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Ninth Circuit Meticulously Applies Consumer Protection Act to Protect "Uniformed" Consumers

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records the FHLBB can subpoena the records of anyone who has any contact with investigated loan proceeds. The court, however, found that such an inquiry is proper if the FHLBB suspects that the parties under investigation are involved in unlawful conduct.

Procedural and Substantive Errors of the Lower Court

The court held that the district court failed to follow the Act's procedures and denied the FHLBB an opportunity to respond to Sandsend's motion to quash the subpoena. First, under the Act, if a party moves to quash a subpoena, the district court "shall order the Government authority to file a sworn response." 12 U.S.C. § 3410(b). Thus the burden is placed upon the district court to obtain the government's response. By failing to demand a response from the FHLBB, the district court thwarted Congress' intent that the FHLBB be heard before a court quashes a subpoena. Additionally, the district court had ruled before the FHLBB's time to respond had expired, thereby denying the FHLBB its right to be heard.

While the court indicated that the procedural errors would have been sufficient grounds for remanding the case, the court also addressed the district court's substantive errors. The court held that Sandsend had failed to meet any of the three bases for quashing a subpoena. First, it was undisputed that the FHLBB's examination of Vision Banc was a legitimate law enforcement inquiry. Second, Sandsend's records were relevant to the FHLBB's inquiry. Although Sandsend had only a tangential relationship to the target of the FHLBB investigation, Sandsend's records were relevant because the FHLBB suspected that Sandsend was involved in unlawful activity. Third, the FHLBB substantially complied with the Act in serving the subpoena. The court held that even if the FHLBB did not technically comply with the service requirements, the FHLBB gave Sandsend actual notice of the subpoena and, therefore, substantially complied with the Act's requirements. The court reversed the district court's judgment and directed the district court to enforce the FHLBB's subpena.

Sheila Hanley

Ninth Circuit Meticulously Applies Consumer Protection Act To Protect "Uninformed" Consumers

In *Jackson v. Grant,* 876 F.2d 764 (9th Cir. 1989), the United States Court of Appeals for the Ninth Circuit held that under California law no contractual loan obligation exists until both lender and borrower are identified. Because notice of the three day rescission period required by the federal Consumer Credit Protection Act, 15 U.S.C. §§ 1601-1693r (1988), was provided when the borrower agreed to be bound by the loan, but not when the lender was finally identified, the borrower could cancel the loan agreement three years after it was entered into.

Background

In 1981, Ms. Edna Jackson ("Jackson") secured a $26,000 loan with a deed of trust on her home. Jackson defaulted on her mortgage payments, and Union Home Loans ("Union"), a real estate loan broker, initiated foreclosure proceedings in June of 1982. In January of 1983, Jackson and Union agreed to refinance the loan in order to avoid foreclosure.

On February 18, 1983, Jackson executed the following documents to secure the new loan: Truth in Lending Act ("TILA") Disclosure Statement, Mortgage Loan Disclosure Statement, Summary of Loan Terms, Deed of Trust, Promissory Note, and Notice of Right to Cancel. The Summary of Loan Terms indicated that Union was not the lender, that the lender was unknown at the time, and that Union did not guarantee that Jackson would receive the loan she requested. The Promissory Note and the Deed of Trust left the lender's name blank. The Notice of Right to Cancel indicated that Jackson could cancel the agreement until March 1, 1983.

Union, unable to find a lender, informed Jackson on April 28, 1983, that it would provide the loan from its own funds. The terms of the loan under this new agreement were essentially the same as previously agreed, except Jackson was to pay an additional $700 to delete credit life insurance from the loan. Jackson agreed to the changes and the parties closed the loan on April 29, 1983, more than one month after signing the original loan documents.

On February 7, 1986, nearly three years later, Jackson notified the assignees of the loan, Syd and Belle G. Grant, that she was electing to cancel the loan agreement pursuant to the TILA provisions. Jackson sought to rescind the transaction in the United States District Court for the Northern District of California three days later.

District Court Proceedings

At trial, Jackson claimed that the loan was consummated on April 29, when Union agreed to provide the loan, and that Union failed to give her notice of her right to rescind the loan agreement within three business days after its consummation. Jackson also alleged that Union had made insufficient payment schedule disclosures in violation of the Consumer Credit Protection Act ("the Act"). The district court held that the loan was consummated on February 18, 1983, when Jackson agreed to be bound by the loan, and therefore Union had properly notified Jackson of her right to cancel the loan. Therefore, the court denied Jackson's request to rescind the loan agreement. The United States Court of Appeals for the Ninth Circuit reversed the trial court's decision.

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"Uninformed" Consumers (from page 19)

The Ninth Circuit's Opinion

Congress enacted the Consumer Credit Protection Act to "avoid the uninformed use of credit." 15 U.S.C. § 1601(a) (1988). In order to achieve this purpose, the Ninth Circuit has liberally construed the Act's provisions and imposed liability on creditors even for technical or minor violations. Under the Act, if a loan is secured by the consumer's residence, the consumer may rescind the transaction until midnight of the third business day after the transaction is consummated or the documents required by the provisions are delivered, whichever is later. 15 U.S.C. § 1635(a) (1988). Furthermore, if the required notice or material disclosures are not delivered, the borrower's right to rescind extends to three years after the loan is consummated. 12 C.F.R. § 226.23(a)(3) (1989). In issuing notice of the right to rescind, the lender must specify the date the rescission period expires. 12 C.F.R. § 226.23(b)(5) (1989).

A loan is consummated when the borrower "becomes contractually obligated on a credit transaction." 12 C.F.R. § 226.2(a)(13) (1989). State law governs when the consumer becomes contractually obligated. 12 C.F.R. § pt. 226, Supp. 1 (Official Staff Interpretations), Commentary § 2(a)(13).

Jackson argued that the loan was not consummated in February 1983, when she signed the Promissory Note. Rather, Jackson contended that the loan was consummated on April 29, 1983, when Union committed its own funds to make the loan. Jackson argued that Union incorrectly notified her on February 18 that she had until March 1 to cancel the loan. She argued that because the loan was not consummated until April 29, Union should have given her notice that she had three days after that date to cancel the loan. Jackson argued that because Union failed to deliver the required notice on April 29, she could rescind the loan within three years.

In contrast, Union argued that the loan was consummated on February 18, 1983, when Jackson executed the loan documents, even though these documents did not identify the lender. Union relied on *Murphy v. Empire of America, FSA*, 746 F.2d 931 (2d Cir. 1984), which held that a loan may be "consummated" before the loan transaction is closed because "[u]nder New York law the consumer's acceptance of a lender's commitment offer constitutes a binding offer." *Id.* at 934.

Union argued that it agreed on February 18, 1983, to come up with the loan funds. The source of the funds was irrelevant because Jackson gave Union the power to fill in the lender's name. Therefore, the loan agreement became binding on February 18, 1983.

The court rejected Union's argument for two reasons. First, *Murphy* applied New York law, whereas Jackson's case was governed by California law. Second, *Murphy* involved a credit transaction which included a lender's letter of commitment. In the present case, Union had not signed a commitment letter on February 18 obligating it to issue the loan.

The court held that under California law the loan became legally binding on April 28, 1983. Section 1550 of the California Civil Code requires four essential elements for a valid contract: parties capable of contracting, the parties' consent, a lawful object, and a sufficient cause or consideration. Cal. Civ. Code § 1550 (West 1988). Furthermore, California law requires not only that the parties to a contract exist but that they be identifiable. Cal. Civ. Code § 1558 (West 1988). The court noted that the documents executed on February 18, 1983, explicitly lacked the name of the lender. Those documents designated Union only as the broker, or credit arranger. Because only one party, Jackson, could be identified, the February 18 agreement was not a binding contract. The loan was not binding until Union agreed on April 28 to provide the necessary funds. The court held that the originally prescribed cancellation date, March 1, 1983, was erroneous; that date could satisfy the Act's requirement only if the consummation date had been in February 1983.

Union, the court held, failed to give Jackson proper notice of her right to cancel. Union's attempt to give Jackson such notice on February 18 was flawed because the loan was not consummated until April 28, 1983, when both parties were named. Because Union failed to give Jackson notice that she could rescind the loan within three days after the April 29 consummation date, Jackson could rescind the loan agreement within three years after April 28, 1983.

The court noted that it reached its decision without enthusiasm because Jackson had obviously benefitted from the loan agreement she now sought to rescind. Nevertheless, because Congress intended that the Act protect all consumers, who are inherently disadvantaged in credit transactions, the appellate court focused on the Union's technical error and not on the borrower's benefit in the transaction and rescinded the loan agreement.

Dissenting Opinion

Judge Trott, dissenting, argued that Union had delivered proper notice under the Act. He argued that Union agreed on February 18, 1983, to come up with the loan funds. The source of the funds was irrelevant because Jackson gave Union the power to fill in the lender's name. Therefore, the loan agreement became binding on February 18, 1983. He asserted that Union had correctly indicated the right to cancel deadline as March 1, 1983, three business days after consummation. Accordingly, Jackson was nearly three years too late in her attempt to cancel.

Judge Trott distinguished the "unwary consumer" from the "wily borrower" and insinuated that Jackson had wilfully abused

the Act provisions. He conceded the technical merit of the majority's analysis but argued that the result was contrary to the purpose of the Act: to protect the uninformed borrower.

Mark A. Myhra

Credit Company Did Not Nullify Its Anti-Waiver Provision By Accepting Late Payments But Its Harassing Phone Calls Violated Connecticut's Unfair Trade Practices Act

In *Tillquist v. Ford Motor Credit Co.,* 714 F. Supp. 607 (D. Conn. 1989), the United States District Court for the District of Connecticut held that the creditor's acceptance of late payments in an installment loan contract did not negate the anti-waiver provision of the contract. Further, the court held that the creditor's repossession was not wrongful or illegal under sections 9-503 and 9-504 of the Uniform Commercial Code or the Connecticut Billing Error Act (Conn. Gen. Stat. § 42-84 (1988)). However, the court held that the creditor violated the Connecticut Creditor's Collection Practices Act (Conn. Gen. Stat. §§ 36-243b and c (1988)), entitling the debtor to punitive damages under the Connecticut Unfair Trade Practices Act (Conn. Gen. Stat. § 42-110a - 110q (1988)).

Background

In June of 1983, Ralph Tillquist ("Tillquist") signed a retail installment loan contract to purchase a car. The Ford Motor Credit Co. ("FMCC") collected the monthly payments. The contract contained an anti-waiver provision which stated that the creditor's acceptance of late payments neither excused the debtor's default nor condoned the late payments.

Tillquist made twenty-two of twenty-five payments late. He was often two months behind in payments and twice was three months behind in payments. After failing to make payments in August and September of 1985, Tillquist contacted FMCC through his lawyer to dispute its records and to request itemization of his payments. Additionally, he asked that FMCC suspend its collections until they resolved the dispute.

FMCC sent Tillquist the requested itemization, including the late charges incurred. When Tillquist did not make his October payment on time, FMCC repossessed his car. Three days later, FMCC sent Tillquist a repossession notice stating that he could reinstate the contract within fifteen days of receiving the notice. The notice also stated that FMCC would not resell the car for at least fifteen days after repossession and allowed Tillquist to redeem the vehicle anytime before FMCC sold the car.

FMCC had frequently called both Tillquist and his wife at work to discuss his delinquent payments both before and after the repossession. The calls persisted even after the Tillquists informed FMCC that the calls were causing problems with their employers. FMCC also called Tillquist's home and spoke to his children about the debt. During one call, a FMCC representative told Tillquist's fourteen year old stepson that he was "stupid" and informed him that FMCC was going to repossess the car.

Tillquist filed a two-count complaint against FMCC in the United States District Court for the District of Connecticut. Tillquist alleged that FMCC's repossession was illegal under section 9-503 of the Uniform Commercial Code ("U.C.C.") and the Connecticut Billing Error Act, Conn. Gen. Stat. §§ 42-84a and b (1988), because he did not owe the amount claimed. Additionally, he claimed that FMCC violated the Retail Installment Sale Financing Act, Conn. Gen. Stat. §§ 42-83 - 100a (1988), by giving conflicting redemption dates. Tillquist also alleged that FMCC committed unfair and harassing collection practices in violation of the Connecticut Creditor's Collection Practices Act. (Conn. Gen. Stat. §§ 36-243a - 243c (1988)).

FMCC's Repossession was Neither Wrongful nor Illegal

Tillquist claimed that after FMCC accepted his late payments it could not repossess his car without informing him that it expected prompt payment. FMCC argued that the contract's anti-waiver provision notified Tillquist that by accepting his late payments FMCC did not waive its right to insist on prompt payments thereafter. The court noted that generally a creditor who has accepted late payments must notify the debtor that it will thereafter insist upon strict compliance with the terms of the contract to avoid repossession. However, other states' courts are split in their conclusions when contracts contain anti-waiver provisions.

Connecticut courts had not previously addressed whether a creditor nullifies an anti-waiver provision in a security agreement by accepting late payments. However, the Connecticut Supreme Court had addressed the effect of an anti-waiver clause in a lease agreement. *S.H.V.C., Inc. v. Roy,* 188 Conn. 503, 450 A.2d 351 (1982). In *Roy,* the court held that a lessor does not void the anti-waiver clause of the lease agreement by accepting late rental payments. In the present case, the district court recognized that although security agreements and leases are distinguishable, the anti-waiver provisions were practically identical. Accordingly, the court followed *Roy* and held that in light of the anti-waiver clause, FMCC did not waive it's right to prompt payment by accepting some late payments. Therefore, FMCC was under no duty to give Tillquist notice before repossessing his car.

The court rejected Tillquist's claim that FMCC violated section 9-503 of the U.C.C. by repossessing his car while the parties disputed whether he had defaulted. Tillquist relied on *Ford Motor Credit Corp. v. Byrd,* 351 So. 2d

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