Loyola Consumer Law Review

Volume 3 | Issue 1 Article 10

1990

Debtor Entitled to Rescind Consumer Credit Transaction for Creditor's Failure to Disclose Debtor's Right to Choose Insurance Carrier

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CERCLA Liability
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ty of releases of federal causes of action. However, in interpreting the meaning and scope of the releases as intended by the parties, state law may determine the content of federal law. If the application of state law would frustrate the objectives of CERCLA, federal law should be applied to interpret the "as is" clause.

In choosing not to apply state law, the district court did not imply that the result under California law would be different from the result under federal law. The district court merely found it unnecessary to draw upon any provisions of California law since the application of federal law would always yield results consistent with the objectives of the federal statute. Therefore, the district court held that it could rely solely upon federal law to interpret the "as is" clause of the deed.

Applying federal law to NL's claim, the district court distinguished the *Marden* decision. Unlike the purchaser in *Marden,* W & R had no knowledge of the contamination at the time of purchase. Because the conveyance between NL and W & R occurred five years prior to the enactment of CERCLA, the parties could not have anticipated the possibility of response costs. In contrast to the *Marden* parties who negotiated a comprehensive settlement agreement with respect to the contaminated property, NL included a standard "as is" clause in its conveyance of the property to W & R without negotiating its specific terms. Accordingly, the district court found that NL originally intended the "as is " clause only to protect itself from any breach of warranty claims typically covered by such clauses and not from CERCLA liability.

The district court noted that permitting a responsible party to avoid liability through a standard "as is" clause would frustrate the language and intent of CERCLA. The sale of property subject to an "as is" provision is not one of the three defenses to strict liability defined in § 9607(b) of CERCLA. Furthermore, § 9607(e) of CERCLA explicitly states that no hold harmless conveyance is effective to transfer liability away from a strictly liable party. Most importantly, the district court noted that one of the primary goals of CERCLA is to require responsible parties to bear the cleanup costs of the hazardous conditions they created.

In accordance with the objectives of the CERCLA statute, the district court held that NL could not rely upon an "as is" clause of the deed as a release from strict liability under CERCLA. Therefore, the district court denied NL's motion for summary judgment.

Rosemary G. Milew

DEBTOR ENTITLED TO RESCIND CONSUMER CREDIT TRANSACTION FOR CREDITOR'S FAILURE TO DISCLOSE DEBTOR'S RIGHT TO CHOOSE INSURANCE CARRIER

The United States Bankruptcy Court for the Eastern District of Pennsylvania held that a creditor's failure to inform the debtor of his right to choose a home insurer under a consumer credit transaction constituted a material violation of the Truth In Lending Act. ***In re Moore,*** 117 B.R. 135 (Bankr.E.D.Pa. 1990). In *Moore,* the creditor's error, although merely a technicality, made the debtor's subsequent rescission of the loan valid, and allowed him to collect statutory damages, costs and attorneys' fees for the creditor's failure to acknowledge properly the rescission.

Background

Russell L. Moore ("the Debtor"), an elderly widower, applied for a loan from Mid-Penn Consumer Discount Co. ("Mid-Penn"). As a condition of its loans, Mid-Penn requires that borrowers use their homes as collateral and that the homes be insured. When no mortgage is outstanding, Mid-Penn requires the borrower to prove that the home is adequately insured or to allow Mid-Penn to obtain insurance. Because the Debtor had paid off the original mortgage on his home the year before his loan application, Mid-Penn asked him to prove he had insurance.

The Debtor told Mid-Penn that he had insurance coverage from the American Bankers Insurance Company of Florida ("Bankers"), but Mid-Penn later discovered that the policy had lapsed. Mid-Penn then attempted to renew the policy for the Debtor and added the amount of the renewal fee to the balance of the principal borrowed. Mid-Penn excluded the amount of Mid-Penn's insurance renewal payment in computing the finance charge. When Bankers refused to renew the Debtor's policy, Mid-Penn obtained alternative coverage through an insurance company of its own choice, without asking the Debtor whether he preferred a specific company. This new policy cost less than the Bankers policy, so Mid-Penn refunded the difference to the Debtor. Mid-Penn then gave the Debtor a Truth In Lending Act ("TILA"), 15 U.S.C. §§ 1601-1700 (1988), disclosure statement which showed the payment of the renewal fee as part of the principal. Neither the TILA statement nor any other document Mid-Penn gave to the Debtor, however, mentioned that the Debtor could choose any company as provider of the required insurance coverage.

Approximately eighteen months after obtaining the loan, the Debtor filed a Chapter 13 bankruptcy case. Mid-Penn filed a secured Proof of Claim with the bankruptcy court, seeking the amount of the principal, legal charges and additional interest. The Debtor attacked Mid-Penn's Proof of Claim, alleging that prior to the bankruptcy, he had rescinded the loan in a letter from his attorney to Mid-Penn. Mid-Penn claimed that its president had replied to the letter, stating that the rescission was not valid.

The Bankruptcy Court's Ruling

Under the TILA and its regulations, insurance premiums written in connection with consumer loan transactions normally must be included in the finance charges rather than in the principal. 15 U.S.C § 1605(c) (1988); 12 C.F.R. § 226.4(d)(2) (1990). In the present case, Mid-Penn excluded the insurance premiums from the finance charge. Thus, Mid-Penn was required to inform the Debtor of his right to choose which insurance company insured his home. Mid-Penn alleged that the TILA only required disclosure if the insurance was purchased "by or through" a creditor. Mid-Penn claimed that it did not have to disclose to the Debtor this right to choose an insurer, as Mid-Penn merely renewed the Debtor's policy.

The bankruptcy court rejected Mid-Penn's allegation. Although Mid-Penn initially did attempt to renew the Debtor's expired policy, Mid-Penn ultimately obtained the insurance from a company of its own choice. Moreover, the court found that the applicability of the disclosure requirement did not depend on whether the insurance was purchased "from or through" the creditor. Instead, TILA requires that the right to choose an insurance company always must be disclosed to the borrower if the premium is excluded from the finance charge.

Furthermore, the court held that the disclosure must be in the TILA statement itself rather than communicated orally or through other documents. Because the TILA statement given to the Debtor did not contain this disclosure, the court found that Mid-Penn's actions constituted a violation of the TILA, albeit a technical one made in good faith. The technical nature of the TILA violation and the good faith intentions of the creditor, however, were irrelevant. The court stated that subsequent to the simplification of TILA in 1980, all violations which remain viable under the amended TILA, even if technical, entitle the Debtor to full remedies provided by the law. *In re Brown,* 106 B.R. 852, 853, 856-857 (Bankr. E.D.Pa. 1989).

The court held that this material violation of the TILA permitted the Debtor to rescind the loan. Mid-Penn's improper response to the rescission allowed the Debtor to recover statutory damages and recoupment in the same amount, relieved him of liability for the finance charge and eliminated Mid-Penn's security interest.

The court held that the Debtor was obligated to repay only the amount he actually received from Mid-Penn. Further, the Debtor could credit his recoupment and previous payments against this amount. Therefore, because the court calculated that the sum of the recoupment and the payments already made was greater than the obligation, it offset Mid-Penn's claim entirely. The court also awarded the Debtor attorneys' fees and costs.

Suzi Guemmer

PUBLIC UTILITIES' RECOUPMENT OF CHARITABLE CONTRIBUTIONS THROUGH RATE STRUCTURE VIOLATES THE FIRST AMENDMENT

In ***Cahill v. Public Serv. Comm.,*** 76 N.Y.2d 102, 556 N.Y.S.2d 840 (N.Y. 1990), the New York Court of Appeals held that a public service commission's policy of allowing utilities to pass along the cost of corporate charitable contributions to ratepayers violated the ratepayers' first amendment rights. The policy violated the ratepayers' first amendment rights because it compelled the ratepayers to contribute financially to the charitable organizations and identified the ratepayers with the causes supported by the organizations. The court rejected the utilities' argument that the compelled recoupment of charitable contributions from ratepayers was analogous to the government's use of tax money for purposes that some taxpayers find objectionable. The court explained that while the government has the authority to use tax money for purposes that taxpayers find objectionable, it cannot delegate its authority to tax to publicly regulated enterprises.

Background

The New York Public Service Commission ("PSC") is a state agency which has total regulatory and rate-fixing authority over public utilities in New York. Prior to 1970, the PSC prohibited utilities in New York from recouping corporate charitable contributions from ratepayers. As a result, the utilities and their shareholders absorbed these costs.

In 1970, the PSC reversed its policy and permitted the utilities to pass along the costs of charitable contributions to ratepayers. The individual utilities treated the contributions as utility operating expenses and incorporated these costs into the utility's rate structure. In accordance with the new rules, New York Telephone ("NY Tel") and Rochester Gas and Electric ("RG & E") sought to recoup from their ratepayers charitable expenditures made to political, religious and other organizations.

Joseph Cahill ("Cahill"), a customer of NYTel, brought an Article 78 proceeding against PSC and the utilities, contending that the charitable contribution recoupment policy violated his first amendment right to free speech and association. Cahill argued that the policy compelled him to fund and to affiliate with organizations espousing political, religious and moral beliefs contrary to his own. Additionally, Cahill objected to the fact that the utilities decided

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