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Consumer Financial Protection Bureau

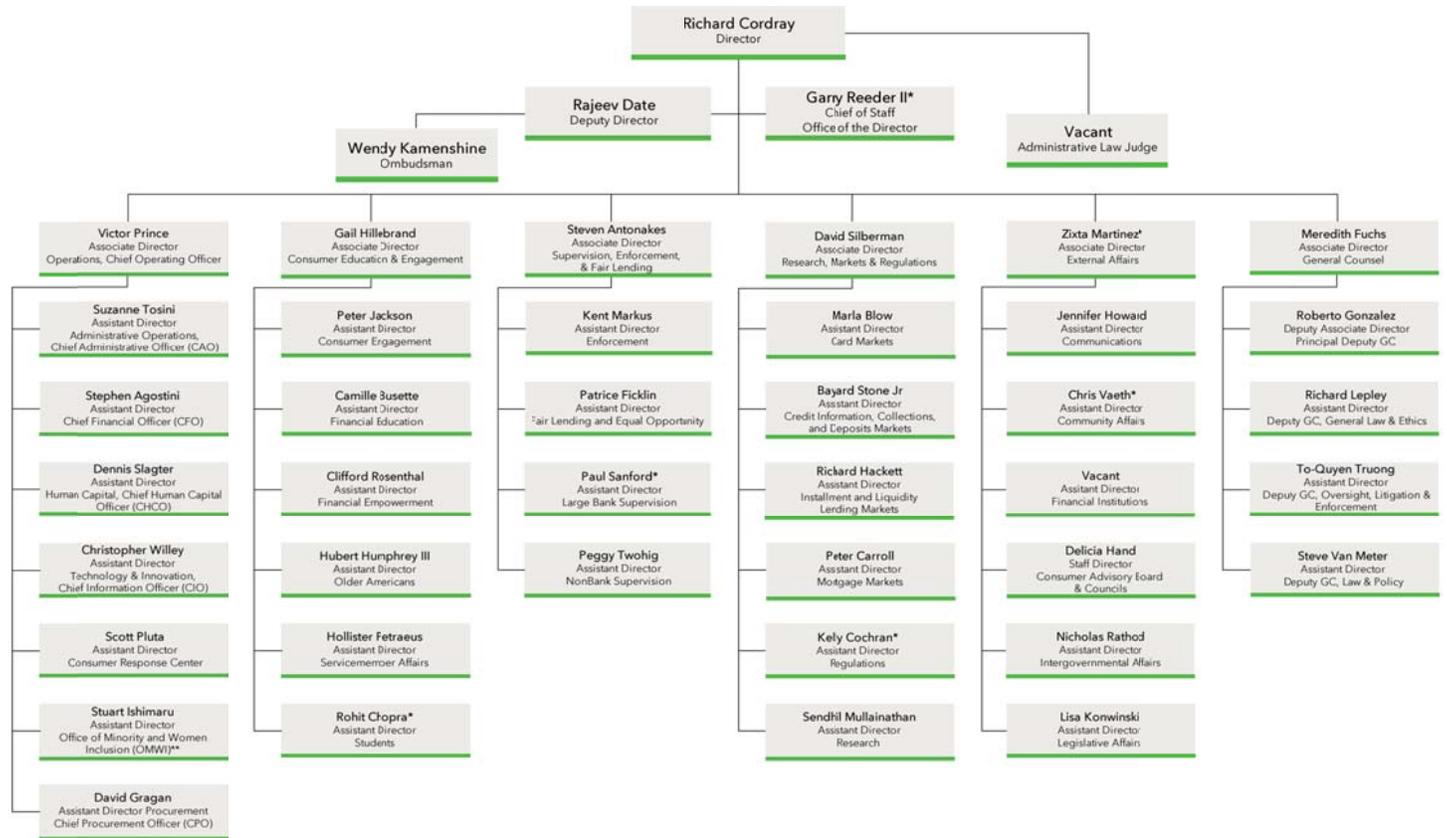
www.consumerfinance.gov

cfpb Consumer Financial
Protection Bureau

Our Vision

A consumer finance marketplace . . .

- where **customers** can see prices and risks up front and where they can easily make product comparisons;
- in which **no one** can build a business model around unfair, deceptive, or abusive practices;
- that **works for** American consumers, responsible providers and the economy as a whole.



Legend

* = Position currently filled on an Acting basis

** = Position has direct report responsibilities to the Director



Office of Enforcement

The CFPB was created by Title X of the Dodd-Frank Act of 2010 (12 U.S.C. § 5481 et seq.). Through the Office of Enforcement the Bureau enforces Federal consumer financial laws, such as the Truth in Lending Act and the Dodd-Frank Act prohibition against Unfair, Deceptive or Abusive practices. The CFPB's jurisdiction covers a wide range of areas, including:

- Mortgage Origination and Servicing
- Real Estate Settlement Services
- Student Loan
- Auto Finance
- Payday Lending and Small Dollar Loans
- Debt Collection
- Debt Relief and Credit Counseling
- Credit Cards and Prepaid Cards
- Electronic Fund Transfers
- Consumer Credit Reporting
- Bank Accounts and Deposit Products
- Privacy
- Credit Discrimination (in collaboration with the Office of Fair Lending and Equal Opportunity)

Our Jurisdiction:

- **What:** Generally consumer financial products and services, with a few exceptions such as securities and traditional insurance.
- **Who:** Generally, anyone who offers or provides a consumer financial product or service and anyone who provides a material service to those persons in connection with their offer or provision of a consumer financial product or service.

Unfair, Deceptive, or Abusive Acts or Practices are generally defined as follows:

Unfair:

- Conduct likely to cause substantial consumer injury that is not reasonably avoidable, when the injury is not outweighed by benefits to consumers or to competition.

Deceptive:

- A representation likely to mislead consumers who are acting reasonably under the circumstances, when that representation is material to the consumer's decision.

Abusive:

- Conduct that materially interferes with a consumer's ability to understand a term or condition of a product or service or takes "unreasonable advantage" of the consumer as described in Dodd-Frank, 12 U.S.C. § 5531(d).

Remedies Available Through CFPB Enforcement:

- A wide range of civil remedies including injunctive relief, asset freezes, disgorgement, monetary restitution and damages, rescission of contracts, and money penalties.
- The CFPB can obtain remedies administratively and in federal and state court proceedings.



Consumer Financial
Protection Bureau

Federal Consumer Financial Statutes Enforced by the CFPB:

- Alternative Mortgage Transaction Parity Act (12 U.S.C. § 3801 et seq.)
- Consumer Financial Protection Act (Title X of Dodd-Frank) (12 U.S.C. § 5481 et seq.)
- Consumer Leasing Act (15 U.S.C. § 1667 et seq.)
- Electronic Fund Transfer Act (15 U.S.C. § 1693 et seq. – excluding § 920)
- Equal Credit Opportunity Act (15 U.S.C. § 1691 et seq.)
- Fair Credit Billing Act (15 U.S.C. § 1666 et seq.)
- Fair Credit Reporting Act (15 U.S.C. § 1681 et seq. – excluding §§ 1681m(e) and 1681w)
- Fair Debt Collection Practices Act (15 U.S.C. § 1692 et seq.)
- Federal Deposit Insurance Act (in part) (12 U.S.C. § 1831t(b) – (f))
- Gramm-Leach-Bliley Act (15 U.S.C. §§ 6802-6809 – in part)
- Home Mortgage Disclosure Act (12 U.S.C. § 2801 et seq.)
- Home Owners Protection Act (12 U.S.C. § 4901 et seq.)
- Home Ownership and Equity Protection Act (15 U.S.C. § 1601 note)
- Interstate Land Sales Full Disclosure Act (15 U.S.C. § 1701)
- Omnibus Appropriations Act, 2009, Section 626 (Public Law 111-8)
- Real Estate Settlement Procedures Act (12 U.S.C. § 2601 et seq.)
- S.A.F.E. Mortgage Licensing Act (12 U.S.C. § 5101 et seq.)
- Truth in Lending Act (15 U.S.C. § 1601 et seq.)
- Truth in Savings Act (12 U.S.C. § 4301 et seq.)

Selected Consumer Financial Regulations Enforced by the CFPB:

- Regulation B – Equal Credit Opportunity (12 C.F.R. part 1002)
- Regulation C – Home Mortgage Disclosures (12 C.F.R. part 1003)
- Regulation D – Alternative Mortgage Transaction Parity (12 C.F.R. part 1004)
- Regulation E – Electronic Fund Transfers (12 C.F.R. part 1005)
- Regulation F – Fair Debt Collection Practices (12 C.F.R. part 1006)
- Regulations G and H – S.A.F.E. Mortgage Licensing (12 C.F.R. parts 1007, 1008)
- Regulations J, K, and L – Interstate Land Sales Registration Program (12 C.F.R. parts 1010, 1011, 1012)
- Regulation M – Consumer Leasing (12 C.F.R. part 1013)
- Regulation N – Mortgage Acts and Practices – Advertising (12 C.F.R. part 1014)
- Regulation O – Mortgage Assistance Relief Services (12 C.F.R. part 1015)
- Regulation P – Privacy of Consumer Financial Information (12 C.F.R. part 1016)
- Regulation V – Fair Credit Reporting (12 C.F.R. part 1022)
- Regulation X – Real Estate Settlement Procedures (12 C.F.R. part 1024)
- Regulation Z – Truth in Lending (12 C.F.R. part 1026)
- Regulation DD – Truth in Savings (12 C.F.R. part 1030)

Selected Consumer Financial Rules Enforced by the CFPB:

- Telemarketing Sales Rule (16 C.F.R. part 310)
- Mortgage Assistance Relief Services Rule (16 C.F.R. part 322)
- Mortgage Act and Practices Rule (16 C.F.R. part 321)

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2012 Consumer Case law update

Foreclosure

South Carolina Court of Appeals

Wells Fargo v. Smith, 398 S.C. 487, 730 S.E.2d 328 (Ct. App. 2012)

Wells Fargo brought a foreclosure suit. Smith counterclaimed accounting, unconscionability, and an attorney preference statute violation, seeking a jury trial for all three. The accounting claim was not appealed. The court held that the unconscionability counterclaim is compulsory, but the claim is in equity so there is no jury trial under the statute or the common law. The court found that the attorney preference statute violation does not affect the enforceability of the note and mortgage, making it so there was “no logical relationship” to the enforcement of either. Therefore, Smith waived the right to a jury trial by asserting the counterclaim in a foreclosure action.

Regions Bank v. Strawn, 2012 WL 3590474 (S.C. Ct. of App. 2012).

Strawn had a mortgage to secure his home. He deeded his property to his wife in 2001, and in 2003, Ms. Strawn sold the property. On that date, the closing attorney had an employee hand deliver a trust account check to the bank for payoff of the mortgage. The bank processed the check, but the bank did not mark the Mortgage as satisfied. Subsequently, Regions issued a new set of checks for credit, resulting in \$72,787.95 in debt with interest and penalties.

In 2005, the closing attorney executed a mortgage lien satisfaction after the Bank’s attorney told him that it hadn’t been satisfied. In 2006, the bank instituted a foreclosure action on the home against Strawn and the subsequent purchaser. The purchaser riled a counterclaim seeking penalties for “failure to satisfy the mortgage within ninety days.”

The trial court determined that Regions violated section 29-3-310 and awarded the purchaser \$25,000 and attorney fees and costs from the bank. The bank appealed.

The court of appeals held that there was evidence to support the district court’s finding that Regions violated S.C. s. 29-3-310. The Court also held that S.C. s. 29-3-310 does not lessen a bank’s obligation for open ended mortgages.

Wachovia Bank v. Blackburn, 394 S.C. 579, 716 S.E.2d 454 (Ct. App. 2011)

Wachovia brought an action to foreclose. Blackburn counterclaimed various causes of action and sought a jury trial. The contract had a waiver of jury trial provision, but Blackburn claimed that the provision was not knowingly or voluntarily read. The court held that the waivers were unambiguous, and that by signing the note, the Blackburns are charged with having read the contract. The waiver only applied to claims arising out of the note, and the court held that the waiver did not apply to those claims that did not arise out of the note.

Carolina First Bank v. BADD, LLC, App. Case No. 2011-187747 (S.C. Ct. App. Oct. 24, 2012)

BADD took out mortgages on income-producing real estate, and two BADD members entered guaranty agreements on the notes. Carolina First filed a foreclosure action against BADD and sought judgment against the personal guarantor for “payment of the residue of the mortgage indebtedness . . . remaining unsatisfied after the judicial sale of the properties.” The guarantor, McKown, sought a jury trial in the claim against him and filed several other counterclaims.

The court looked at the main purpose of the claim, which it found to be a guarantee. A guarantee agreement is one at law, even if it is only for a foreclosure deficiency. The guarantee agreement was “separate and distinct from the foreclosure action and was legal in nature.” Therefore, the jury trial was granted for the guarantee claim.

South Carolina Supreme Court

Arrow Bonding Co. v. Warren, 2012 WL 3793256 (Aug. 2012)

On the sale date, Warren tendered \$5,343.82, the amount due on the original judgment, but not the amount due with interest and fees, which was \$7,693.31. The property, which was valued at \$263,121 by a tax assessor sold for \$2500, leaving a deficiency of \$5,191.31 because the Warren’s money was returned. Arrow did not seek a deficiency.

Warren argued that the foreclosure sale of \$2500 was grossly inadequate because the properties were tax assessed at \$263,121. There were liens of \$100,000. The court used the liens plus the \$2500 to determine that the price was not grossly inadequate.

Matrix Financial Services Corporation v. Frazer, 394 S.C. 134, 714 S.E.2d 532 (2011).

Frazer defaulted on a loan in California. They moved to South Carolina and purchased a home in Greenville. Matrix was assigned the loan and subsequently refinanced the loan agreement with Frazer with the assistance of an attorney. The California default was recorded after the original loan but before the refinanced loan. Frazer filed bankruptcy. Matrix sought equitable subrogation on the refinanced loan, but Frazer counterclaimed an unclean hands claim.

The Supreme Court held that equitable subrogation is “not a remedy available to a lender that refinances the original debt owed to it.” On the unclean hands argument, the court noted that Matrix hired LandAmerica OneStop to provide all the usual attorney services but without the supervision of an attorney. “Thus, Matrix committed the unauthorized practice of law in closing the refinance mortgage[.]” Because of that, the court stated “that a lender may not enjoy the benefit of equitable remedies when that lender failed to have attorney supervision during the loan process as required by our law.” The court applied it to “all filing dates” after the opinion.

In re Mortgage Foreclosure Actions, 396 S.C. 209 (2011)

In an attempt to increase communication between lenders and debtors and to provide opportunities for loss mitigation, Chief Justice Toal issued Administrative Order No. 2011-05-02-01. The Administrative Order applies to “all mortgage foreclosure proceedings concerning Owner-Occupied dwellings.” The order defines owner-occupied dwelling as “mortgaged real property that is the principal residence of any mortgagor.” This includes properties that may not

have qualified under HMP, such as if the loan exceeded a certain amount or if the property was not owned, securitized, or guaranteed by Fannie Mae or Freddie Mac.

This Administrative Order *requires* the Mortgagee's attorney to serve a "notice of the Mortgagor's right to foreclosure intervention" when the attorney serves the summons and complaint to commence the action. This language indicates that this form should be included with the complaint and not merely mentioned within the complaint.

A foreclosure hearing cannot be held until the "Mortgagee's attorney certifies that the Mortgagee has complied with:"

(1)(a) The mortgagor has "been served with a notice of the Mortgagor's right to foreclosure intervention for the purpose of seeking a resolution of the foreclosure action by loan modification or other means of loss mitigation;"

(1)(b) The mortgagor has "received and examined all documents and records . . . to evaluate eligibility for foreclosure intervention;

(1)(c) The "Mortgagor has been afforded a full and fair opportunity to submit any other information or data pertaining to the Mortgagor's loan or personal circumstances for consideration by the Mortgagee;

(1)(d) That after completion of the foreclosure intervention process, the Mortgagor does not qualify for loan modification or other means of loss mitigation . . . and the parties have been unable to reach any other agreement concerning the foreclosure process; and

(1)(e) that notices of the denial of loan modification or other means of loss mitigation has been served on the Mortgagor by mailing such notice to all known addresses of the Mortgagor; provided, that such notice shall also state that the Mortgagor has 30 days from the date of mailing of notice of denial of relief to file and serve an answer or other response to the Mortgagee's summons and complaint."

If the Mortgagor does not respond within 30 days after being served, the Mortgagee's attorney can certify that "the Mortgagor has failed, refused, or voluntarily elected not to participate in any foreclosure intervention process." The actions cannot proceed until the attorney certifies that the Mortgagee has been denied assistance in accordance with (1)(b) through (e) or that the Mortgagor failed to respond to the notice.

If an agreement is reached, the agreement must be "reduced to writing, executed by the Mortgagor and Mortgagee, and served on all parties in the case." The action shall be "stayed, and no hearing or foreclosure sale" shall be "held for 90 days following the entry of any agreement, unless the Mortgagor shall not comply with the terms of the Agreement." If the Mortgagor fails to comply with the agreement within the 90 day timeframe, the Mortgagee's attorney "shall file and serve on all parties a 'Notice of Breach of Agreement'." The foreclosure action cannot proceed until this has been filed. If the Mortgagor is in compliance within the agreement after 90 days, the Mortgagee's attorney must "promptly file a notice of dismissal of the action without prejudice, and the case will be dismissed." This notice must be served on "all parties to the action."

The court shall “hear and determine any dispute concerning any party’s compliance with this order, including without limitation, the failure of any party to act in good faith in complying with the terms of this order.” If the court “determines that any party to the foreclosure action . . . has failed to comply with the terms of this order, or has not attempted to reach an agreement for foreclosure intervention in good faith, the Court may, in its discretion, impose such sanctions as it determines to be reasonable and just under the circumstances, including without limitation, the assessment of reasonable attorneys’ fees and costs against the culpable party.”

The court can also “order the parties to submit to mediation[,]” and the “mediation shall proceed in accordance with the ADR Rules.”

B.A.C. Home Loan Servicing, L.P. v. Kinder, 398 S.C. 619 (2012)

Kinder asserted an unauthorized practice of law claim against BAC because it allegedly did not close the second mortgage with an attorney, but the Court held that *Matrix* applied prospectively to documents filed after August 8, 2011. Therefore, her claim failed because the document was executed prior to August 8, 2011.

Consumer Protection Code

Delebreau v. Bayview Loan Servicing, 680 f.3d 412 (4th Cir. 2012)

The Delebreaus appealed the district court’s judgment that the one year statute of limitations under the West Virginia Consumer Credit and Protection Act barred their claims against Bayview. The sole issue on appeal was whether, under the statute of limitations, “the due date of the last scheduled payment of the agreement” was the loan acceleration date set by Bayview declaring the entire loan amount due or the loan maturity date designated in the Delebreau’s loan documents. The Fourth Circuit Court of Appeals concluded that the acceleration date was the operative date for purposes of applying the statute of limitations because no further payments were scheduled after that date.

In 1999, the Delebreaus refinanced a home mortgage with Option One Mortgage Corporation, executing a note in the amount of the principal loan amount, \$84,500, and a deed of trust securing the note on the property and granting the lender the option to accelerate the loan in the event of a default. In March 2004, Bayview began servicing the loan pursuant to an agreement with Option One. As a result of several late payments, the Delebreaus entered into a loan modification agreement with Bayview in June 2006 which increased the principal balance of the loan and extended the maturity date to June 1, 2030. After the Delebreaus again fell behind on the loan, Bayview sent them a letter in June 2007 advising them that they were in default and exercised their right to accelerate the loan, effective June 5, 2007. The full amount of the loan immediately became due and payable, and no additional payments were scheduled thereafter.

In March 2009, the Delebreaus filed an action on behalf of borrowers whose home mortgage loans were serviced by Bayview, alleging that Bayview improperly added fees to borrowers’ accounts in violation of the Consumer Credit Act. Bayview filed a motion for summary judgment, arguing that the Delebreaus’ claims were barred by the statute of limitations. The

district court agreed with Bayview, holding that the claims were barred because the Delebreaus' did not file the action until more than one year after the acceleration date.

The Delebreaus appealed the judgment, contending that the district court erred in holding that under the terms of the parties' agreement, the statute of limitations began to run from the acceleration date. The court of appeals first noted that the purpose of a statute of limitation is to ensure that causes of action be brought within a reasonable period of time, encouraging promptness and avoiding stale claims. The determination of the meaning of the statutory phrase "due date of the last scheduled payment of the agreement" begins with considering whether the language is unambiguous. The court concluded that the meaning of the statute was unambiguous because it plainly referred to the last date under the parties' agreement providing for payment of a specified loan amount. The original schedule of payments ending in 2030 no longer had any effect under the terms of the deed of trust, since the entire amount was due at that time. The court of appeals noted that the Delebreaus' interpretation was clearly not in keeping with the purpose of statutes of limitation, as it would result in the claims expiring on June 1, 2031, more than twenty years after their default. The court affirmed the district court's ruling, concluding that since no additional payments were scheduled after the date Bayview exercised the right of acceleration under the deed of trust, that date became the last scheduled payment under the statute of limitation, and the Delebreaus were foreclosed from bringing their claims.

Epps v. J.P. Morgan Chase Bank, N.A., 675 F.3d 315 (4th Cir. 2012)

On appeal, the Fourth Circuit vacated the district court's decision and held that a Maryland law, requiring creditors to fulfill certain notice requirements before repossessing a debtor's tangible personal property upon the debtor's default of a loan, was not preempted by the National Bank Act ("NBA") or related regulations issued by the Office of the Comptroller of the Currency ("OCC").

In 2007, Donna Epps purchased a used vehicle from Thompson Toyota Scion ("Thompson"), an automobile dealer in Maryland. Epps financed her purchase through a retail sales installment contract ("RIC") with Thompson, and Thompson later assigned the RIC to JP Morgan Chase Bank, N.A. ("Chase"). By the end of 2009, Epps had fallen behind and ceased all payments to Chase pursuant to the RIC. Upon Epps's default, Chase repossessed her vehicle financed through the RIC but failed to comply with notice requirements set forth in the Maryland Credit Grantor Closed End Credit Provisions ("CLEC") or the RIC, which expressly provided that the contract would be subject to the CLEC. Epps subsequently filed this action in Maryland state court, claiming that Chase violated the CLEC and breached the RIC. Chase removed the action to the U.S. District Court of Maryland which ruled in favor of Chase and dismissed Epps' complaint in its entirety after finding that the CLEC post-repossession notice requirements were preempted by federal OCC regulations and dismissing Epps's breach of contract claim, despite the fact that the RIC specified that the CLEC applied.

On appeal, the Fourth Circuit considered Epps' two main arguments: (1) that the district court erred in finding that the NBA and OCC regulations preempt the CLEC and (2) that the district court erred in rejecting her breach of contract claim. On the first issue, the court dismissed Epps's request that it apply a presumption against preemption, finding that "the CLEC regulates

an area with authorized federal presence,” and affirming its decision in *Nat’l City Bank of Ind. v. Turnbaugh*, 463 F.3d 325, 330 (4th Cir. 2006), that “an assumption against preemption ‘is not triggered when a State regulates an area where there has been a history of significant federal presence.’” Next, the court looked at Congress’s intent and found that while the NBA does not expressly preempt state law, the OCC regulations do contain express preemption provisions. However, the court found that the repossession provisions at issue were not expressly preempted by these regulations. The court further concluded that “field preemption” did not apply because “the NBA and OCC regulations do not ‘occupy the field.’” Finally, the court dismissed several of Chase’s claims after distinguishing debt collection from the extension of credit, finding that the OCC regulations do not preempt state law on debt collection, and concluding that “[t]he Supreme Court has long recognized that national banks are subject to state law regarding collection of debts.” The court also affirmed the Ninth Circuit’s conclusion that “debt collection, and specifically the right to repossess property that is the subject of a secured transaction, has deep roots in common law and remains a fixture of state, not federal law,” *Aguayo v. U.S. Bank*, 653 F.3d 912, 923 (9th Cir. 2011), and found that because the CLEC “does not discriminate against national banks,” it is “preserve[d] from any preemptive effect of the NBA or OCC regulations.”

Addressing Epps’s second claim that the district court erred in dismissing her breach of contract claim, the court rejected Chase’s argument that because it did not negotiate the terms of the RIC, it could not be bound by the contract’s election of the CLEC. The court concluded that Chase, as Thompson’s successor-in-interest, is bound by Thompson’s voluntary decision to have the RIC governed by the CLEC and held that the district court erred in dismissing Epps’s breach of contract claim.

SunTrust Bank, N.A. v. Northen @ 4th Circuit: *In Re McCormick*, 669 F.3d 177 (4th Cir. 2012)

The Fourth Circuit affirmed avoidance of SunTrust’s lien on a tract of land owned by debtor John McCormick. SunTrust contended that even though recordation of the lien on the tract was deficient, the Trustee was imputed with constructive knowledge of the lien because he either had constructive knowledge of the deed of trust that was properly recorded as to an adjacent tract of land, which by its terms also created a lien on the contested tract of land; or because the deed was recorded in an unofficial index in Orange County and a careful and prudent title examiner would have found the lien on Tract I in that index. The Fourth Circuit held that the Trustee’s status vis-à-vis the title of Tract I is, under § 544(a)(3), that of a bona fide purchaser under North Carolina law, and North Carolina law allows a purchaser to rely exclusively on the official recordation index of the county to discover liens, regardless of what other independent knowledge that purchaser might have. Therefore, SunTrust’s lien was avoided and the bankruptcy court’s decision was affirmed.

TILA

Watkins v. SunTrust Mortg., 663 F.3d 232 (4th Cir. 2011)

When Edward and Danielle Watkins refinanced their home loan with SunTrust Mortgage, they were given a notice of a right to rescind. This notice substantially complied with Model Form H-8 (in accordance with 12 C.F.R. pt. 226) rather than Model Form H-9. H-9 applied specifically to rescissions of refinancing agreements while H-8 dealt with rescissions generally.

Eighteen months later, Watkins had fallen behind on paying the loan and SunTrust informed him of its intent to foreclose. Watkins responded by demanding a rescission of transaction because the form used was improper. When SunTrust refused to rescind, Watkins filed an action for declaratory judgment of his right to rescind and for statutory damages of \$2,000. The district court, however, dismissed the action for failure to state a claim upon which relief could be granted.

Watkins appealed, relying heavily on precedent from the Seventh Circuit that found a TILA violation where a lender provided both H-8 and H-9 information because “hypertechnicality reigns in TILA cases.” The Fourth Circuit disagreed. The court held that the language of H-8 and H-9 were nearly identical and that both complied with the mandates of Regulation Z, where rescission information requirements are laid out.

Judge Wynn dissented. He pointed to Congressional intent and even prior Fourth Circuit precedent to argue that “to insure that the consumer is protected, as Congress envisioned requires that the provisions of the Act and the regulations implementing it be absolutely complied with and strictly enforced.” Because SunTrust unequivocally agreed that it used the wrong form, and because TILA is to be “strictly enforced,” Judge Wynn would have found a violation and reversed the lower court.

Gilbert v. Residential Funding, LLC, 678 F.3d 271 (4th Cir. 2012)

The Fourth Circuit Court of Appeals held that for purposes of a Truth in Lending Act (“TILA”) claim, a borrower’s right to rescind may be exercised by providing notice within the three year statutory period, and does not require filing suit by the expiration of the three years. Finding that the borrower’s notice of rescission was timely filed, the Court of Appeals held that the district court erred by considering the refusal to rescind TILA claim time barred. Additionally, the Fourth Circuit held that the borrower’s sufficiently plead a usury claim because the lender charged an interest rate higher than what was allowed by North Carolina law. Further, the District Court dismissed all of the borrower’s North Carolina Unfair Deceptive Trade Practices Act (“NCUDTPA”) claims because violations of the relevant section cannot be assigned, but only some of their claims related to the original creditor who is not a party to the suit. Therefore, this Court held that the claims concerning the Appellees should proceed. Finally, the District Court erred by holding that res judicata prevented the borrower’s from litigating their claims because the North Carolina Superior Court confirmed the clerk’s finding that the foreclosure action could proceed. However, the North Carolina Court of Appeals reversed the Superior Court’s judgment, and their claims are no longer barred by res judicata.

This action arose out of a May 5, 2006 adjustable rate mortgage the Gilberts (“borrowers”) executed with First National Arizona to refinance the existing lien on the property. First National Arizona’s interest was subsequently transferred through several entities; Deutsche Bank

is the current holder of the deed of trust on the subject property. RFL is the master servicer, and GMAC is the subservicer. The borrower's defaulted on the mortgage in 2008; foreclosure proceedings were instituted on March 12, 2009. On April 5, 2009, the borrower's counsel wrote a letter to GMAC alleging TILA violations and providing notice the borrowers were rescinding the transaction. On April 14, 2009, GMAC responded that they found no material disclosure errors that would entitle the borrower's to an extended right of rescission. While the foreclosure action was pending appeal in the North Carolina Court of Appeals, the borrowers instituted this action and the Appellee's removed it to federal court.

The interpretation of the notice requirement for a TILA claim has generated a split in authority. The Ninth Circuit previously held that a suit must be filed within three years to meet the statutory requirement. However, the Fourth Circuit, relying on the plain language of the relevant regulation, found that writing a letter to the servicer met the notice requirement. The District Court had relied on a previous Fourth Circuit case, *American Mortgage Network, Inc. v. Shelton*, to interpret the notice requirement as mandating a lawsuit within the three year period. However, the Fourth Circuit held in *Shelton* that a borrower cannot unilaterally rescind a transaction by providing notice, which is distinct from this case where the issue was whether a borrower has properly exercised her right to rescind in the required time period. The case is remanded for the District Court to determine whether the transaction should be voided and to consider the claims improperly dismissed.

Arbitration

Bradley v. Brentwood Homes, Inc., 398 S.C. 447, 730 S.E.2d 312 (2012).

The Supreme Court held that a real estate transaction does not involve interstate commerce; thus, the FAA does not apply to arbitration clauses in the agreement. Here, Bradley and Brentwood entered into a Home Purchase Agreement. The agreement contained an arbitration clause that violated S.C. Code Ann. 15-48-10(a). Brentwood argued that the FAA applied to the arbitration clause. The court, however, found that this was not interstate commerce. The court based its reasoning on the fact that a real estate transaction is inherently intrastate because the land is firmly located in one state. The court also stated that out of state financing or a national warranty does not bring the intrastate nature of the real estate contract. Central to the holding was the idea that land is inherently intrastate because it is "firmly planted in one particular state." The Court did, however, find it significant that Bradley "did not name the national warranty company as a defendant in his lawsuit as his claims involved fraud, negligence, and breach of an implied warranty and not a claim under the 2-10 HBW Warranty." The court also discussed the "well-established real estate exception to the FAA." The burden of proof of interstate commerce was on Brentwood Homes. The party must introduce "sufficient evidence that the transaction involved interstate commerce to subject the Agreement to the FAA."

Lucey v. Meyer, Op. No. 4960 2012 WL 5305744 (S.C. Ct. App. Oct. 24, 2012)

Meyer is an attorney, who was an Assistant Solicitor for the Ninth Circuit for white collar crimes. In January 2006, she moved to South Carolina and joined the firm. In June 2006, she entered into an employment agreement. On the second page of the agreement, there was an

arbitration clause. The clause made it so that neither side could bring witnesses. The paragraph above the signature line indicated that she had time to read the agreement and that she could schedule a meeting to discuss the agreement.

Meyer argued that the employment contract was not interstate commerce, rendering it out of the reach of the FAA. She also argued that it was unconscionable because there was an absence of meaningful choice and it was oppressive and one-sided.

The court held that the employment contract involved interstate commerce. The court focused on the fact that Meyer worked on specific out-of-state cases. It distinguished the situation where an attorney “simply work[s] in South Carolina on cases that involved out-of-state clients and businesses.” The court looked at how Meyer traveled out-of-state to work on cases and billed her travel and work there.

The court then looked at the unconscionability claim. The court found that there was not an absence of meaningful choice even though the employment agreement was not entered into until 6 months after she was hired. The court found that she knew the terms or should have known because her “substantial work as an assistant solicitor in addition to her time at law school” gave her enough sophistication that any disadvantage would be minimal. Another factor was that there was an “apparent opportunity for negotiation[,] . . . [that] did not force Meyer to ‘take-it-or-leave-it.’ Rather it indicated Meyer had some bargaining power, while perhaps not as much as the Firm.” Lastly the court acknowledged that the arbitration clause was not buried into the contract because it was a short contract and it was not the second page. After the court held that the because “its sole limitation is the presentment of live witnesses and there is no other limitation of evidence or testimony[,]” the arbitration clause was “not unduly harsh.” The court held that a limitation of this sort, standing alone, cannot be a “reason to invalidate an arbitration agreement.”

Peabody Holding Co. v. United Mine Workers of Amer., International Union, 665 F.3d 96 (4th Cir. 2012).

Appellee United Mine Workers of America, International Union entered into a limited job-preference agreement with Peabody Coal Company, which also bound Peabody Coal’s parent company and the parent company’s subsidiaries. The Union submitted a grievance to an arbitrator, who determined that the dispute was arbitrable but deferred a ruling on the merits. Peabody Holding responded by seeking a declaratory judgment in federal court that the dispute is not arbitrable. The district court entered judgment in favor of the Union and held that the arbitrator correctly determined that the dispute was arbitrable, and, in the alternative, the dispute was arbitrable even if the arbitrator lacked authority to decide the arbitrability question. The Fourth Circuit Court of Appeals found that the court, not the arbitrator, must decide the initial question of arbitrability. However, the court held that Peabody Holding did not rebut the presumption in favor of arbitrability, and therefore, the parties must proceed to arbitration.

ESAB Group, Inc. v. Zurich Insurance PLC, 685 F.3d 276 (4th Cir. 2012)

The court of appeals affirmed the lower court's exercise of personal and subject matter jurisdiction, and its authority to remand the remaining nonarbitrable claims to state court.

In 1925, Congress enacted the Federal Arbitration Act, which protects the enforceability of domestic arbitration agreements. The Convention of the Recognition and Enforcement of Foreign Arbitral Awards, adopted in 1958, ensures that courts enforce agreements to arbitrate in foreign tribunals, and awards granted by such tribunals. In 1945, Congress enacted the McCarran-Ferguson Act, which essentially authorizes reverse preemption of generally applicable federal laws by state laws enacted for the purpose of insurance regulation.

In the present case, ESAB Group contends that, pursuant to the McCarran-Ferguson Act, South Carolina law reverse preempts federal law in the area of commercial arbitration of insurance disputes. Thus, the issue before the court is whether the McCarran-Ferguson Act applies, such that state law can reverse preempt federal law and invalidate a foreign arbitration agreement.

In the underlying suit, ESAB Group faced numerous products liability suits stemming from personal injuries allegedly caused by its welding products. Several of ESAB Group's insurers, including Zurich Insurance, refused coverage, and ESAB brought suit in South Carolina state court. The insurers removed the case to federal court pursuant to the Convention Act's grant of removal jurisdiction. ESAB Group disputed the district court's exercise of subject matter jurisdiction, and Zurich Insurance disputed the district court's exercise of personal jurisdiction.

The district court found that it had jurisdiction over the subject matter and the parties to the action, and subsequently enforced the underlying arbitration agreements. Since the court referred to arbitration all claims providing a basis for subject matter jurisdiction, the court remanded the remaining claims to state court. On appeal, ESAB Group disputes the district court's exercise of subject matter jurisdiction, and Zurich Insurance disputes the district court's exercise of personal jurisdiction and its authority to remand the nonarbitrable claims to state court.

The Court of Appeals first considered whether the federal courts have jurisdiction over the present action or whether, as ESAB Group contends, South Carolina law reverse preempts federal law and eliminates the basis for jurisdiction. The court held that, because the Supreme Court has made it clear that the McCarran-Ferguson Act is limited to domestic affairs, the Convention Act falls outside of its scope. Thus, the district court's exercise of subject matter jurisdiction was proper. Furthermore, the court held that, because the relevant Zurich policies contain valid arbitration clauses that are subject to the Convention Act, the district court properly compelled arbitration of ESAB Group's claims under those policies. The Court, applying a three-part test to determine if the exercise of specific jurisdiction over Zurich comported with due process, affirmed the district court's exercise of personal jurisdiction. Finally, the court of appeals, noting that while a district court may be compelled to stay nonarbitrable issues within an otherwise arbitrable claim, there is no like requirement that the court exercise supplemental jurisdiction over nonarbitrable claims where all claims within the court's original jurisdiction have been sent to arbitration, held that the district court had the authority to decline to exercise jurisdiction over the nonarbitrable claims and to remand those claims to state court.

Judge Wilkinson concurred, listing several additional reasons supporting the majority opinion.