularities in the mortgage documents. Well, there are usually plenty of irregularities to be found.

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PRIVATE LABEL SECURITIZATION – KEY PARTIES INVOLVED



JUDICIAL ESTOPPEL

- I. If you do not schedule your clients's consumer law claim, you may be estopped from bringing the claim.

As the Debtor is swearing that he has listed all of his assets, if he fails to list an FDCPA, RESPA , TILA, or other claim, and Debtor subsequently files suit on said claim, the defense states: “He already swore he did not have a claim, cannot change his story now, that would be prejudicial to creditors and the bankruptcy trustee!”

6th Circuit Case

White v. Whyndham Vacation Ownership, et. al. 2009 (6th Cir.)

This Debtor had a sexual harassment claim, but did not schedule it.

She filed a state Human Rights Commission complaint November 15, 2006,

She requested EEOC action on May 27, 2008, and action was taken on July 8, 2008.

Then, in August 8, 2008, she files her Chapter 13 bankruptcy; the harassment claim is listed neither on Schedule B nor on the Statement of Financial Affairs question about lawsuits, pending or completed in the last year.

The 341 hearing was held September 11, 2008, and the plan was confirmed October 1, 2008.

The discrimination lawsuit was not filed until October 2, 2008.

Debtor filed an Application to Employ Counsel for that suit on October 3, 2008.

The Defendants, having checked the records, filed their motion to dismiss, based on judicial estoppel.

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On November 11, Debtor files some amendments which the 6th Circuit called insufficient.

Her bankruptcy attorney filed an affidavit opposing motion to dismiss the suit, part of which is reprinted below:

5. Betsy White (Debtor) did inform me of her [harassment claim] when I met with her. At no time did Ms. White attempt to conceal, or otherwise, keep that information secret.
6. When I appeared in Court on Ms. White's bankruptcy, this lawsuit was discussed, as well as, any potential claims thereof.
7. I am unsure why documentation filed in her bankruptcy matter did not list this action, however we have subsequently filed an Amendment to cure this oversight.

This did not convince the District court of anything, it granted Defendant's motion, treating it as a motion to dismiss as one for failure to state a claim upon which relief can be granted, citing *Salehpour v. Univ. of Tenn.*, 159 F.3d 199, 203-204 (6th Cir. 2004) and *Browning v Levy*, 283 F.3d.761 (6th Cir. 2002).

“judicial estoppel bars a party from (1) asserting a position that is contrary to one that the party has asserted under oath in a prior proceeding, (2) where the prior court adopted the contrary position “either as a preliminary matter or as part of a final disposition.”” (at 775-776) (this was also in a bankruptcy case)

There are exceptions: “where the debtor lacks knowledge of the factual basis of the undisclosed claims” and “the debtor has no motive for concealment” (Id. At 776)

Another factor that could get the Debtor off the hook: absence of bad faith, *Eubanks v CBSK Financial Group, Inc.*, 385 F.3rd 894, (6th Cir. 2004)

The *White* court refers to a bankruptcy court order requiring debtor to make payments and to attend the 341 hearing .

“At this point, the bankruptcy court adopted her position: “(W)hen a bankruptcy court – which must protect the interests of all creditors - approves a payment from the bankruptcy estate on the basis of a party's assertion of a given position, that, in our view, is sufficient “judicial acceptance” to estop the party from later advancing an inconsistent position.” *Lewis v Weyerhaeuser Co.*, 141 F. App'x 420, (6th Cir. July 6, 2005)

The *White* court, referencing the Application to Employ Counsel, and the Affidavit of the bankruptcy attorney, stated these were “limited and ineffective attempts to correct her initial misfiling . (Id. At page 11)

The Statement of Financial Affairs was amended, but not until after the motion to dismiss the discrimination suit was filed, so the Court dismissed that entirely.

Making things worse for our Debtor, the claim was allegedly worth \$1.25 million. she had listed another claim on her Schedule B, and no one gave the court a transcript showing that the Debtor counsel mentioned the claim at any bankruptcy court hearing.

Debtor lost, in spite of language in the Order Confirming Plan as follows:

“Any and all net proceeds from debor(s) pending sexual harassment lawsuit claim to be paid into the plan as additonal payments, except for Court approved legal fees and expenses.”

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So, the moral of the story is, do not get into litigation about good faith, or amendments were timely filed, or if the claim was mentioned to someone at a hearing, so everybody knew about it.

Just list potential FDCPA claim, or RESPA claim, or even potential claims for consumer law violations, and exempt them.

TRUTH IN LENDING

15 USC 1601 was passed in 1968 and has been amended numerous times since.

The goal was to force creditors to disclose the true cost to consumers of credit cards, other covered transactions and personal property leases.

This is a highly technical statute, with some strict liability provisions. (*Semar v. Platte Valley Federal Savings & Loan Ass'n*, 791 F. 2d 699 (9th Cir. 1986), and *Ohio Builders and Remodelers, Inc.*, 212 F. Supp. 752, S.D. Ohio (2002), which cites *Weeden v Auto Workers Credit Union, Inc.*, No. 97-3073, 1999WL 191430 (6th Cir. March 19, 1999)

As is the habit of Congress, as with having the IRS determine income and expense figures for the means test, much of the legislation is effectively punted, in this case, to the Federal Reserve Board, which was given the power to enforce much of TILA, and to issue regulations under it.

“The holding stands for the proposition that, a high degree of deference to administrative interpretation is warranted, credit transactions defy exhaustive regulation by a single statute, and Congress therefore delegated expansive authority to the Federal Reserve Board to elaborate and expand the legal framework governing commerce in credit, opinions construing the Act or Regulation Z should be dispositive unless they are demonstrably irrational. (National Consumer Law Center, Truth in Lending, 5th edition, section 1.4.3.2, page 13)

This outline is just of part of the Act, primarily, most of the sections that are related to mortgages.

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A. EXCLUSIONS

TILA is not meant to apply to transactions between businesses, loans over a certain amount, transactions covered by the SEC, student loans, and some other transactions. (see 15 USC 1603)

TILA does not apply to mortgage brokers or servicers, but to companies or individuals who regularly extended or offer to extend consumer credit for which a finance charge is or may be imposed or which, by written agreement, is payable in more than four installments.

B. FINANCE CHARGE

Under TILA, the amount of credit extended is the amount financed, everything else is a finance charge.

The TILA definition of finance charge is:

- . Any charge
- . Payable directly or indirectly by the consumer
- . Imposed directly or indirectly by the creditor
- . As an incident to or a condition of the extension of credit.

Any charge which meets this definition is a finance charge unless it is specifically excluded elsewhere in the TILA statute or Regulation. Moreover these exclusions must be narrowly construed. (footnote omitted) National Consumer Law Center, Truth in Lending, 5th edition, section 3.5, page 61.

And that is the tricky part, which finance charges are legitimate, most are not; they are just ways to hide a higher than disclosed interest rate.

If there are \$10,000 of finance charges on a mortgage, and \$8,000 of them do not belong there, that extra \$8,000 is interest under TILA, and must be included in the calculation of the interest rate on the mortgage. (see example on next page)

Yes, they are hard to read.

One thing to look for is “junk fees.”

Such as, on the previous page:

Processing Fee	Pamela Allen	\$350
Broker Administrative	Liberty Lending	495.00
Underwriting Fee	America's Wholesale Lender	895.00
Premium Paid By Lender	Liberty Lending	2,728.00
Document Signing Fee	Countrywide Home Loans	250.00

The TILA issue is: are these charges that should be included, as interest, in the cost of the loan?

If yes, and they were not, the disclosed interest rate will be wrong, and, depending on the amount of the discrepancy, will constitute a TILA violation.

Unfortunately, cases interpret this in widely different ways.

I refer you to the NCLC manual for more.

C. NOTICE OF RIGHT TO RESCIND

c) Rebuttable presumption of delivery of required disclosures

Many cases state that it is a question of fact whether the notice was received, even if there is a signed receipt, once the Plaintiff disputes receiving copies of the notice.

(*Moore v Mortgagestar, Inc.*, 2002 U.S. Dist. LEXIS 27457 (W.D. Va. Dec. 18, 2002),

Rowland v Novus Fin. Corp., 949 F.Supp. 1447, 1458 (D. Haw. 1996), *Jaaskelainen v.*

Wells Fargo Bank, N.A. 391 B.R. 627, cases collected in footnote 108 (Bankr. D. Mass. 2008))

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The three day right to rescind does not begin to run until the consumer receives all the material disclosures, correctly made. (15 USC section 1635 (a): Reg. Z sections 226.15(a)(3). See, *Smith v Wells Fargo Credit Corp*, 713 F. Supp. 354, 355 (D. Ariz. 1989)

D. RIGHT TO RESCIND

Rescission is cancelling the transaction, applicable only when the principal residence is the collateral. The statutorily required right to rescind form states that the borrower has been advised there are three days in which there is an absolute right to undo the transaction, just because you changed your mind, or, for no reason at all.

Rescission rights apply to transactions that open a credit line or increase the limit on a pre-existing loan.

It means, unringing the bell, putting the parties where they were before the transaction. *Barrett v. JP Morgan Chase Bank, N.A.*, 445 F.3d 874, 877 (6th Cir. 2006)

All finance charges must be refunded (226.223(d)(2) and any security interest cancelled (226.23(d)(1).

The kicker is, the rest of the money the creditor spent, usually the lion's share of which went to pay off a prior mortgage, has to be tendered back to the creditor by the borrower. (226.23(d)(3).

Rescission is available as a remedy for loans secured by a principal residence, that were not used to buy or build the residence. 16 USC 1635 and Regulation Z section 226.23 (12 C.F.R. Section 226.23)

"This provision was enacted to give the consumer the opportunity to reconsider any transaction which would have the serious consequence of encumbering the title to his

home." (U. S. Rep. No. 368, 96th Cong., 2d Sess. 28, reprinted in 1980 U.S.C.C.A.N. 236, 264. See *Rodash v AIB Mortgage Co.*, 16 F3d 1142 (11th Cir. 1994)

“The sequence of procedures under § 226.23(d)(2) and (3), or a court’s modification of those procedures under § 226.23(d)(4), does not affect a consumer’s substantive right to rescind and to have the loan amount adjusted accordingly. Where the consumer’s right to rescind is contested by the creditor, a court would normally determine whether the consumer has a right to rescind and determine the amounts owed before establishing the procedures for the parties to tender any money or property.”

Off’l Staff Comm. to Reg. Z, 12 C.F.R. Pt. 226, Supp. I at ¶ 23(d)(4)-1.

A consumer facing foreclosure, where the foreclosure process has actually commenced, has greater rescission rights, as any understatement of the finance charges by \$35.00 or more triggers the right to rescind. 15 USC 1635(I)(2); Reg. Z section 226.23(h)(2)(i); *Bynum v. Equitable Mortgage Group*, 2005 WL 818619 (D.D.C. Apr. 7, 2005); *Riopta v Amresco Residential Mortgage Corp.*, 101 F. Supp. 2D 1326, (D.Haw. 1999) See NCLC Truth In Lending, section 4.6.3.2.3.

This is as opposed to the general rule of \$100 or ½ of 1% of the total amount of credit extended. Reg. Z section 226.23(g)(1)(ii).

The basic statute of limitations for TILA actions is one year. 15 USC 1640(e).

However, there is an extended right to rescind, up to three years. 15 USC 1635(f).

E. DAMAGES

The law does not provide for punitive damages.

Actual damages are recoverable, including emotional distress, but are not required.

Of course, you have to prove those.

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However, you can bring an action just for statutory damages, for violation of the statute, without any actual damages.

This is a fee shifting statute, so you get costs and actual attorney fees. 15 USC 1640 (a)(3)

Statutory damages are available for specified portions of the statute. *Baker v Sunny Chevrolet, Inc.*, 349 F.3d 862 (6th Cir. 2003)

“For a credit transaction not under an open end credit plan that is secured by real property or a dwelling, not less than \$200 or greater than \$2,000.” 15 USC 1640 (a)(2) (A)

Of course, in a rescission case, you unwind the transaction, so there are additional damages available.

F. RECENT STATUTORY CHANGES

Every crisis creates a call for more government regulation, at least in some quarters.

The latest is the new Consumer Protection Agency, authorized by the Dodd-Frank Wall Street Reform and Consumer Protection Act.

There are new yield spread premium (YSP) rules, which expand coverage to include mortgage originators. (15 USC 1641(a), (d).

If either signer or co-signer has been convicted of fraud, no relief under TILA. (15 USC 1640 (1).

Big change: YSPs based on anything other than the amount of the loan are prohibited.

Previously, mortgage companies paid more for higher interest loans.

Mortgage brokers frequently put people into loans with a higher interest rate than the interest rate for which they were qualified.

Also gone from mortgages: mandatory arbitration and single premium credit insurance. (15 USC 1639(c)).

Pre-payment penalties are prohibited in large categories of loans. (15 USC 1639(c)).

Restrictions on appraisals are included, but leave a big exception. (15 USC 1639(e)).

Something affecting our clients, periodic statements must be provided, (15 USC 1638(f)), and, payoff balances MUST be provided within 7 days of a written request, (15 USC 1639(g)).

G. STRATEGY

Under 15 USC 1640 (e), you can bring a TILA case “in any U. S. district court, or in any other court of competent jurisdiction.”

This includes bankruptcy court.

You can join state law claims, if you have any, you can wait for the proof of claim to be filed by the mortgage company, and object to that as one count of your complaint.

That will help keep it from being removed to Federal District Court.

So, you file a Chapter 13 case to stop a foreclosure, and file your TILA adversary proceeding for rescission.

This will hold up confirmation, until it is determined if the claim is secured, or rescinded, and unsecured.

If you win, and it is unsecured, that will change your liquidation analysis.

The home is now unencumbered, or less encumbered, so can you include that entire balance left due on the former mortgage as an unsecured debt, and pay it less than 100%?

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Some courts have said yes.

“Bankruptcy, however, relieves the debtor from his obligation to pay the creditor upon rescission. Conditioning rescission upon the debtor's payment therefore imposes an obligation from which the debtor has been legally freed. Unlike the situation absent bankruptcy, there is a legitimate, legal impediment to the debtor's reciprocal performance. It would be palpably unfair to deny the relief to which a consumer is entitled under TILA because that consumer has also availed himself of bankruptcy relief. To do so would require that the consumer choose between bankruptcy and TILA, something neither form of statutory relief contemplates.¹¹⁹”

119. *Myers*, 175 B.R. at 128-129 (*quoting* *In Re Piercy*, 18 B.R. 1004, (Bankr. W.D. Ky. 1982).

(Jaasekelainen at p. 645-646)

However, I have not had success with this argument in the Eastern District of Michigan.

H. ISSUES

Most of the bad mortgage loans were written during the peak of the bubble, 2005-2007, so the statute of limitations has run out on most of the claims, even if there were issues with disclosure.

It is nearly impossible to get new financing for our clients, in order to make a tender in a rescission case.

With the crash in home prices, it can be a Pyrrhic victory to prevail on a TILA claim.

If the Debtor owes \$300,000, and you can get rid of \$100,000 with a successful TILA case, but the home is still worth only \$150,000, or \$100,000, what is the point?

It would still be a bad deal for the homeowner, who is not in your office because she could afford the payments.

TILA issues could be raised in objections to mortgage company proofs of claim, and may be useful as leverage in getting a loan modification.

Some loan modifications and forbearance agreements had provisions waiving any and all claims against the mortgage company, so beware.

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A. Settlement Statement

U.S. Department of Housing
and Urban Development

OMB No. 2502-0265

Type of Loan							
1. <input type="checkbox"/> FHA	2. <input type="checkbox"/> FmHA	3. <input type="checkbox"/> Conv Units	6. File Number	7. Loan Number	8. Mortgage Ins Case Number		
4. <input type="checkbox"/> VA	5. <input type="checkbox"/> Conv Ins.	6. <input type="checkbox"/> Seller Finance		9623			
<p>C. Note: This form is furnished to give you a statement of actual settlement costs. Amounts paid to and by the settlement agent are shown. Items marked "p.o.c." were paid outside the closing; they are shown here for informational purposes and are not included in the totals.</p>							
D. Name & Address of Borrower Renata Hukic 24801 Harrison Harrison Township, MI 48045			E. Name & Address of Seller		F. Name & Address of Lender Americo's Wholesale Lender 2375 North Glassville Drive RGV-B-195 Richardson, TX 75083		
G. Property Location 24801 Harrison Street Harrison Township, MI 48045				H. Settlement Agent Name Clinton Valley Title Agency 44777 Hayes Road Sterling Heights, MI 48313 Tax ID: 20-4960447		I. Settlement Date 1/26/2007 Fund: 1/31/2007	
J. Summary of Borrower's Transaction				K. Summary of Seller's Transaction			
100. Gross Amount Due from Borrower				400. Gross Amount Due to Seller			
101. Contract Sales Price				401. Contract Sales Price			
102. Personal Property				402. Personal Property			
103. Settlement Charges to borrower				403.			
104. Loan Payoff to Chase				404.			
105. Loan Payoff to Chase				405.			
Adjustments for items paid by seller in advance				Adjustments for items paid by seller in advance			
106. Assessment Taxes				406. Assessment Taxes			
107. School Property Taxes				407. School Property Taxes			
108. Village Property Taxes				408. Village Property Taxes			
109. Other Taxes				409. Other Taxes			
110. 2005 County Taxes				410.			
111. Duplicate Tax Bill				411.			
112.				412.			
113.				413.			
114.				414.			
115.				415.			
116.				416.			
120. Gross Amount Due From Borrower				420. Gross Amount Due to Seller			
200. Amounts Paid By Or In Behalf Of Borrower				500. Reductions in Amount Due to Seller			
201. Deposit or earnest money				501. Excess Deposit			
202. Principal amount of new loan(s)				502. Settlement Charges to Seller (line 1400)			
203. Existing loan(s) taken subject to				503. Existing Loan(s) Taken Subject to			
204. Loan amount 2nd lien				504. Payoff of first mortgage loan			
205.				505. Payoff of second mortgage loan			
206. Second Mortgage Proceeds				506.			
207.				507.			
208.				508.			
209.				509.			
Adjustments for items unpaid by seller				Adjustments for items unpaid by seller			
210. Assessment Taxes				510. Assessment Taxes			
211. School Property Taxes				511. School Property Taxes			
212. Village Property Taxes				512. Village Property Taxes			
213. Other Taxes				513. Other Taxes			
214.				514.			
215.				515.			
216.				516.			
217.				517.			
218.				518.			
219.				519.			
220. Total Paid By/For Borrower				520. Total Reduction Amount Due Seller			
300. Cash At Settlement From/To Borrower				600. Cash At Settlement To/From Seller			
301. Gross Amount due from borrower (line 120)				601. Gross Amount due to seller (line 420)			
302. Less amounts paid by/for borrower (line 220)				602. Less reductions in amt. due seller (line 520)			
303. Cash To Borrower				603. Cash Seller			

Section 5 of the Real Estate Settlement Procedures Act (RESPA) requires the following: HUD must develop a Special Information Booklet to help persons borrowing money to finance the purchase of residential real estate to better understand the nature and costs of real estate settlement services; Each lender must provide the booklet to all applicants from whom it receives or for whom it prepares a written application to borrow money to finance the purchase of residential real estate; Lenders must prepare and distribute with the Booklet a Good Faith Estimate of the settlement costs that the borrower is likely to incur in connection with the settlement. These disclosures are mandatory.

Section 4(a) of RESPA mandates that HUD develop and prescribe this standard form to be used at the time of loan settlement to provide full disclosure of all charges imposed upon the borrower and seller. These are third party disclosures that are designed to provide the borrower with pertinent information during the settlement process in order to be a better shopper. The Public Reporting Burden for this collection of information is estimated to average one hour per response, including the time for reviewing instructions, searching existing data sources, gathering and maintaining the data needed, and completing and reviewing the collection of information. This agency may not collect this information, and you are not required to complete this form, unless it displays a currently valid OMB control number. The information requested does not lend itself to confidentiality.

R. Hukic
 EXHIBIT NO. 28
 Not 1-13-09

616

File No. [REDACTED]

I. Settlement Charges

Total Sales/Broker's Commission based on price \$0.50 @ % = \$0.00				Paid From	Paid From
Division of Commission (line 700) as follows:				Borrower's	Seller's
				Funds at	Funds at
				Settlement	Settlement
701.	to			\$0.00	\$0.00
702.	to				
703. Commission Paid at Settlement					
800. Items Payable in Connection with Loan					
801.	Loan Origination Fee %	to			
802.	Loan Discount %	to			
803.	Appraisal Fee	to	Navarro Appraisal	POC (B) \$300.00	
804.	Credit Report	to	Credit Plus	\$14.00	
805.	Processing Fee	to	Paradis Allen	\$350.00	
806.	Broker Administration Fee	to	Liberty Lending	\$495.00	
807.	Underwriting Fee	to	America's Wholesale Lender	\$895.00	
808.	Flood Check Fee	to	Landsafe Flood Determination, Inc.	\$26.00	
809.	Tax Service Fee	to	Countrywide Tax Service	\$90.00	
810.	Premium Paid by Lender	to	Liberty Lending	POC (L) \$2,720.00	
811.	Document Signing Fee	to	Countrywide Home Loans	\$250.00	
900. Items Required by Lender To Be Paid in Advance					
901.	Interest from 1/31/2007 to 2/1/2007 @ \$37.07/day			\$37.07	
902.	Mortgage Insurance Premium for months	to			
903.	Hazard Insurance Premium for 1 years	to	State Farm Insurance	POC (B) \$562.00	
1000. Reserves Deposited With Lender					
1001.	Hazard (Homeowner's) Insurance	4 months @	\$42.48 per month	\$169.92	
1002.	Mortgage Insurance	months @	\$0.00 per month		
1003.	City Property Taxes	9 months @	\$107.71 per month	\$969.39	
1004.	County Property Taxes	3 months @	\$46.84 per month	\$140.52	
1005.	Assessment Taxes	months @	\$0.00 per month		
1006.	School Property Taxes	months @	\$0.00 per month		
1007.	Village Property Taxes	months @	\$0.00 per month		
1008.	Other Taxes	months @	\$0.00 per month		
1011.	Aggregate Adjustment			(\$578.41)	
1100. Title Charges					
1101.	Settlement or Closing Fee	to	Clinton Valley Title Agency	\$175.00	
1102.	Abstract or Title Search	to			
1103.	Title Examination	to			
1104.	Title Insurance Binder	to			
1105.	Document Preparation	to			
1106.	Notary Fees	to			
1107.	Attorney's Fees	to			
(includes above items numbers:)					
1108.	Title Insurance	to	Clinton Valley Title, Agent for Title	\$390.50	
(includes above items numbers:)					
1109.	Lender's coverage		\$136,000.00/\$390.50		
1110.	Owner's coverage		\$0.00/\$0.00		
1111.	Escrow Fee	to			
1112.	Edco Fee	to	Clinton Valley Title Agency	\$20.00	
1113.	Overnight Processing and Delivery	to	Clinton Valley Title Agency	\$60.00	
1114.	Bank Wire Fee	to	Clinton Valley Title Agency	\$17.00	
1200. Government Recording and Transfer Charges					
1201.	Recording Fees	Deed	; Mortgage \$47.00 ; Releases	\$47.00	
1202.	City/county tax/stamps	Deed	; Mortgage to		
1203.	State tax/stamps	Deed	; Mortgage to		
1204.	County Tax Stamps	to	County Register of Deeds		\$0.00
1205.	State Tax Stamps	to	County Register of Deeds		\$0.00
1206.	City Transfer Tax	to			
1207.	Recording Processing Fee	to	Clinton Valley Title Agency	\$20.00	
1300. Additional Settlement Charges					
1301.	Survey	to			
1302.	Pest Inspection	to			
1400.	Total Settlement Charges (enter on lines 103, Section J and 502, Section K)			\$3,587.99	

I have carefully reviewed the HUD-1 Settlement Statement and to the best of my knowledge and belief, it is a true and accurate statement of all receipts and disbursements made on my account or by me in this transaction. I further certify that I have received a completed copy of pages 1, 2 and 3 of this HUD-1 Settlement Statement.

Renata Flukic
Renata Flukic

SETTLEMENT AGENT CERTIFICATION

The HUD-1 Settlement Statement which I have prepared is a true and accurate account of this transaction. I have caused the funds to be disbursed in accordance with this statement.

[Signature] 1/26/07
Settlement Agent Date

Warning: It is a crime to knowingly make false statements to the United States on this or any other similar form. Penalties upon conviction can include a fine and imprisonment. For details see: Title 18 U.S. Code Section 1001 and Section 1010.

RESPA

A. WHAT IS RESPA?

The Real Estate Settlement and Procedures Act, 12 USC 2601 et seq.

Passed in 1974, amended in 1990 and, most recently, in the Dodd-Frank legislation, it was a response to complicated record keeping and mortgagors difficulty in figuring out the status of their loans in the era of mortgage servicing and more complex real estate closings.

The 1990 amendments dealt with requirements on the transfer of servicing rights, another new phenomenon, and for the handling of escrow accounts.

It applies to big lenders. 12 USC 2602.

This section focuses on the provisions that: deal with mortgage servicer wrongdoing, and, provide for a private right of action.

These actions can be brought in state or federal court. 12 USC 2614.

B. WHAT DOES RESPA HAVE TO DO WITH CONSUMER BANKRUPTCY CASES?

(thanks to attorney O. Max Gardner of North Carolina for permission to use some of the material in this sub-section)

If you practice Chapter 13 consumer bankruptcy law, you should know what the letters “QWR” (Qualified Written Request) mean.

This is a great source for obtaining information on our client'(s) mortgages, and available without an adversary proceeding or contested matter.

It can be used to find out how the servicer for the securitized trust is applying the debtor's money and the disbursements on the arrearage claim from the Chapter 13 Trustee. It can also be used to identify all of the “ancillary fees” and “collateral charges” that mortgage servicers throw onto our clients' accounts, without notice or explanation.

12 USC 2605 and 2609, known as the “Servicer Act,” require servicers to respond to borrower requests for information, and correction of account errors. The “Servicer Act” provisions contain the authority for the QWR.

It gives borrowers, our clients, the right to sue for violations of these provisions, 12 USC 2605(f).

The law provides that you can secure records on the mortgage note, on any alleged default on the contract, or, dispute the status of what happened to your mortgage payments, were they all credited? How?

Do not abuse this provision.

A simple sample letter is attached.

There are cases of lawyers drafting QWRs with over 150 questions.

This is past what the statute, or any other Federal or Bankruptcy discovery process, allows.

The standard letter in a Chapter 13 context should include requests for:

A complete life of loan transactional history

DETROIT CONSUMER BANKRUPTCY CONFERENCE

The Transaction Codes for the software platform of the Servicer

The Key Loan Transaction history, bankruptcy work sheet, or any summary of all of the accounts in an XL spreadsheet format

The MERS Milestone Reports and the Edgar website address for the Pooling and Servicing Agreement, Prospectus and Prospectus Supplement;

The name, address, name of a contact person and telephone number of the current holder and owner of the mortgage note

Copies of all collection notes and communications files

An itemized statement of the amount needed to fully reinstate the loan

All communications with any non-lawyer third-party providers

All Form P-309 screen shots of all system accounts

C. DOES RESPA CONFLICT WITH BANKRUPTCY LAW?

Some mortgage servicers argued that Bankruptcy law “pre-empted” RESPA, so debtors were limited to bankruptcy court rules as to what information servicers would be required to disclose.

Federal law pre-empts state law, not other federal laws.

One court in our state re-phrased the issue as: Does RESPA conflict with bankruptcy law, and found it does not, which is the majority rule.

See *Conley v Central Mortgage Co.*, 08-CV-13432, (E.D. MI. 2009), 2009 WL 2498022.

What if you object to a proof of claim, and join a RESPA violation claim to that?

Can you stay in bankruptcy court, or does the reference have to be withdrawn, and the case heard in District Court?

No, you can stay in bankruptcy court. *Alfonseca-Baez v Doral Financial Corp.*, 376 BR 70, (D.P.R., 2007)

C. WHAT YOU DO WITH QWR

I always have the client send it.

I do not want to be involved as a witness, or litigate side issues about whether the letter qualifies as a QWR, thus triggering the provisions of RESPA.

Send it to the right address.

I send a question out on the consumer attorney listservs to which I belong, and usually get a response.

If not, google for RESPA address.

Do not send a QWR to the address for payments, which will be a lockbox operation, where no one reads what is in the envelope, they just throw the payment in one box and toss everything else.

DETROIT CONSUMER BANKRUPTCY CONFERENCE

Send it to the right address, or you may have no case. *Bally v Hometown Lending, Inc.*, 2005 WL2250856 (N.D. Ill. Sept. 8, 2005)

The burden is on the servicer to show that the mortgagor was provided with the correct address. *McLean v GMAC Mortgage, Inc.*, 2008 WL 2741159 (N.D.Ill. July 8, 2008)

Do not send a QWR just to the servicer's attorney, even if they filed an appearance in the Chapter 13 case. *Griffin v Citifinancial Mortgage Co. Inc.*, 2006 WL 266106 (M.D. Pa. Feb. 1, 2006)

The statute requires the QWR to be in writing, name and account number, or, sufficient information for the servicer to identify the account. 12 USC 26059e)(1)(B)(i) and Reg. X, 24 C.F.R 3500.21(e)(2).

Include the address of the property on which the mortgage is a lien, even though that is not specifically required by the statute.

This is not a game where you want to make them work to find the records. You want the records.

A QWR is not a QWR if “it is delivered to a servicer more than 1 year after either the date of transfer of servicing or the date that the mortgage servicing loan amount was paid in full, whichever date is applicable.” Reg. X, 24 D.F.R. 3500.21(e)(2)(ii).

Servicers tried to argue that, if they acquired the transfer rights more than one year ago, the QWRs they got were not valid QWRs.

Courts have correctly held that the meaning of the regulation is that the servicer who transferred the rights, does not have to respond if it gets a QWR more than one year after

it handed off the rights to the loan in question. See *Davidson v. Countrywide Home Loans, Inc.*, 2010 WL 962712 (S.D.Cal. Mar 16, 2010).

D. WHAT THE MORTGAGE SERVICER DOES WITH A QWR

Receipt of a QWR must be acknowledge within 20 days, changed to five days by Dodd-Frank, effective date not set yet.

These are business days, not calendar days.

That is, they must tell the borrower; “Hey, we got your letter, we are working on it.”

They have 60 business days to actually send the information, changing to 30, with a provision that can extend it to 45, under the new law, effective date not set yet.

The new law also bans charging the borrower for producing or copying records, an issue on which the courts had been split.

The servicer is not just supposed to regurgitate the informaiton, they are supposed to correct errors.

E. DAMAGES

ACTUAL DAMAGES

Some courts say you have to have actual damages, to have a claim. *Hutchinson v. Del. Sav. Bank F.S.B.*, 410 F.Supp. 2D 374 (D.N.J. 2006) .

Actual damages can include:

cost of the paper and postage to send the QWR, *In re Tomasevic*, 273 B.R. 682 (Bankr. M.D.Fl. 2002).

DETROIT CONSUMER BANKRUPTCY CONFERENCE

transportation costs, time spent away from work in getting compliance, inconvenience, *Rawlings v Dovenmuehle Mortgage*, 64 F.Supp. 2D, 1156 (M.D. Ala. 1999).

Money paid to old servicer, after effective date of transfer to new servicer, *Wanger v EMC Mortg. Corp.*, 103 Cal.App 4th 1125, 127 Cal. Rptr. 2D 685 (2002).

damage to credit report *Johnstone v Bank of Am.*, 173 F.Supp. 2D 809 (N.D. Ill. 2001).

emotional distress, some courts, may be established by lay testimony, *McLean v GMAC Mortgage Corp.*, 595 F. Supp. 2D 1360 (S.D. Fla. 2009).

Any damages you can prove were caused by a RESPA violation would be actual damages.

STATUTORY DAMAGES

If the evidence shows a “pattern or practice of noncompliance” you can get statutory damages of \$1,000, raised to \$2,000 by Dodd-Frank. 12 USC 2605(f)(1)(B); Reg x, 24 C.F.R. 3500.21(f)(1)(i).

At least one court has held that this requirement can be satisfied from just your client's case, *Ploog v. Homeside Lending, Inc.*, 209 F.Supp. 2D 863 (N.D. Ill 20021), but normally will require discovery and proving that this servicer does this all the time.

There is no treble damage provision; there is no mention of punitive damages, but they are not specifically allowed.

FEE SHIFTING STATUTE

12 USC 2605(f)(3) Costs

In addition to the amounts under paragraph (1) or (2), in the case of any successful action under this section, the costs of the action, together with any attorneys fees incurred

in connection with such action as the court may determine to be reasonable under the circumstances.

F. STATUTE OF LIMITATIONS

12 USC 2614, has a three year statute of limitations, but, can a RESPA violation be pleaded after that as a setoff in an objection to a bankruptcy proof of claim. *In re Thompson*, 350 B.R. (Bankr. E.D. Wis 2006)

(Certified mail)

TO: (designated qualified written request address)

Re: (address and mortgage loan #)

Dear Sir/Madam,

Please treat this letter as a "qualified written request" under the Real Estate Settlement Procedures Act, codified as Section 2605(e) of Title 12 of the United States Code.

This request is made to get information about the fees, expenses, costs, accounting, escrow procedures, and the application of payments in connection with this loan.

Specifically, the following:

- A complete life of loan transactional history;
- The Transaction Codes for the software platform of the Servicer;
- The Code definitions in plain English;
- The Key Loan Transaction history, bankruptcy work sheet, or any summary of all of the accounts in an XL spreadsheet format;
- The MERS Milestone Reports and the Edgar website address for the Pooling and Servicing Agreement, Prospectus and Prospectus Supplement;
- The name, address, name of a contact person and telephone number of the current holder and owner of the mortgage note;
- Copies of all collection notes and communications files;
- An itemized statement of the amount needed to fully reinstate the loan;
- All communications with any non-lawyer third-party providers; and
- All Form P-309 screen shots of all system accounts.

All records of any suspense or other accounts connected with this mortgage

Date:

DETROIT CONSUMER BANKRUPTCY CONFERENCE



TOWNE
MORTGAGE COMPANY

700 Tower Drive, Suite 110
Troy, MI 48098
www.townemortgage.com
Tel 248-247-1800
Fax 248-247-1891

February 28, 2008

John H. VanLoon
25327 Culver St.
St. Clair Shores, MI 48081

Dear Mr. VanLoon:

Please be advised that I am in receipt of your correspondence dated February 20, 2008 and received in our office on February 27, 2008.

Please also be advised that all of the requested documentation has been made available to you in the form of monthly statements. Therefore, unless you are claiming an error in the servicing of your loan and provide a basis for this belief, 12 U.S.C. 2605(e) is not applicable.

Furthermore, pursuant to 12 U.S.C. 2605(e), a qualified written request must include a statement of the reasons for your belief that your account is in error. Unless this is provided to our office within fifteen (15) days, we cannot and will not undertake any further action.

Thank You

Sincerely,

Maria A. Zain

Corporate Counsel

Direct Line: (248) 247-1840

Fax: (248) 247-1892

Payment history for account number 6690 [redacted] as of 05/08/2006.

Transaction Date	Description	Amount Received	Effective Date	Due Date Payment Applied To	Principal Paid	Interest Paid	Escrow Paid	Optional Products Paid	Fees Paid	Fee Desc.	Other Paid
					\$53.07	\$488.96	\$0.00	\$0.00	\$0.00		\$0.00
04/26/2006	Payment	\$542.03	04/26/2006	04/26/2006	\$53.07	\$488.96	\$0.00	\$0.00	\$0.00		\$0.00
03/27/2006	Payment	\$542.03	03/27/2006	03/26/2006	\$36.47	\$505.56	\$0.00	\$0.00	\$0.00		\$0.00
02/24/2006	Payment	\$3.00	02/24/2006		\$0.00	\$0.00	\$0.00	\$0.00	\$3.00	phone checks - checkwriter	\$0.00
02/24/2006	Payment	\$542.03	02/24/2006	02/26/2006	\$68.55	\$473.48	\$0.00	\$0.00	\$0.00		\$0.00
01/26/2006	Payment	\$3.00	01/26/2006		\$0.00	\$0.00	\$0.00	\$0.00	\$3.00	phone checks - checkwriter	\$0.00
01/26/2006	Payment	\$542.03	01/26/2006	01/26/2006	\$51.80	\$490.23	\$0.00	\$0.00	\$0.00		\$0.00
12/27/2005	Payment	\$3.00	12/27/2005		\$0.00	\$0.00	\$0.00	\$0.00	\$3.00	phone checks - checkwriter	\$0.00
12/27/2005	Payment	\$542.03	12/27/2005	12/26/2005	\$18.95	\$523.08	\$0.00	\$0.00	\$0.00		\$0.00
11/25/2005	Payment	\$3.00	11/25/2005		\$0.00	\$0.00	\$0.00	\$0.00	\$3.00	phone checks - checkwriter	\$0.00
11/25/2005	Payment	\$542.03	11/25/2005	11/26/2005	\$67.46	\$474.57	\$0.00	\$0.00	\$0.00		\$0.00
10/27/2005	Payment	\$3.00	10/27/2005		\$0.00	\$0.00	\$0.00	\$0.00	\$3.00	phone checks - checkwriter	\$0.00
10/27/2005	Payment	\$542.03	10/27/2005	10/26/2005	\$99.47	\$442.56	\$0.00	\$0.00	\$0.00		\$0.00
09/30/2005	Payment	\$3.00	09/30/2005		\$0.00	\$0.00	\$0.00	\$0.00	\$3.00	phone checks - checkwriter	\$0.00
09/30/2005	Payment	\$542.03	09/30/2005	09/26/2005	\$360.65	\$181.38	\$0.00	\$0.00	\$0.00		\$0.00
09/21/2005	Other Fee Adjustment	(\$21.00)			\$0.00	\$0.00	\$0.00	\$0.00	\$0.00		(\$21.00)
09/21/2005	Payment	\$0.00	09/21/2005		\$0.00	\$0.00	\$0.00	\$0.00	\$21.00		(\$21.00)
09/21/2005	Payment	\$0.00	09/21/2005		\$0.00	\$0.00	\$0.00	\$0.00	\$94.94	late charges	(\$94.94)
09/20/2005	Misapplication Reversal	\$0.00	09/19/2005		(\$115.94)	\$0.00	\$0.00	\$0.00	\$0.00		\$115.94
09/19/2005	Payment	\$3.00	09/19/2005		\$0.00	\$0.00	\$0.00	\$0.00	\$3.00	phone checks - checkwriter	\$0.00

3514
balance

.../payment/history/index.cfm?fa=results

05/09/2006

DETROIT CONSUMER BANKRUPTCY CONFERENCE

HomEq Payment History

		<i>Payment Received</i>			<i>Original Total</i>			<i>Original Interest</i>			<i>Rec Paid</i>		<i>Orig Pay</i>	
09/19/2005	Payment	\$426.09	09/19/2005	08/26/2005	\$145.12	\$280.97	\$0.00	\$0.00	\$0.00			\$0.00		
09/19/2005	Payment	\$115.94	09/19/2005		\$115.94	\$0.00	\$0.00	\$0.00	\$0.00			\$0.00		
09/12/2005	Late Charge Assessment	\$0.00	09/12/2005		\$0.00	\$0.00	\$0.00	\$0.00	(\$21.68)	late charges		\$21.68		
09/09/2005	Misc. Other Fee Disbursement	\$0.00			\$0.00	\$0.00	\$0.00	\$0.00	\$0.00			\$100.00		
09/02/2005	Payment	\$3.00	09/02/2005		\$0.00	\$0.00	\$0.00	\$0.00	\$3.00	phone checks - checkwriter		\$0.00		
09/02/2005	Payment	\$1,084.06	09/02/2005	06/26/2005	\$0.00	\$542.03	\$0.00	\$0.00	\$0.00			\$542.03		
09/02/2005	Payment	\$0.00	09/02/2005	07/26/2005	\$0.00	\$542.03	\$0.00	\$0.00	\$0.00			(\$542.03)		
09/02/2005	Payment	\$115.94	09/02/2005	08/26/2005	\$31.50	\$84.44	\$0.00	\$0.00	\$0.00			\$0.00		
08/16/2005	Property Preservation	\$0.00			\$0.00	\$0.00	\$0.00	\$0.00	\$0.00			\$8.80		
08/10/2005	Late Charge Assessment	\$0.00	08/10/2005		\$0.00	\$0.00	\$0.00	\$0.00	(\$21.68)	late charges		\$21.68		
07/11/2005	Late Charge Assessment	\$0.00	07/11/2005		\$0.00	\$0.00	\$0.00	\$0.00	(\$21.68)	late charges		\$21.68		
06/28/2005	Payment	\$3.00	06/28/2005		\$0.00	\$0.00	\$0.00	\$0.00	\$3.00	phone checks - checkwriter		\$0.00		
06/28/2005	Payment	\$542.03	06/28/2005	05/26/2005	\$0.00	\$542.03	\$0.00	\$0.00	\$0.00			\$0.00		
06/10/2005	Late Charge Assessment	\$0.00	06/10/2005		\$0.00	\$0.00	\$0.00	\$0.00	(\$21.68)	late charges		\$21.68		
05/25/2005	Other Fee Adjustment	\$21.00			\$0.00	\$0.00	\$0.00	\$0.00	\$0.00			\$21.00		
05/25/2005	Payment	\$0.00	05/25/2005		\$0.00	\$0.00	\$0.00	\$0.00	\$0.00			\$0.00		
05/25/2005	Payment	\$521.03	05/25/2005	04/26/2005	\$0.00	\$542.03	\$0.00	\$0.00	(\$21.00)			\$0.00		
05/25/2005	Payment	\$542.03	05/25/2005		\$0.00	\$0.00	\$0.00	\$0.00	\$0.00			\$542.03		
05/25/2005	Payment	(\$1,063.06)	05/25/2005		\$0.00	\$0.00	\$0.00	\$0.00	\$0.00			(\$1,063.06)		
05/25/2005	Payment	\$542.03	05/25/2005	03/26/2005	\$0.00	\$542.03	\$0.00	\$0.00	\$0.00			\$0.00		
05/24/2005	Property Preservation	\$0.00			\$0.00	\$0.00	\$0.00	\$0.00	\$0.00			\$8.80		
05/11/2005	Late Charge Assessment	\$0.00	05/11/2005		\$0.00	\$0.00	\$0.00	\$0.00	(\$21.68)	late charges		\$21.68		
04/29/2005	Payment	\$0.00	03/24/2005	02/26/2005	\$0.00	\$542.03	\$0.00	\$0.00	\$0.00			(\$542.03)		
04/26/2005	Payment	\$3.00	04/26/2005		\$0.00	\$0.00	\$0.00	\$0.00	\$0.00			\$3.00		
04/26/2005	Payment	\$542.03	04/26/2005		\$0.00	\$0.00	\$0.00	\$0.00	\$0.00			\$542.03		
04/25/2005	Payment	\$0.00	04/26/2004	04/26/2004	\$12.37	\$529.66	\$0.00	\$0.00	\$0.00			(\$542.03)		
04/25/2005	Payment	\$0.00	05/26/2004	05/26/2004	\$45.57	\$496.46	\$0.00	\$0.00	\$0.00			(\$542.03)		
04/25/2005	Payment	\$0.00	06/29/2004	06/26/2004	\$0.00	\$542.03	\$0.00	\$0.00	\$0.00			(\$542.03)		
04/25/2005	Payment	\$0.00	08/25/2004	07/26/2004	\$0.00	\$542.03	\$0.00	\$0.00	\$0.00			(\$542.03)		
04/25/2005	Payment	\$0.00	09/27/2004	08/26/2004	\$0.00	\$542.03	\$0.00	\$0.00	\$0.00			(\$542.03)		
04/25/2005	Payment	\$0.00	10/25/2004	09/26/2004	\$0.00	\$542.03	\$0.00	\$0.00	\$0.00			(\$542.03)		
04/25/2005	Payment	\$0.00	11/23/2004	10/26/2004	\$0.00	\$542.03	\$0.00	\$0.00	\$0.00			(\$542.03)		
04/25/2005	Payment	\$0.00	12/26/2004	11/26/2004	\$0.00	\$542.03	\$0.00	\$0.00	\$0.00			(\$542.03)		
04/25/2005	Payment	\$0.00	01/24/2005	12/26/2004	\$0.00	\$542.03	\$0.00	\$0.00	\$0.00			(\$542.03)		
04/25/2005	Payment	\$0.00	02/25/2005	01/26/2005	\$0.00	\$542.03	\$0.00	\$0.00	\$0.00			(\$542.03)		
04/25/2005	Payment	\$0.00	04/25/2005		\$0.00	\$0.00	\$0.00	\$0.00	\$0.00			\$0.00		
04/22/2005	Misapplication Reversal	\$0.00	03/25/2004		\$0.00	(\$542.03)	\$0.00	\$0.00	\$0.00			\$542.03		
04/22/2005	Misapplication Reversal	\$0.00	05/26/2004		\$0.00	(\$542.03)	\$0.00	\$0.00	\$0.00			\$542.03		
04/22/2005	Misapplication Reversal	\$0.00	06/29/2004		\$0.00	(\$542.03)	\$0.00	\$0.00	\$0.00			\$542.03		
04/14/2005	Other Fee Adjustment	(\$24.00)			\$0.00	\$0.00	\$0.00	\$0.00	\$0.00			(\$24.00)		
	Misapplication													

HomeEq Payment History

04/14/2005	Reversal	\$0.00	03/24/2005		\$0.00	(\$542.03)	\$0.00	\$0.00	\$24.00		\$518.03
04/14/2005	Misapplication Reversal	\$0.00	08/25/2004		\$0.00	(\$542.03)	\$0.00	\$0.00	\$0.00		\$542.03
04/14/2005	Misapplication Reversal	\$0.00	09/27/2004		\$0.00	(\$542.03)	\$0.00	\$0.00	\$0.00		\$542.03
04/14/2005	Misapplication Reversal	\$0.00	10/25/2004		\$0.00	(\$542.03)	\$0.00	\$0.00	\$0.00		\$542.03
04/14/2005	Misapplication Reversal	\$0.00	11/23/2004		\$0.00	(\$542.03)	\$0.00	\$0.00	\$0.00		\$542.03
04/14/2005	Misapplication Reversal	\$0.00	12/26/2004		\$0.00	(\$542.03)	\$0.00	\$0.00	\$0.00		\$542.03
04/14/2005	Misapplication Reversal	\$0.00	01/24/2005		\$0.00	(\$542.03)	\$0.00	\$0.00	\$0.00		\$542.03
04/14/2005	Misapplication Reversal	\$0.00	02/25/2005		\$0.00	(\$542.03)	\$0.00	\$0.00	\$0.00		\$542.03
04/12/2005	Other Fee Adjustment	\$291.00			\$0.00	\$0.00	\$0.00	\$0.00	\$0.00		\$291.00
04/11/2005	Late Charge Assessment	\$0.00	04/11/2005		\$0.00	\$0.00	\$0.00	\$0.00	(\$21.68)	late charges	\$21.68
04/08/2005	Other Fee Adjustment	\$24.00			\$0.00	\$0.00	\$0.00	\$0.00	\$0.00		\$24.00
04/08/2005	Payment	\$0.00	03/24/2005	02/26/2005	\$0.00	\$542.03	\$0.00	\$0.00	(\$24.00)		(\$518.03)
04/07/2005	Misc. Other Fee Disbursement	\$0.00			\$0.00	\$0.00	\$0.00	\$0.00	\$0.00		\$6.44
03/24/2005	Payment	\$542.03	03/24/2005	01/26/2005	\$0.00	\$542.03	\$0.00	\$0.00	\$0.00		\$0.00
03/09/2005	Other Fee Adjustment	(\$100.00)			\$0.00	\$0.00	\$0.00	\$0.00	\$0.00		(\$100.00)
03/08/2005	Misc. Other Fee Disbursement	\$0.00			\$0.00	\$0.00	\$0.00	\$0.00	\$0.00		\$100.00
02/25/2005	Payment	\$542.03	02/25/2005	12/26/2004	\$0.00	\$542.03	\$0.00	\$0.00	\$0.00		\$0.00
01/25/2005	Payment	\$542.03	01/24/2005	11/26/2004	\$0.00	\$542.03	\$0.00	\$0.00	\$0.00		\$0.00
12/28/2004	Payment	\$542.03	12/26/2004	10/26/2004	\$0.00	\$542.03	\$0.00	\$0.00	\$0.00		\$0.00
11/24/2004	Payment	\$542.03	11/23/2004	09/26/2004	\$0.00	\$542.03	\$0.00	\$0.00	\$0.00		\$0.00
10/26/2004	Payment	\$542.03	10/25/2004	08/26/2004	\$0.00	\$542.03	\$0.00	\$0.00	\$0.00		\$0.00
09/28/2004	Payment	\$542.03	09/27/2004	07/26/2004	\$0.00	\$542.03	\$0.00	\$0.00	\$0.00		\$0.00
09/03/2004	Other Fee Adjustment	(\$100.00)			\$0.00	\$0.00	\$0.00	\$0.00	\$0.00		(\$100.00)
09/02/2004	Misc. Other Fee Disbursement	\$0.00			\$0.00	\$0.00	\$0.00	\$0.00	\$0.00		\$100.00
08/26/2004	Payment	\$0.00	08/25/2004	06/26/2004	\$0.00	\$542.03	\$0.00	\$8.00	\$0.00		(\$550.03)
08/25/2004	Payment	\$542.03	08/25/2004		\$0.00	\$0.00	\$0.00	\$0.00	\$0.00		\$542.03
06/30/2004	Payment	\$0.00	06/29/2004	05/26/2004	\$0.00	\$542.03	\$0.00	\$8.00	\$0.00		(\$550.03)
06/29/2004	Payment	\$542.03	06/29/2004		\$0.00	\$0.00	\$0.00	\$0.00	\$0.00		\$542.03
05/28/2004	Other Fee Adjustment	(\$191.00)			\$0.00	\$0.00	\$0.00	\$0.00	\$0.00		(\$191.00)
05/27/2004	Statutory Expense Disbursement	\$0.00			\$0.00	\$0.00	\$0.00	\$0.00	\$0.00		\$16.00
05/27/2004	Attorney Advances	\$0.00			\$0.00	\$0.00	\$0.00	\$0.00	\$0.00		\$175.00
05/27/2004	Payment	\$0.00	05/26/2004	04/26/2004	\$0.00	\$542.03	\$0.00	\$8.00	\$0.00		(\$550.03)
05/26/2004	Payment	\$542.03	05/26/2004		\$0.00	\$0.00	\$0.00	\$0.00	\$0.00		\$542.03
04/26/2004	Payment	\$542.03	04/26/2004		\$0.00	\$0.00	\$0.00	\$0.00	\$0.00		\$542.03
03/25/2004	Payment	\$542.03	03/25/2004	03/26/2004	\$88.74	\$453.29	\$0.00	\$0.00	\$0.00		\$0.00
03/02/2004	Other Fee Adjustment	(\$100.00)			\$0.00	\$0.00	\$0.00	\$0.00	\$0.00		(\$100.00)
02/27/2004	Payment	\$542.03	02/27/2004	02/26/2004	\$0.00	\$542.03	\$0.00	\$0.00	\$0.00		\$0.00

Amount = should be applied

Fees Paid

270 DUT

late charges applied to principal

DETROIT CONSUMER BANKRUPTCY CONFERENCE

HomeEq Payment History

02/06/2004	Misc. Other Fee Disbursement	\$0.00			\$0.00	\$0.00	\$0.00	\$0.00	\$0.00	\$0.00	\$100.00
01/26/2004	Payment	\$542.03	01/26/2004	01/26/2004	\$0.00	\$542.03	\$0.00	\$0.00	\$0.00		\$0.00
12/24/2003	Payment	\$542.03	12/23/2003	12/26/2003	\$78.58	\$463.45	\$0.00	\$0.00	\$0.00		\$0.00
11/25/2003	Payment	\$542.03	11/25/2003	11/26/2003	\$10.83	\$531.20	\$0.00	\$0.00	\$0.00		\$0.00
10/24/2003	Payment	\$542.03	10/24/2003	10/26/2003	\$27.20	\$514.83	\$0.00	\$0.00	\$0.00		\$0.00
09/23/2003	Payment	\$542.03	09/23/2003	09/26/2003	\$10.50	\$531.53	\$0.00	\$0.00	\$0.00		\$0.00
08/22/2003	Payment	\$542.03	08/22/2003	08/26/2003	\$26.88	\$515.15	\$0.00	\$0.00	\$0.00		\$0.00
07/22/2003	Payment	\$542.03	07/22/2003	07/26/2003	\$69.24	\$472.79	\$0.00	\$0.00	\$0.00		\$0.00
06/24/2003	Payment	\$542.03	06/24/2003	06/26/2003	\$0.00	\$542.03	\$0.00	\$0.00	\$0.00		\$0.00
05/22/2003	Payment	\$542.03	05/22/2003	05/26/2003	\$100.91	\$441.12	\$0.00	\$0.00	\$0.00		\$0.00
04/28/2003	Payment	\$542.03	04/28/2003	04/26/2003	\$0.00	\$542.03	\$0.00	\$0.00	\$0.00		\$0.00
03/24/2003	Payment	\$542.03	03/24/2003	03/26/2003	\$74.88	\$467.15	\$0.00	\$0.00	\$0.00		\$0.00
02/24/2003	Payment	\$542.03	02/24/2003	02/26/2003	\$8.08	\$533.95	\$0.00	\$0.00	\$0.00		\$0.00
01/23/2003	Payment	\$542.03	01/23/2003	01/26/2003	\$24.56	\$517.47	\$0.00	\$0.00	\$0.00		\$0.00
12/23/2002	Payment	\$542.03	12/23/2002	12/26/2002	\$48.31	\$493.72	\$0.00	\$0.00	\$0.00		\$0.00
11/25/2002	Payment	\$542.03	11/25/2002	11/26/2002	\$0.00	\$542.03	\$0.00	\$0.00	\$0.00		\$0.00
10/22/2002	Payment	\$542.03	10/22/2002	10/26/2002	\$63.96	\$478.07	\$0.00	\$0.00	\$0.00		\$0.00
09/24/2002	Payment	\$542.03	09/24/2002	09/26/2002	\$0.00	\$542.03	\$0.00	\$0.00	\$0.00		\$0.00
08/22/2002	Payment	\$542.03	08/22/2002	08/26/2002	\$46.46	\$495.57	\$0.00	\$0.00	\$0.00		\$0.00
07/25/2002	Payment	\$554.03	07/25/2002	07/26/2002	\$0.00	\$542.03	\$0.00	\$0.00	\$12.00	phone checks - checkwriter	\$0.00
06/21/2002	Payment	\$542.03	06/21/2002	06/26/2002	\$72.89	\$469.14	\$0.00	\$0.00	\$0.00		\$0.00
05/24/2002	Payment	\$542.03	05/24/2002	05/26/2002	\$5.81	\$536.22	\$0.00	\$0.00	\$0.00		\$0.00
04/22/2002	Payment	\$542.03	04/22/2002	04/26/2002	\$5.76	\$536.27	\$0.00	\$0.00	\$0.00		\$0.00
03/21/2002	Payment	\$542.03	03/21/2002	03/26/2002	\$98.66	\$443.37	\$0.00	\$0.00	\$0.00		\$0.00
02/25/2002	Payment	\$542.03	02/25/2002	02/26/2002	\$0.00	\$542.03	\$0.00	\$0.00	\$0.00		\$0.00
01/22/2002	Payment	\$542.03	01/22/2002	01/26/2002	\$0.00	\$542.03	\$0.00	\$0.00	\$0.00		\$0.00
12/20/2001	Payment	\$542.03	12/20/2001	12/26/2001	\$54.84	\$487.19	\$0.00	\$0.00	\$0.00		\$0.00
11/21/2001	Payment	\$542.03	11/21/2001	11/26/2001	\$41.77	\$500.26	\$0.00	\$0.00	\$0.00		\$0.00
10/26/2001	Payment	\$542.03	10/26/2001	10/26/2001	\$0.00	\$542.03	\$0.00	\$0.00	\$0.00		\$0.00
09/20/2001	Payment	\$542.03	09/20/2001	09/26/2001	\$70.79	\$471.24	\$0.00	\$0.00	\$0.00		\$0.00
08/23/2001	Payment	\$542.03	08/23/2001	08/26/2001	\$92.28	\$449.75	\$0.00	\$0.00	\$0.00		\$0.00
07/30/2001	Payment	\$542.03	07/30/2001	07/26/2001	\$0.00	\$542.03	\$0.00	\$0.00	\$0.00		\$0.00
06/26/2001	Payment	\$542.03	06/26/2001	06/26/2001	\$0.00	\$542.03	\$0.00	\$0.00	\$0.00		\$0.00
05/24/2001	Payment	\$542.03	05/24/2001	05/26/2001	\$36.08	\$505.95	\$0.00	\$0.00	\$0.00		\$0.00
04/24/2001	Payment	\$542.03	04/24/2001	04/26/2001	\$69.29	\$472.74	\$0.00	\$0.00	\$0.00		\$0.00
03/29/2001	Loan Set Up	\$0.00	03/27/2001		(\$62,500.00)	\$0.00	\$0.00	\$0.00	\$0.00		\$62,500.00

UNITED STATES BANKRUPTCY COURT
EASTERN DISTRICT OF MICHIGAN

IN RE: JOHN H. and CARALEE VAN LOON

Debtors

CHAPTER 13
HON. PHILLIP J. SHEFFERLY
CASE NO. 05-49934

_____/

JOHN VAN LOON

Plaintiffs

ADV. NO. 08-

v

TOWNE MORTGAGE COMPANY

Defendant _____/

COMPLAINT FOR DAMAGES FOR VIOLATION OF THE REAL ESTATE
SETTLEMENT AND PROCEDURES ACT AND FOR TRIAL BY JURY

1. Defendant is a foreign corporation that services Plaintiffs' federally related mortgage loan, as defined in 12 USC section 2602, as it is secured by a lien on residential real property designed principally for the occupancy of from one to four families, and made by "creditors" which make or invest in residential real estate loans aggregating more than \$1,000,000 per year, and is a servicer within the meaning of the RESPA statutes.
2. Plaintiff is a natural person who resides in St. Clair Shores, Michigan.
3. This Court has jurisdiction per 11 USC 2614, and 28 USC 1331, and supplemental jurisdiction of the state law claims regarding the same transaction and events under 28 USC section 1367.
4. Plaintiff entered into the mortgage serviced by Defendant on June 26, 2001.
5. Plaintiff properly sent a letter requesting an accounting under RESPA, certified, attached as Exhibit A.

DETROIT CONSUMER BANKRUPTCY CONFERENCE

6. The letter was received by Defendant, per attached certified mail receipt, Exhibit B.
7. Plaintiff received the attached letter, Exhibit C, refusing to respond.
8. Plaintiff complied with the request in that refusal letter, Exhibit C.
9. Defendant 's failure to take corrective action with respect to the servicing of the account violates 12 USC 2605 (e)(2).
10. These actions by the Defendant caused actual damages to Plaintiff, including mental distress and damage to her credit reports. Plaintiff made repeated requests by telephone and correspondence, were forced to hire counsel, and still received inconsistent and irreconcilable no records from Defendant explaining why Defendant shows Plaintiff one month behind on the account.
11. These actions by Defendant are part of a pattern and practice of noncompliance with the requirements of the RESPA statutes, compelling the award of additional damages against Defendant.
12. Defendant negligently serviced the loan, in breach of its duty to Mr. Van Loon to maintain proper and accurate loan records and to discharge and fulfill the other incidents attendant to the maintenance, accounting and servicing of loan records in a non-negligent manner.
13. These actions by Defendant justify an award of punitive damages and actual attorney fees and costs.

WHEREFORE, Plaintiff prays that this Honorable Court enter Judgment for them, against Defendant, for statutory, actual and punitive damages and actual costs and attorney fees.

JURY DEMAND

Plaintiffs hereby demand trial by jury.

August 12, 2008

/s/KURT O'KEEFE

Kurt O'Keefe P30718

Attorney for Plaintiff

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Detroit MI 48226-4105

313-962-4630

koklaw@gmail.com

UNITED STATES BANKRUPTCY COURT
EASTERN DISTRICT OF MICHIGAN

In re: Bankruptcy Case No. 05-49934
John H. Van Loon Hon. Phillip J. Shefferly
Caralee Van Loon Chapter 13

Debtors.

John Van Loon

Plaintiff,

v

Adv. Pro. No. 08-04916

Towne Mortgage Company
Defendant.

PLAINTIFF'S MOTION FOR, AND BRIEF IN SUPPORT OF, SUMMARY JUDGMENT

Plaintiff, through his attorney, submits the following pursuant to Bankruptcy Rule 7056:

1. That there is no issue of material fact, and Plaintiff is entitled to Summary Judgment as a matter of law.

WHEREFORE, Plaintiff prays that this Honorable Court enter Judgment for him, against Defendant, in the amount of \$5,000.0 actual damages, \$10,000 punitive damages, and actual attorney fees as determined by the Court.

BRIEF IN SUPPORT OF MOTION

Plaintiff filed his complaint for violations of the Real Estate Settlement and Procedures Act, (hereinafter, RESPA), 12 USC 2602, on August 12, 2008.

Plaintiff's Request for Admissions were served on counsel for Defendant on November 24, 2008. No response has been received, and the 30 day time allowed for response under Bankruptcy Rule 7036 has expired.

Therefore, the following facts, and application of the law to the facts, have been conclusively established:

1. Defendant is a servicer within the meaning of the RESPA statutes.
2. This court has jurisdiction over this case.
3. Plaintiff properly sent a letter requesting an accounting under RESPA.

DETROIT CONSUMER BANKRUPTCY CONFERENCE

4. Defendant did not comply with the request in the letter it received, attached as Exhibit A.
5. Defendant's failure to take corrective action, (4) above, violates RESPA, 12 USC 2605(e)(2).
6. These actions by Defendant, (4) and (5) above, caused actual damages to Plaintiff, including A. mental distress and B. damage to credit reports and C. numerous calls, letters, and having to hire counsel and file this lawsuit to resolve the issues.
7. These actions by Defendant are part of a pattern and practice of noncompliance with the requirements of the RESPA statutes.
8. Defendant negligently serviced the loan, in breach of its duty to Plaintiff to maintain proper and accurate loan records and to discharge and fulfill the other incidents attendant to the maintenance, accounting and servicing of loan records in a non-negligent manner.
9. At the time the complaint was filed in this case, Defendant's records showed Plaintiff one month behind on his mortgage payment.
10. After the suit was filed, without any extra payments being paid, Defendant's records showed Plaintiff one month ahead on his mortgage payment.
11. Defendant's wrongdoing allows this Court to award punitive damages under the RESPA statutes.
12. Plaintiff has suffered damages of \$5,000.
13. Punitive damages of \$10,000 are appropriate in this case.

Defendant 's failure to take corrective action with respect to the servicing of the account violates 12 USC 2605 (e)(2).

CONCLUSION

Plaintiff is entitled, as a matter of law, to a Judgment against Defendant for \$15,000, plus actual attorney fees.

January 4, 2009

/s/KURT OKEEFE

Attorney for Plaintiff

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UNITED STATES BANKRUPTCY COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

IN RE:

John and Caralee Van Loon,

Debtor.

Case No. 05-49934
Chapter 13
Hon. Phillip J. Shefferly

John Van Loon,

Plaintiff,

vs.

Adv. Proc. No. 08-4916

Towne Mortgage Company,

Defendant.

DEFAULT JUDGMENT

On August 12, 2008, Plaintiff filed this adversary proceeding against Defendant alleging that Defendant violated § 2605(e)(2) of the Real Estate Settlement Procedures Act (RESPA), 12 U.S.C. § 2605. On February 13, 2009, the Court entered the default (docket entry #28) of the Defendant for failure to comply with a prior order of this Court. Pursuant to the Court's entry of default, and in accordance with L.B.R. 7055-1, the Plaintiff filed an application for entry of default judgment on February 16, 2009 (docket entry #29). The application requests entry of a default judgment in the amount of \$15,000, consisting of \$5,000 actual damages and \$10,000 punitive damages, plus an award of actual attorney fees as determined by the Court. In support of his application for a default judgment, the Plaintiff also directs the Court's attention to the Plaintiff's pending motion for summary judgment and brief filed in support (docket entry #22) for authority for the requested relief. For the following reasons, the Court finds that the Plaintiff is entitled to a default judgment for

DETROIT CONSUMER BANKRUPTCY CONFERENCE

actual damages and an award of attorney fees, but is not entitled to a default judgment for punitive damages.

First, as explained in the order of default entered by the Court on February 13, 2009 (docket entry #28), the Plaintiff is entitled to a default judgment against the Defendant because of the Defendant's violation of the January 12, 2009 order (docket entry #25) that required, among other things, that Defendant obtain counsel to represent it in this adversary proceeding in compliance with L.B.R. 9010-1(a)(1) no later than January 30, 2009. Second, consistent with the Defendant's failure to comply with the January 12, 2009 order, it appears from a review of the Court file that the Defendant has also failed to respond to a request for admissions filed and served by the Plaintiff upon the Defendant. The Court file reflects that on November 24, 2008, the Plaintiff filed and served a request for admissions (docket entry #20) upon the Defendant. According to the motion for summary judgment filed by the Plaintiff on January 5, 2009 (docket entry #22), the Defendant did not respond to the request for admissions and, therefore, the matters set forth in such request are deemed admitted and conclusively established under Fed. R. Civ. P. 36(a)(3) and (6) (incorporated by Fed. R. Bankr. P. 7036). Among the facts conclusively established by the Defendant's failure to respond to the request for admissions are that the Defendant violated § 2605(e) of RESPA (request for admission #5), that the Defendant's violation of RESPA caused actual damages to the Plaintiff (request for admission #6), and that Defendant's actions are part of a pattern or practice of non-compliance with RESPA (request for admission #7). Third, § 2605(f) of RESPA provides that a loan servicer that fails to comply with § 2605 shall be liable to the borrower for any actual damages caused, and additional damages in the case of a pattern or practice of non-compliance in an amount not to exceed \$1,000, together with attorney fees incurred in connection with such action

as the Court may determine to be reasonable under the circumstances. Although the Plaintiff's complaint also requests an award of punitive damages, there is no statutory authority in § 2605 of RESPA to award punitive damages in these circumstances.

Having reviewed the entire court file, including the complaint, the application for default judgment, the motion for summary judgment and the provisions of RESPA, the Court concludes that the Plaintiff is entitled to a default judgment in the amount of \$6,000 together with reasonable attorney fees incurred in connection with this action. Accordingly,

IT IS HEREBY ORDERED that a default judgment is entered in favor of the Plaintiff, John Van Loon, and against the Defendant, Towne Mortgage Company, in the amount of \$6,000 together with attorney fees incurred by the Plaintiff in connection with this action to be determined by the Court upon submission of an affidavit by the Plaintiff to be filed within ten days from the date of this judgment.

Signed on February 18, 2009

 /s/ Phillip J. Shefferly
Phillip J. Shefferly
United States Bankruptcy Judge

THERE'S GOLD IN THEM BILLS!

ETHICAL AND MALPRACTICE CONSIDERATIONS FOR THE FDCPA CASE

by Jesse R. Sweeney, Esq.

There are many potential pitfalls and traps which lie in wait for the unsuspecting Debtor or Creditor attorney when dealing with the Fair Debt Collection Practices Act. This article will provide a useful way of navigating them and saving yourself and your client time and money.

- FAILING TO LOCATE A FAIR DEBT CASE

The initial consultation is a time where you're collecting information on assets, liabilities, income and expenses, but what about potential claims that arise prior to the case? While it is standard to request information on existing and potential lawsuits prior to the filing of a case, an unsophisticated Debtor may be unable to identify the potential FDCPA case without a substantial amount of investigation. Every bankruptcy attorney owes his/her client a duty to adequately inspect the case prior to filing to determine whether or not there is a fair debt case. In order to do this adequately, one must ensure they ask not the right questions.

Here are some common statements by Debtors which would indicate a potential FDCPA case:

"They have been calling my house nonstop, at all hours of the night."

"They are calling my neighbors, my relatives, and my place of employment. They threatened to throw me in jail, or that I could not file bankruptcy on this debt."

"They egged my car."

Of course, you may have to investigate further to determine whether this was a collection agency or the original creditor owed the debt, but assuming it's the former, you may have yourself a case.

- FAILING TO LIST A FAIR DEBT CASE IN THE SCHEDULES, AND EXEMPT THE SAME

If you believe you have a pre-petition Fair Debt Collections Case, do not forget to list the same in Schedule B, and exempt the same in Schedule C. If you're not sure, you may want to put the Trustee on notice of such a claim anyway, but specify to the best of your ability the maximum amount of monetary damages to which you believe your client may be entitled. Particular concern must be applied in a Chapter 13 case where you over-estimate damages in such a case to the detriment of the Debtor, forcing the Debtor into a high plan payment amount due to high amounts on the liquidation analysis.

DETROIT CONSUMER BANKRUPTCY CONFERENCE

- OFFER OF JUDGMENT

Rule 68 of the Federal Rules of Civil Procedure provides that either party may submit an offer of judgment - essentially an offer to settle the case at a proscribed amount. In many cases where the damages are specious at best, you may be wise to accept the offer from a creditor where the judgment that the offeree finally obtains is not more favorable than the unaccepted offer, the offeree must pay the costs incurred after the offer was made.

- IDENTIFYING ADDITIONAL CLAIMS

There are additional, parallel claims involved in an FDCPA claim, such as State law violations and, more specific to bankruptcy, violations of the automatic stay (for post-petition claims). When filing your adversary proceeding, do not forget to mention stay violation issues.

- STATUTE OF LIMITATIONS

You/your client only have one year to file a FDCPA claim from the date of the actual alleged violation, so if you're a Debtor attorney, or filing pre-bankruptcy, make sure you do so right away. Although the 9th Circuit has held that the time period doesn't begin to run until after the claimant learns or should have learned of the violation (The Discovery Rule), make sure you do your best to find out about any potential claims by asking as many questions as possible. The earlier you file your case, the better because you can be sure to exempt the claim in Schedule C for bankruptcy purposes.

- DISCHARGE AND THE AUTOMATIC STAY

Remember that a discharge violation is ALSO a violation of the FDCPA if it's committed by a debt collector. Why? Because any communication intended to collect a discharged debt where the collector knew the Debtor had a discharge is also a misleading or false collections notice. Further, a violation of the automatic stay can also be a misleading or false collections practice, where the collection agency knows the Debtor is in a bankruptcy, and has no right to collect, but falsely implies that it has the ability to collect on behalf of a creditor.

- FOR CREDITOR ATTORNEYS

The easiest way to avoid getting ensnared by FDCPA violations is to do the collecting yourselves. But chances are, you may have been hired to collect, and you are therefore a collection agency/debt collector covered by the Act. Be diligent to include your standard FDCPA language that you are a debt collector attempting to collect a debt. Keep it simple and straightforward. Identify who you are, on who's behalf you are collecting, how much debt is owed and, even if it is not a first attempt, that they have a right to request validation of the debt. Avoid phone calls altogether, but if you must call, do it in the middle of the day, and not often. Be friendly and courteous, don't threaten, coerce, and if they ask you to stop calling, simply stop calling. If you're a lawyer, simply proceed to the next step and file a collections lawsuit. And most importantly, always run the social security number and/or name on your due diligence software to determine if they have filed for bankruptcy protection. The best letter is simple. It identifies you, your firm name, a debt is owed, and how much you should pay. I have attached a sample letter below.

Language for a correct 'Dunning Letter' - this is assuming it is a first contact, or within 5 days of a telephone call that is a first contact with a consumer. That being said, an over-cautious debt collection agency might wish to put this language on every letter.

This is an attempt to collect a debt and any information obtained will be used for that purpose.

Dear Debtor,

You owe \$5000.00 to our firm, Creditor and Owed, PC. Please make payment to the below listed address. Unless you contact our firm in writing within 30 days after receipt of this notice, the debt will be assumed to be valid. If you notify us in writing within the thirty-day period that the debt, or any portion thereof, is disputed, we will obtain verification of the debt or a copy of a judgment against you (if any) and we will mail to you a copy of such verification or judgment. Upon your request within the thirty-day period, we will provide you with the name and address of the original creditor, if different from the current creditor.

**SELECTED DEFENSES TO CLAIMS BASED UPON FDCPA, RESPA, TILA
AND COMMON LAW CLAIMS**

John P. Kapitan
Trott & Trott, P.C.

FDCPA LITIGATION - DEFENSES

A. Claims

Actions taken by a “debt collector” that are prohibited under the FDCPA.

B. Damages

Actual, punitive (up to \$1,000 in an individual action), and costs such as reasonable attorney’s fees.

C. Statute of Limitations

One year from the date the violation occurred. "An action to enforce any liability created by [the FDCPA] may be brought . . . within one year from the date on which the violation occurs." *Johnson v. Riddle*, 305 F.3d 1107, 1113 (10th Cir. 2002) (quoting 15 U.S.C. § 1692k(d)).

D. Key Issues to Defeat Claims

1. Is Defendant a debt collector?

“Any person who uses any instrumentality of interstate commerce or the mails in any business the principal purpose of which is the collection of any debts, or who regularly collects or attempts to collect, directly or indirectly, debts owed or due or asserted to be owed or due another.” 15 U.S.C. §1692a(6)

Not a Debt Collector

a. Lender

- Foreclosing on real property.
- Collecting its debts using its own name. (Ex. Mortgage company is not a debt collector as its primary purpose was to make and service consumer loans, and further, because it did not collect debts for any entity other than itself. *Oldroyd v. Assoc. Cons. Disc. Co.*, 863 F. Supp. 237 (E.D. Pa. 1994); *Russell v. Standard Fed. Bank*, 2000 U.S. Dist LEXIS 19149 (E.D. Mich. Nov 27, 2000))

b. Servicer

- An entity collecting debts it originates, sells, and continues to service (like mortgages). 15 U.S.C. §1692a(6)(F)(iii).

DETROIT CONSUMER BANKRUPTCY CONFERENCE

- *Perry v. Stewart Title Co.*, 756 F.2d 1197, 1208 (5th Cir. 1985) ("The legislative history of section 1692a(6) indicates conclusively that a debt collector does not include the consumer's creditors, a mortgage servicing company, or an assignee of a debt, as long as the debt was not in default at the time it was assigned."). 15 U.S.C. §1692a(6)(F)(iii).

2. Is the action a collection of a "debt"? Does not apply to commercial debts.

"any obligation or alleged obligation of a *consumer* to pay money arising out of a *transaction* in which the money, property, insurance, or services which are the subject of the transaction are *primarily for personal, family, or household purposes*, whether or not such obligation has been reduced to judgment." 15 U.S.C.A. §1692a(5)

3. Bona Fide Error Defense under 1692(k)(c)?
Only available for technical and clerical mistakes.
4. Good Faith Defense under 1692(k)?

Debt collector may not be held liable for "any act done or omitted in good faith in conformity with an advisory opinion of the Commission, notwithstanding that after such act or omission has occurred, such opinion is amended, rescinded, or determined by judicial or other authority to be invalid for any reason."

E. FDCPA claims cannot be premised upon proofs of claims or requests for relief from the automatic stay filed in a bankruptcy proceeding

Baldwin v. McCalla, Raymer, Padrick, Cobb, Nichols & Clark, L.L.C., 1999 U.S. Dist. LEXIS 6933, No. 98 C 4280, 1999 WL 284788 (N.D. Ill. Apr. 26, 1999), is an oft cited case that addresses the issue of whether FDCPA claims are actionable when based upon an alleged violation of a bankruptcy matter. These courts hold that it is not available. (See, e.g., *Rice Etherly v. Bank One (In re Rice Etherly)*, 336 B.R. 308 (Bankr. E.D. Mich. 2006); *Walls v. Wells Fargo Bank, N.A.*, 255 B.R. 38, 2000 U.S. Dist. LEXIS 15381 (E.D. Cal. 2000) (affirmed by *Walls v. Wells Fargo Bank, N.A.*, 276 F.3d 502 (9th Cir. 2001)) (finding preclusion); *Wehrheim v. Secrest*, 2002 U.S. Dist. LEXIS 19020,

2002 WL 31242783, (S.D.Ind. Aug. 16, 2002) (same); *Degrosiellier v. Solomon & Solomon, P.C.*, 2001 U.S. Dist. LEXIS 15254, 2001 WL 1217181 (N.D.N.Y. Sept. 27, 2001) (same); *Diamante v. Solomon & Solomon, P.C.*, 2001 U.S. Dist. LEXIS 14818, 2001 WL 1217226 (N.D.N.Y. Sept. 18, 2001) (same); *Gray-Mapp v. Sherman*, 100 F. Supp. 2d 810 (N.D.Ill. 1999) (same)). This is the majority view.

In cases such as *Baldwin*, *Walls*, and *Diamante*, courts find support for their holdings in the decision of the United States Supreme Court in *Kokoszka v. Belford*, 417 U.S. 642, 41 L. Ed. 2d 374, 94 S. Ct. 2431 (1974). In *Kokoszka*, the Supreme Court was called upon to make a decision between conflicting principals of the Consumer Credit Protection Act (the "CCPA"), the predecessor statute to the FDCPA, and bankruptcy law. The Supreme Court held that the garnishment limiting provisions of the CCPA could not be relied upon to upset the bankruptcy trustee's decision to treat an income tax refund as property of the estate. In support of its holding, the Supreme Court noted that while the CCPA sought to prevent consumers from entering bankruptcy, if bankruptcy did occur, the debtor's protections and remedies lied exclusively within the bankruptcy act, (the predecessor to the bankruptcy code). *Kokoszka*, 417 U.S. at 650; *Diamante*, 2001 U.S. Dist. LEXIS 14818, 2001 WL 1217226 at *4 (citing *Kibler v. WFS Fin., Inc.*, 2000 U.S. Dist. LEXIS 19131, 2000 WL 1470655 (C.D. Cal. Sept 13, 2000) at *9). Accordingly, the Court refused to allow plaintiff to rely on the CCPA to set aside a decision made by the trustee.

The FDCPA is the successor statute to the CCPA. Both statutes share the purpose of protecting consumers from unfair practices. However, as held in *Kokoszka*,² those who have entered bankruptcy proceedings must find all protections and remedies within the

confines of bankruptcy law. When dismissing FDCPA claims in reliance on *Kokoszka*, it is reasoned that if The Congress did not intend that the CCPA interfere with the bankruptcy scheme, it similarly did not intend any interference by way of the FDCPA. Logically then, *Kokoszka* provides analogous Supreme Court precedent for holding that an FDCPA claim based upon a bankruptcy matter is barred on the ground that the consumer's remedies in such situations lie exclusively within the Bankruptcy Code.

FRAUD LITIGATION - DEFENSES

A. Plaintiff has not sufficiently stated a claim for fraud under Fed. R. Civ. P. 9(b).

"The Sixth Circuit reads this rule liberally, however, requiring a plaintiff, at a minimum to 'allege the time, place, and content of the alleged misrepresentation on which he or she relied; the fraudulent scheme; the fraudulent intent of the defendants; and the injury resulting from the fraud.'" *Coffey v. Foamex L.P.*, 2 F.3d 157, 161-162 (6th Cir. 1993). Rule 9 is also balanced against Rule 8, which requires pleadings to be "simple, concise and direct." With both rules in mind, the Sixth Circuit has noted that, "allegations of fraudulent misrepresentation[s] must be made with a sufficient particularity and a sufficient factual basis to support an inference that they were knowingly made." *Advocacy Organization for Patients and Providers v. Auto Club Ins. Ass'n*, 176 F.3d 315, 322 (6th Cir. 1999).

B. Has plaintiff plead the required elements?

Under Michigan law, the claim of fraudulent misrepresentation requires the Plaintiff to show that:

- i. the defendant made a material representation (Statements of opinion or intention or statements relating to future performance or prediction of future events usually are not actionable);
- ii. the representation was false;
- iii. the defendant knew it was false when it was made or made it recklessly, without knowledge of its truth as a positive assertion;
- iv. the representation was made with the intention to induce reliance by the Plaintiff;
- v. the Plaintiff acted in reliance upon it; and
- vi. the Plaintiff suffered injury.

Kassab v. Michigan Basic Prop Ins Ass'n, 441 Mich 433, 442 (1992)

C. Reliance

- i. Actual reliance? (Ex. *Brown v. Interbay Funding, LLC*, 417 F. Supp. 2d 573 (D.Del. 2006) – borrower did not rely on appraisal.)
- ii. Reasonable or Justified reliance? No reliance if contradicts loan documents. (*Davis v. G.N. Mortgage Corp.*, 396 F.3d 869 (7th Cir. 2005) – borrowers could not rely on oral promise regarding prepayment penalty when loan documents were contrary.; see also, *Trade Fin. Ptnrs, LLC v. AAR Corp*, 573 F.3d 401

D. Borrower is expected to read the loan documents.

Courts examine the “extent of the confidence.”

E. Promise to do something in the future

As a rule, promises to do something in the future do not constitute fraudulent misrepresentations. It is also a general rule that statements promissory in their character that one will do a particular thing in the future are not misrepresentations, but are contractual in their nature, and do not constitute fraud. “Reasons given for this rule are that a mere promise to perform an act in the future is not, in a legal sense, a representation, and a failure to perform it does not change its character. Moreover, a representation that something will be done in the future, or a promise to do it, from its nature cannot be true or false at the time when it is made. The failure to make it good is

merely a breach of contract, which must be enforced by an action on the contract, if at all” *Kirk v. Vaccaro*, 344 Mich 226, 232 (1955)

RESPA – DEFENSES TO COMMON CLAIMS

A. Improper Disclosures

Claim: Failure to provide or improper disclosure on Good Faith Estimate (GFE) and HUD-1 (YSP [yield spread premium] improperly disclosed).

A defense to this claim is that there is no private right of action – “[N]o private right of action exists for violations of § 2604(c) *Johnson v. Equity Title & Escrow Co.*, 476 F.Supp. 2d 873 (W.D. Tenn. 2002); see also, *Marshall-Ford v. Wells Fargo Mortgage*, 2009 U.S. Dist. LEXIS 77795 (E.D. Mich. August 31, 2009).

B. Qualified Written Request (QWR)

The most common claim in respect to a QWR, is that the servicer failed to respond to the inquiry. 12 U.S.C. §2605(e). Many inquiries, however, are not qualified written requests because they do not conform to the requirements found under the statute. Some considerations when defending a QWR claim is:

1. Whether the borrower made a proper QWR. See, *Holland v. GMAC Mortgage Corp.*, 2006 U.S. Dist LEXIS 25723 (D.Kan. Apr. 26, 2006) (alleged “QWR” did not meet definition under statute because insufficient detail why plaintiff believed account was in error). RESPA defines a QWR as including a statement of the reasons for the borrower’s belief that the account is in error. Allowing borrowers to allege error without justification would encourage frivolous requests for documents at great expense. *Pettie v. Saxon Mortgage*, 2009 U.S. Dist. LEXIS 41496 (W.D. Wash. 2009).

2. Whether the *servicer* of the mortgage received the QWR. *See, Griffin v. Citifinancial Mortgage Co.*, 2006 U.S. Dist LEXIS 6709 (M.D. Pa. Feb 1, 2006) (servicer had no responsibility to respond to alleged “QWR” because request for information sent to attorney hired by the servicer to represent its interests in plaintiff’s bankruptcy case)
3. Whether the servicer complied with provisions.
4. Whether plaintiff waited 60 days after the QWR to file suit.
5. Whether plaintiff properly plead that she suffered damages. (Whether the plaintiff can prove that she was damaged as a result of the servicer’s failure to comply with RESPA.)
6. Whether plaintiff is barred from pursuing the claim. There is a 3 year statute of limitations period. 12 U.S.C. § 2614.

TRUTH IN LENDING ACT (“TILA”) – common claims

A. Generally - TILA grants a right of rescission on certain mortgage loan transactions in which an obligor offers his or her principle dwelling as security. 15 U.S.C. § 1635(a); 12 CFR § 226.23(a).

“The consumer may exercise the right to rescind until midnight of the third business day following consummation, delivery of the notice required by paragraph (b) of this section [notice of right to cancel], or delivery of all material disclosures, whichever occurs last.” 12 CFR 226.23(a)(3); see also, 15 U.S.C. § 1635(f).

“The term ‘material disclosures’ means the required disclosures of the annual percentage rate, the finance charge, the amount financed, the total of payments, the payment schedule, and the disclosures and limitations referred to in § 226.32(c) and (d).” 12 CFR 223.23, FN 48 (2007 edition). Written acknowledgment of receipt of the disclosures creates a rebuttable presumption that such disclosures were, in fact, delivered. 15 U.S.C. § 1635(c).

DETROIT CONSUMER BANKRUPTCY CONFERENCE

B. Statute of limitations - Actions for violation of the TILA must be brought within one year from the date of the occurrence of the violation. 15 U.S.C. § 1640(e) (“Any action under this section may be brought * * * within one year from the date of the occurrence of the violation”). *See, Rudisell v. Fifth Third Bank*, 622 F.2d 243,246 (6th Cir. 1980); *Walker v. Michael W. Colton Trust*, 33 F.Supp.2d 585 at 590 (E.D. Mich. 1999). The right to rescind provides a longer limitations period. Generally, TILA provides that borrowers have three business days following the consummation of a loan transaction to rescind the transaction. 15 U.S.C. § 1635. This right of rescission is extended to three years after consummation of the loan if the lender (1) fails to provide notice of the right to rescind, or (2) fails to make a material disclosure. 12 C.F.R. § 226.23(a)(3).

C. Status Quo Ante - Rescission aims to return parties to the status quo. *See Decision One Mortgage Co., LLC v Fraley*, 2000 U.S. App. LEXIS 33881 (6th Cir. Dec. 19, 2000) (explaining that rescission aims to restore parties to the position they held prior to entering the transaction and that without requiring the tender of the loan proceeds, the defendants would "receive a windfall and be placed in a far better position than they held prior to entering the transaction"); *Rudisell v. Fifth Third Bank*, 622 F.2d 243, 254 (6th Cir. 1980) (explaining that since rescission is an equitable remedy, the court may require a debtor to tender first).

NEGLIGENCE AND BREACH OF FIDUCIARY DUTY

- A. Common Claims –
1. Mortgage lender should not have made loan to the borrower since they cannot afford it.
 2. The lender should have known that stated income on a stated income loan is false.

3. The lender should have known that property value was inflated.
4. The lender should have placed borrower's best interests first.

B. Defenses –

1. Lenders are not required to “watch out for the best interests” of the borrower. “The relationship between a lending institution and its borrower-client is not fiduciary in nature. A commercial lender is entitled to pursue its own economic interests in a loan transaction. This right is inconsistent with the obligations of a fiduciary which require that the fiduciary knowingly agree to subordinate its interests to act on behalf of and for the benefit of another.” *Nymark v. Heart Federal Savings & Loan Assn.* 231 Cal.App.3d 1089, 1093, fn.1. (1991)
2. Borrower has choice to take the loan; borrower also has duty not to submit false information (e.g., income) to lender on a 1003
3. An agreement to repay what is already owed is not consideration
4. An oral agreement cannot trump a written agreement
5. An implied agreement cannot contradict a written agreement
6. Loan documents are also helpful to defend these types of claims and are found in standard mortgage clauses such as the following:

Borrower Not Released; Forbearance By Lender Not a Waiver.

Extension of the time for payment or modification of amortization of the sums secured by this Security Instrument granted by Lender to Borrower or any Successor in Interest of Borrower shall not operate to release the liability of Borrower or any Successors in Interest of Borrower. Lender shall not be required to commence proceedings against any Successor in Interest of Borrower or to refuse to extend time for payment of otherwise modify amortization of the sums secured by this Security Instrument by reason of any demand made by the original Borrower or any Successors in Interest of Borrower. Any forbearance by lender in exercising any right or remedy including, without limitation, Lender's acceptance of payments from third persons, entities or Successors in Interest of Borrower or in amounts less than the amount then due, shall not be a waiver of or preclude the exercise of any right or remedy.

[found generally in paragraph 12 of a standard mortgage]