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UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF MARYLAND

In re	*	
KATHLEEN P. FARRAN	*	Case No. 94-50944-JS
Debtor	*	
* *		
KATHLEEN P. FARRAN	*	
Plaintiff	*	
v.	*	Adv. Pro. No. 94-5273-JS
PENN MORTGAGE COMPANY, INC.	*	
Defendant	*	
* * * * * * * * * * *		

REPLY TO RESPONSE TO MOTION FOR SUMMARY JUDGMENT

The Plaintiff/Debtor, Kathleen P. Farran, through her attorney, Elizabeth Renuart, hereby replies to the Defendant's Response to her Motion for Summary Judgment as follows:

1. Despite the Defendant's claim that there are six disputes of material fact, five of these disputes are disputes of law not fact. The main issue is whether the Defendant is a qualified lender under the Depository Institutions and Monetary Control Act of 1980. 12 U.S.C.A. §§ 1735f-7a(a)(1) and 1735f-5(b)(2)(D). (West 1989); 12 C.F.R. §§ 590.2(b)(6) and 590.2(f) (1994). A determination of this issue involves questions of fact. Based upon Defendant's own documents, there is no dispute of material fact that the Defendant fails to qualify for the federal preemption.

2. If the Defendant does not qualify for the federal preemption, it charged points in excess of that allowed under Md.

Code Ann., Com Law II § 12-108. From this legal conclusion flows the violation of the Consumer Protection Act.

3. There is no question of fact regarding what is on the face of the notice of right to cancel. Whether it complies with the Truth-In-Lending Act is a question of law.

WHEREFORE, the Plaintiff requests this Court to:

(a) Grant the relief requested in her Objection to Proof of Claim and Complaint.

Elizabeth Renuart
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321 E. 25th Street
Baltimore, Maryland 21218
(410) 366-8621

Attorney for Plaintiff

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 16 day of February, 1995, copies of the Reply to Defendant's Response to the Motion for Summary Judgment, Memorandum, and Exhibits were mailed, postage prepaid, to: Robert B. Scarlett, 201 N. Charles Street, Baltimore, MD 21201; Robert Grossbart, 1 N. Charles Street, Suite 1902, Baltimore, MD 21201; Ellen W. Crosby, Trustee, 7123-25 Harford Road, Baltimore, MD 21234.

Elizabeth Renuart

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PENN MORTGAGE COMPANY, INC.	*	
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* * * * * * * * * * *

REPLY MEMORANDUM IN SUPPORT OF PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT

I. Statement of Facts

Ms. Farran accepts the Statement of Facts in Defendant's Memorandum in Support of its Response to Plaintiff's Motion for Summary Judgment (hereafter Defendant's Memorandum) with the following exceptions: The Defendant states that it qualified for the federal preemption under the Depository Institutions and Monetary Control Act of 1980 (hereafter "DIDMCA"). Defendant's Memorandum at 2. This is a conclusion which Ms. Farran disputes.[1] In addition, the Defendant states that it gave Ms. Farran "proper" notice of the right to cancel. Defendant's Memorandum at 3. Ms. Farran disputes this conclusion. The Defendant states that Ms.

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[1] While Ms. Farran disputes certain conclusions, the facts underlying the legal conclusions are not in dispute as will be shown in this Memorandum.

Farran defaulted on the loan on September 1, 1993. Ms. Farran admits to this but states that she brought the account current in November, 1993 as evidenced in Exhibit 19, p. 3 attached to Defendant's Memorandum. She again defaulted after November, 1993.

The Defendant then lists six "facts" which it claims are "material facts in dispute." Defendant's Memorandum at 4-5. Of these six, only number 5 represents an apparent dispute of fact.[2] Essentially, this case boils down to five violations[3] of various laws. If the Defendant charged points in excess of that allowed by the Maryland Interest and Usury Provisions, Md. Code Ann., Com. Law II § 12-108, then it violated that law as well as the Truth-In-Lending Act (TILA) and the Maryland Consumer Protection Act. Defendant's argument is that it can charge whatever interest and points it pleases because it is exempt from the Maryland Interest and Usury Provisions pursuant to DIDMCA. In addition, quite separate and apart from the illegal points, the Defendant violated TILA because of the content and timing of the notice of right to cancel, certificate of completion, and distribution of the proceeds.

Defendant's alleged disputed Fact Nos. 1-4, 6, 7 are really disputes of law. Facts No. 1-4 are undisputed if the Defendant is not entitled to claim the federal preemption. Specifically,

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[2] Ms. Farran uses the word "apparent" because she will show later in this Memorandum and attached Exhibits that, in fact, there is no dispute.

[3] Ms. Farran did not raise one of these five claims in her Motion for Summary Judgment as it involves factual issues. This claim is the subject of her Motion to Amend the Objection to Proof of Claim and Complaint.

regarding alleged Fact. No. 1, the Defendant nowhere claims that it informed Ms. Farran that the $350 was illegal. This issue is relevant to Ms. Farran's Consumer Protection Act claim. Its defense is that the charge is legal. Therefore, it did not inform Ms. Farran that it was illegal. But if the charge is illegal, the only question will be whether this violates the Maryland Consumer Protection Act, a legal question.

Regarding alleged Fact No. 2, whether Ms. Farran has overpaid is a legal conclusion which is true and undisputed if the Defendant charged illegal points and if Ms. Farran timely rescinded under TILA. Thus, it is a conclusion that flows from the initial premise that the Defendants charged illegal points. The Defendants dispute this conclusion by arguing that the points charged are legal and that Ms. Farran's claim is barred by the statute of limitations. Ms. Farran will show that there is no dispute of fact as to either of these two defenses.

Regarding alleged Fact No. 3, whether Ms. Farran properly rescinded is also a legal conclusion that flows if the Defendant charged illegal points and if Ms. Farran timely rescinded. Again, Ms. Farran will show that there is no dispute of fact as to either of these two defenses.

Regarding alleged Fact No. 4, whether the Defendant honored the rescission request made by Ms. Farran is undisputed. The Defendant did not honor it. Its defense is that it did not have to.

Regarding alleged Fact No. 5, the issue of the applicability

of the federal preemption involves factual issues which will be shown to be undisputed. It also involves application of federal law to the facts.

Regarding alleged Fact No. 6 (also numbered Fact No. 5), whether Penn Mortgage violated applicable lending laws is a question of law once the facts related to the federal preemption are established.

Regarding alleged Fact No. 7 (numbered Fact No. 6), whether the statute of limitations bars this action is a question of law, not of fact.

Significantly, the Defendant did not dispute any other facts set forth in the Plaintiff's Motion for Summary Judgment.

II. Legal Argument

A. The Burden Of Proof Is Upon The Defendant

The Defendant's opening salvo is that Ms. Farran "neglects to inform this Court that the loan which was made to the Plaintiff is not governed by those Maryland statutes cited by the Plaintiff. Penn Mortgage's loan to the Plaintiff was a 'federally-related loan' as defined by the Depository Institution's Deregulation and Monetary Control Act of 1980..." Defendant's Memorandum at 5.

In point of law, whether the Defendant qualifies for a federal preemption under DIDMCA is an affirmative defense to be raised by the Defendant, not the Plaintiff. Pacific Mortgage and Inv. Group. LTD v. Horn, 100 Md. App. 311, 329, 641 A.2d 913, 922 (1994); In re Russell, 72 B.R. 855, 867 (Bank. E.D. Pa. 1987). Ms. Farran pled the applicability of the Maryland Interest and Usury Provisions in

her Objection to Proof of Claim and Complaint. She argued the merits of this claim in her Motion for Summary Judgment. She need do no more. The Defendant must raise and prove its entitlement to the federal preemption.

B. Penn Mortgage Has Not Proven It Is Entitled To The Federal Preemption

Decades ago, Congress created a "most favored lender" status for federally chartered banks. 12 U.S.C.A. § 85 (West 1989). The National Bank Act allowed such banks to charge the higher of the maximum rate allowed lenders under state law or an alternative federal rate based on the federal discount rate. Thus, federal banks, but not other lenders, could claim the advantage of the federal usury rate whenever the federal rate exceeds the state's interest ceiling.

In the late 1970's and early 1980's, interest rates soared. In the mid-1970's, the legal rate in Maryland applicable to loans secured by first mortgages on residential real property was 10%. 1975 Md. Laws ch. 49.[4] In 1979, the Maryland General Assembly responded to this situation and amended Md. Code Ann., Com. Law II § 12-103(b) to eliminate any interest restrictions on loans secured by a first mortgage or first deed of trust on residential real property. 1979 Md. Laws ch. 1. Apparently, the lending crisis was so urgent that the General Assembly declared the bill "an emergency measure and necessary for the immediate preservation of the public health and safety...." Id. Section 2. In that same bill, the

[4] This rate remained unchanged until 1979.

General Assembly did not, however, change the portion of § 12-108 which prohibits the charging of points on loans. In relevant part, § 12-108 has remained virtually unchanged since that time.

In order to increase the availability of credit on a national level, Congress passed the Depository Institutions and Monetary Control Act of 1980 (hereafter "DIDMCA"). This Act expanded the traditional preemption of state interest and point ceilings for the benefit of national banks to state-chartered banks, federal savings and loans, and federal credit unions. 12 U.S.C.A. §§ 1735f-7a(a)(2), 1831d(a), 1730g, 1785(g) (West 1989). In addition, Congress allowed certain, narrowly defined lenders, of which the Defendant claims it is one, to charge any interest or points. 12 U.S.C.A. § §§ 1735f-7a(a)(1), 1735f-5(b)(2)(D) (West 1989); 12 C.F.R. §§ 590.2(b)(6) and 590.2(f) (1994).

The legislative intent behind these changes was apparently to stimulate the housing market by making returns on mortgage loans competitive during a period of high mortgage interest rates. See S. Rep. No. 368, 96th Cong., 2d Sess. 18 reprinted in 1980 U.S.C.C.A.N. 236, 254; In re Russell, 72 B.R. 855, 867 (Bankr. E.D. Pa. 1987). Specifically, the Senate Report states: "H.R. 4986 as amended provides for a limited preemption of state usury laws." Id. at 254 (emphasis added). Later, the Committee reiterated this by stating: "The Committee believes that this limited modification in state usury laws will enhance the stability and viability of our Nation's financial system and is needed to facilitate a national housing policy and the functioning of a national secondary market

in mortgage lending." Id. at 255 (emphasis added).

The Court in In re Russell recognized that the reach of the federal preemption should be limited given the fact that as of 1987, the lending crisis that precipitated the enactment of DIDMCA, had passed. 72 B.R. at 867. Since 1987, the interest rates have declined further. Thus, the holding in In re Russell is even more accurate today:

> The DIDMCA is hardly a Congressional expression of distaste with state usury laws generally, but a compromise with the ideals of such laws--that there should be limits upon rates of interest that lenders can legally charge--in a time of crisis. Moreover, the crisis has passed. Therefore, applying the DIDMCA to any transaction other than those which it is very clearly provided are within its scope would fail to recognize the context of this law in the scheme of the inter-relationship between federal and state law.

Id. For this reason, the Court placed the burden upon the lender to prove that it meets each and every requirement of DIDMCA. Id. at 869. The holding in this case and the authorities upon which it relied have been expressly adopted in Maryland. Pacific Mortgage and Inv. Group. LTD v. Horn, 100 Md. App. 311, 329, 641 A.2d 913, 922 (1994).

As noted above, only certain types of lenders may claim this preemption. Since the Defendant is not a bank, federal credit union, federal savings and loan or other such depository and since the loan is not a federally-insured loan, the only pigeonhole into which the Defendant is trying to fit is one defined as follows:

> (A) The loan must be secured by a first lien on residential real property (12 U.S.C.A. § 1735f-7a(a)(1)(A) (West 1989));
>
> (B) Made after March 31, 1980 (§ 1735f-7a(a)(1)(B));

> (C) Made by a "creditor" as defined in TILA, 15 U.S.C.A § 1602(f) (West 1982) which means a person who regularly extends consumer credit which is payable by agreement in more than four installments or for which the payment of a finance charge is or may be charged and is the person to whom the debt arising from the transaction is initially payable on the face of the agreement (§ 1735f-7a(a)(1)(C); § 1735f-5(b)(2)(D));
>
> (D) Which creditor makes or invests in residential real estate loan aggregating more than $1,000,000 per year (§ 1735f-7a(a)(1)(C); § 1735f-5(b)(2)(D)).

The regulations promulgated by the Federal Home Loan Bank Board pursuant to DIDMCA defines a residential real estate loan as a loan secured by "real estate improved or to be improved by a structure or structures designed primarily for dwelling, as opposed to commercial use." 12 C.F.R. §§ 590.2(b)(6)(i) and (ii), 590.2(f) (1994). Thus, Congress intended that only a certain type of lender can take advantage of the valuable federal preemption, that is, those making a large volume of residential real estate loans. Given that Congress also intended that the modification to the state usury laws be limited, only those loans that are clearly secured primarily by residential real property can be considered.

Penn Mortgage Co., Inc. made a loan to Ms. Farran after March 31, 1980 which was secured by a first lien on her residential real property. That is undisputed. Penn Mortgage Co. admitted in its Answer to the Objection to Proof of Claim that it was a creditor within the meaning of the Truth-In-Lending Act. Thus, the missing piece is the final requirement that it made residential real estate loan aggregating more than $1,000,000 per year.

The only "evidence" produced by the Defendant in support of its claim that it is entitled to the federal preemption are two

affidavits, one from Stanley S. Goldberg who states he is the president of the Defendant and the other from R. Marc Goldberg who has been the attorney for the Defendant and its Trustee on deeds of trust.[5] Each of these witnesses simply assert that the Defendant made more than $1,000,000 worth of loans secured by residential real property in the year prior to June, 1989.[6] The Defendant produces no proof of these allegations. The Defendant's Exhibits consist of documents related solely to Ms. Farran's loan.

The Court in In re Russell was faced with a similar situation. The "proof" offered there to satisfy the lender's burden was an affidavit from the President of the lender company which stated "in conclusory terms, that the Defendant regularly extends credit payable in four or more installments, 'makes or invests in residential real property loans that aggregate more than $1,000,000 per year,' and was engaged in 'such activity' both at the time of the loan and at present." 72 B.R. at 868. The Court found that the affidavit was not "evidence" that the lender qualified for the

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[5] The third affidavit is from Marjorie A. Corwin in which she renders a legal opinion that, inter alia, the Defendant is entitled to the federal preemption because it represented to her that it made more than $1,000,000 of loans secured by residential real property in the year prior to June, 1989. This affidavit is obviously not based upon any personal knowledge whatsoever in violation of Fed. R. Civ. P. 56(e). Further, the witness renders a legal opinion which cannot be the basis of an expert opinion. Adalman v. Baker, Watts & Co., 807 F.2d 359, 365-68 (4th Cir. 1986); Federal Realty Inv. Trust v. Pacific Ins. Inc., 760 F. Supp. 533, 538 (D. Md. 1991). To the extent that the Goldbergs render legal opinions in their affidavits, they should also be ignored by this Court.

[6] Indeed, these affidavits are not made upon personal knowledge as required by Fed. R. Civ. P. 56(e). Instead, they are sworn to based upon "knowledge, information and belief."

preemption. Id. at 869.

The affidavit relied upon by the lender in Russell and the ones offered here are strikingly similar. The Defendant did not attach copies of any loans made a year prior to June, 1989 nor show that any such loans involved credit totalling more than $1,000,000 nor that these loans were secured primarily by residential real property. It simply made these assertions. Two of the affidavits produced are from lawyers who, in a conclusory way, claim that the Defendant is entitled to the preemption. These lawyers knew or should have known that the Defendant cannot meet its burden in such a way under the decisions in In re Russell and Pacific Mortgage and Inv. Group. LTD. The Court should hold the Defendant strictly to its burden of proof.

Thus, there is no dispute of material fact regarding the applicability of the federal preemption and summary judgment should be granted to Ms. Farran.

Even if the Defendant had produced enough evidence to carry its burden, the Defendant would be unable to show that some of the loans made during the relevant time period were secured by "real estate improved or to be improved by a structure or structures designed primarily for dwelling, as opposed to commercial use." 12 C.F.R. §§ 590.2(b)(6)(i) and (ii), 590.2(f) (1994)(emphasis added). The Federal Home Loan Bank Board is charged by Congress to issue rules and regulations and to publish interpretations governing the implementation of the law. 12 U.S.C.A. § 1735f-7a(f) (West 1989). In an opinion letter dated June 30, 1980, the Board

dealt with a situation similar to this where a lender secured a loan by more than one piece of property. The Board stated that the loan is secured by residential real property if the non-residential security is not the primary collateral for the loan. The lender represented that the non-residential collateral consistituted minor portion of the total value of the collateral. Federal Home Loan Bank Board Letter dated June 30, 1980 attached as Exhibit V.

In its Answer to Interrogoatory No. 1, the Defendant claimed that it made thirty-two, qualifying loans during the relevant time period. These loans total $1,019,500. See Exhibit M which is copy of the first page of each deed of trust or mortgage showing the amount of the indebtedness.[7] See Exhibit N which is a list of the loans in Exhibit M showing the loan dates and amounts of each loan. Of these loans, there are at least three that are not secured primarily by residential real property as required by 12 C.F.R. §§ 590.2(b)(6)(i) and (ii), 590.2(f) (1994).

Specifically, the Defendant made two loans to Richard C. Day on September 16, 1988 and June 2, 1989 totalling $109,000. See Exhibit N. Each of these loans were secured by two pieces of property, 302 German Hill Road in Baltimore County and 2225 Grafton Shop Road in Harford County. See Exhibits O and P. Regarding 302

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[7] By using these documents, Ms. Farran does not waive her right to contest that these loans qualify as "residential real property" loans or can be counted toward the $1,000,000 worth of loans in the year prior to her loan. She is using them only for the purpose of showing that the Defendant claims these are the "qualifying" loans, the date of each loan, and the loan amount. These documents were produced by the Defendant in response to Ms. Farran's Request for Production.

German Hill Road, the Defendant admitted in its answer to Plaintiff's Interrogatory 4 that this property was used as a catering business. Thus, it was not residential property. In its answer to Interrogatory 5, the Defendant stated that 2225 Grafton Shop Road was residential property. In response to a Request to Produce Documents at deposition, the Defendant produced a document from its records entitled "Allocation of Recordation Tax" signed by Richard C. Day in which he attests that the value of 302 German Hill Road, the commercial property, constitutes 71% of the value of both properties. See Exhibit Q.

Thus, Defendant's own documents prove that these two loans were secured primarily by commercial property. They cannot, therefore, count towards the $1,000,000 worth of loans the Defendant must have made to qualify for the preemption. Excluding these loans, the Defendant made only $910,500 in potentially qualifying loans.

This amount drops further when the loan to Steven R. and Susan Hankins dated August 10, 1988 in the amount of $50,000 is examined. See Exhibit R. That loan was secured by five different parcels. Id. Of these five, the Defendant admitted in its answer to Interrogatory 12 that three are commercial (parcel nos. 2, 3, 5, Exhibit R) and two are residential (parcel nos. 1, 4, Exhibit R). From its records, the Defendant also produced Harford County Tax Billings for that time period which show the tax assessed values of the commercial properties exceed that of the residential parcels even if the fair market value of parcel no. 1 is used. See Exhibit

S and Exhibit T (deed showing parcel no. 1 was sold to the Hankins in 1988 for $1,000,000 just eight months before the loan in question). Roger Mainster, a qualified real estate appraiser, in his report shows that the value of the residential properties versus the value of the commercial properties securing this loan is only 13.13% of the total. See Affidavit and Report attached as Exhibit U. This loan cannot, therefore, count towards the $1,000,000 worth of loans the Defendant must have made to qualify for the preemption. At best, therefore, the Defendant made only $860,500 in potentially qualifying loans.

Since the Defendant cannot prove it made more than a $1,000,000 worth of qualifying loans, it cannot exempt itself from Maryland's Interest and Usury Provisions.

C. The Notice Of Right To Cancel Is Defective

Ms. Farran is not claiming, as indicated by the Defendant, that the notice of right to cancel is defective because it fails to state the date of delivery. Defendant's Memorandum at 8. Rather, the notice is defective because it does not state that she may cancel within three days of delivery of the date of the notice of right to cancel. 12 C.F.R. § 226.23(a)(3) (1994).

A creditor is deemed to be in compliance with TILA disclosure requirements if it uses the model form created by the Federal Reserve Board. § 1604(b). A creditor may change the model form only if the changes do not delete any required information. Id. Here, however, the Defendant deleted required information, that is, one of the three events that terminates the three-day right to

rescind.

In addition, Ms. Farran refers the Court to her argument in her Motion for Summary Judgment and will not repeat it here.

There is no question of fact as to what the notice stated and did not state. Thus, summary judgment is appropriate.

D. The Defendant Never Pled Or Raised The Statute Of Limitations Under TILA Until Now

Fed. R. Civ. P. 8(c) requires a defendant to plead certain enumerated affirmative defenses including the statute of limitations. Absent prejudice to the opposing party, an affirmative defense may be raised at summary judgment even though not specially pled. EEOC v. Peterson, Howell & Heather, Inc., 702 F. Supp. 1213, 1217 n.6 (D. Md. 1989). There, however, the defendant moved to amend its answer which the Defendant here has not done. In addition, the plaintiff claimed no harm. Ms. Farran has conducted no discovery as she did not know this issue would be raised until three weeks before trial. See Abel v. Knickerbocker Realty Co., 846 F. Supp. 445 (D. Md 1994)(Court found no prejudice because the Plaintiff had conducted discovery regarding the affirmative defense and had raised it before the creditor did in her motion for summary judgment).

E. Rescission Can Be Raised Defensively At Any Time

The statute of limitations set forth in 15 U.S.C. § 1635(f) (1988) prohibits a consumer from filing an affirmative action to rescind beyond three years. But there is a well-recognized distinction between the maintenance of an original action and the assertion of a defense by way of recoupment. This distinction is

established in federal law.

> If the claim for income tax deficiency had been the subject of a suit, any counter demand for recoupment of the overpayment of estate tax could have been asserted by way of defense and credit obtained notwithstanding the statute of limitations had barred an independent suit against the government therefor. This is because recoupment is in the nature of a defense arising out of some feature of the transaction upon which the plaintiff's action is grounded. Such a defense is never barred by the statute of limitations so long as the main action itself is timely.

Bull v. United States, 295 U.S. 247, 262, 79 L.Ed. 1421, 1428, 55 S. Ct. 695, 700-01 (1935). The concept of recoupment is also established in Maryland law. Holloway v. Chrysler Credit Corp., 251 Md. 65 (1967).

In the TILA context, courts have held that a defense based upon TILA can be raised in a foreclosure or other proceeding at any time. FDIC v. Ablin, 532 N.E. 2d 379 (Ill. App. 1988); Community Nat'l Bank and Trust Co. v. Mc Clammy, 525 N.Y.S.2d 629 (App. Div. 1988); Dawe v. Merchants Mortgage and Trust Corp., 683 P.2d 796, 800-01 (Colo. Sup. Ct. 1984)(en banc). The Defendant chose to file a foreclosure against Ms. Farran in state court. Ms. Farran then instituted this bankruptcy action. Following that, the Defendant again sought to collect on the alleged debt by filing a proof of claim. Once it did, the Defendant subjected itself to any defenses "arising out of some feature of the transaction upon which [his] action is grounded." Bull v. United States, supra. The Supreme Court of Colorado correctly found that:

> In this case, petitioners' TILA claim arose contemporaneously with the execution of the deed of trust and promissory note. Both claims arose out of the same purchase agreement. Merchants brought suit to obtain

judgment on a delinquent promissory note, and petitioners asserted a right to rescind on the basis of a TILA violation.

In our view, petitioners' defense emerges from the transaction upon which Merchant's complaint is based. Petitioners here do not seek restitution for the installment payments tendered previously to Merchants; rather, they seek to avoid liability for future payments on the note. Their defense is, therefore, in the nature of recoupment rather than a claim for affirmative relief.

The purpose of TILA is to assure a meaningful disclosure of credit terms so that the consumer will be able to compare more readily the available credit terms and to avoid the uninformed use of credit. 15 U.S.C. § 1601 (1982). If recoupment claims were barred by the relevant statute of limitations, lenders could avoid the penalties of the Act by waiting, as here, three years or more to sue on the borrower's default, and thereby frustrate the fundamental policy of TILA.

Dawe v. Merchants Mortgage and Trust Corp., 683 P.2d at 800-01.

Here, the Defendant admits that the TILA claims arose out of the same transaction as that upon which it is attempting to collect through the bankruptcy. The Defendant agrees that the Truth-In-Lending Disclosure Statement was provided to Ms. Farran at the settlement. See Paragraph 11 of the Affidavit of R. Marc Goldberg attached to Defendant's Response to Summary Judgment. Mr. Goldberg further asserts that Ms. Farran purportedly waived her right to rescind in the notice of right to cancel furnished her at the settlement by signing a Certificate of Completion. Id. The Defendant admits that the $350 origination fee which Ms. Farran contests was charged at settlement and is listed in the Settlement Statement on line 801. Defendant's Exhibit 8. There is no doubt that these defenses are part and parcel of the transaction upon which the Defendant is attempting to collect when it filed its Proof of Claim.

Specifically in the Chapter 13 context, courts have held that when the creditor files a proof of claim, the debtor may defend against that claim by raising TILA as a defense at any time. In re Woolaghan, 140 B.R. 377 (Bankr. W.D. Pa. 1992); In re Kenderdine, 118 B.R. 258 (Bankr. E.D. Pa. 1990); In re Hanna, 31 B.R. 424 (Bankr. E.D. Pa. 1983); In re Galea'i, 31 B.R. 629, 633-35 (Bankr. D. Hawaii 1981); In Re Norris, 138 B.R. 467 (E.D. Pa. 1992); Jones v. Progressive-Home Fed. Sav. & Loan Ass'n, 122 B.R. 246 (W.D. Pa. 1990).

Indeed, Section 502 of the Bankruptcy Code states that a claim filed by a creditor is allowed unless a debtor objects. 11 U.S.C.A. § 502(a) (West 1993). Once an objection is made, "the court, after notice and a hearing, shall determine the amount of such claim...as of the date of the filing of the petition, and shall allow such claim in such amount, except to the extent that -- (1) such claim is unenforceable against the debtor, under...any applicable law...." § 502(b)(1)(emphasis added).

Ms. Farran filed an Objection to the Proof of Claim and Complaint in response to the Defendant's Proof of Claim. She seeks no affirmative award of damages. Instead, she seeks to show that the underlying debt and mortgage are unenforceable. This showing defeats the Proof of Claim. As an example, if the Court upholds Ms. Farran rescission, she would be entitled to the difference between the amount she has paid ($12,346.75) and the amount financed ($9,633.33) which is $2,713.42, if she were suing affirmatively. 15 U.S.C.A. § 1635(b) (West 1982); Regulation Z,

Official Staff Commentary, § 226.23(d)(2)-1. In addition, Ms. Farran would be entitled to the statutory penalty of $1,000 because the Defendant failed to honor the rescission. 15 U.S.C.A. § 1640(a) (West 1982). She is not seeking the return of any monies under TILA or the affirmative award of any penalty. See Objection to Proof of Claim.

It would defeat the purpose of Section 502 of the Bankruptcy Act and of TILA to prevent Ms. Farran from raising rescission as a defense to the creditor's attempt to collect on this loan. Rescission renders the creditor's claim "unenforceable" under 502(b)(1) and should be allowed. The TILA violations actually negate the validity of the underlying loan transaction.

As noted in the Memorandum in Support of the Motion for Summary Judgment, our Circuit Court of Appeals has held: "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. Mars v. Spartanburg Chrysler Plymouth, Inc., 713 F.2d 65, 67 (4th Cir. 1983); Jenkins v. Landmark Mortgage Corp of Va., 696 F. Supp. 1089, 1095 (W.D. Va. 1988). The consumer need not show actual harm to trigger a violation. Id. Given the remedial nature of the Act, it should be enforced here.

F. The Defendant Violated The Consumer Protection Act

The Defendant's response to this claim is that it did not charge illegal points and, therefore, could not violate the Consumer Protection Act. The Defendant, however, failed to carry

its burden of proving that it qualifies for the federal preemption. Thus, it charged points in excess of that permitted under Md. Ann. Code, Com. Law II § 12-108.

The Defendant admits that it did not tell Ms. Farran that it was charging illegal points. It, therefore, violated the Consumer Protection Act. Md. Ann. Code, Com. Law II § 13-301(3).

III. Conclusion

The Defendant did not carry its burden of proving that it is exempt from the point restriction set forth in the Maryland Interest and Usury Provisions. Since it did not and cannot prove that it qualifies for the federal preemption, it violated Md. Ann. Code, Com. Law II § 12-108.

By adding the $350 origination fee into the finance charge, the Defendant also violated TILA. By failing to include all required disclosures in the Notice of Right to Cancel, the Defendant again violated TILA. Either of these violations allows Ms. Farran to rescind defensively and to show that she owes nothing. Further, the mortgage is void and the debt is unenforceable.

In addition, the Defendant violated the Consumer Protection Act by failing to tell Ms. Farran a material fact which deceives or tends to deceive. Ms. Farran can offset the $350 against the amount sought in the proof of claim.

Elizabeth Renuart
St. Ambrose Legal Services
321 E. 25th Street

its burden of proving that it qualifies for the federal preemption. Thus, it charged points in excess of that permitted under Md. Ann. Code, Com. Law II § 12-108.

The Defendant admits that it did not tell Ms. Farran that it was charging illegal points. It, therefore, violated the Consumer Protection Act. Md. Ann. Code, Com. Law II § 13-301(3).

III. Conclusion

The Defendant did not carry its burden of proving that it is exempt from the point restriction set forth in the Maryland Interest and Usury Provisions. Since it did not and cannot prove that it qualifies for the federal preemption, it violated Md. Ann. Code, Com. Law II § 12-108.

By adding the $350 origination fee into the finance charge, the Defendant also violated TILA. By failing to include all required disclosures in the Notice of Right to Cancel, the Defendant again violated TILA. Either of these violations allows Ms. Farran to rescind defensively and to show that she owes nothing. Further, the mortgage is void and the debt is unenforceable.

In addition, the Defendant violated the Consumer Protection Act by failing to tell Ms. Farran a material fact which deceives or tends to deceive. Ms. Farran can offset the $350 against the amount sought in the proof of claim.

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