TILA SECTION 1641(G) DOES NOT APPLY RETROACTIVELY

The U.S. Court of Appeals for the Ninth Circuit recently held that a 2009 amendment to the federal Truth in Lending Act ("TILA"), codified at 15 U.S.C. § 1641(g), which contains disclosure requirements for the sale or transfer of a mortgage loan, does not apply retroactively.

A copy of the opinion is available at: Link to Opinion

The plaintiff homeowners ("Homeowners") brought a putative class action against two banks ("Banks") alleging violations of various federal and state laws and alleging claims arising out of the modification of the deed of trust for the plaintiffs' home ("Deed of Trust"). Among those claims, the Homeowners asserted that the Banks did not comply with the disclosure requirements of section 1641(g) when one of the Banks transferred the Deed of Trust to the other Bank in 2006.

As you may recall, TILA (at 15 U.S.C. 1641(g)) requires that "not later than 30 days after the day on which a mortgage loan is sold or otherwise transferred or assigned to a third party, the creditor that is the new owner or assignee of the debt" must notify the "borrower in writing of such transfer." The disclosure must also include the date of transfer, contact information of the new loan owner, and other relevant information.

Failure to comply with those requirements allows a borrower to sue to recover actual damages, a statutory penalty up to $4,000 on individual claims and up to $1 Million in a class action, plus fees and costs. See 15 U.SC. § 1640(a).

However, Congress did not enact section 1641(g) until 2009. Thus, the Homeowners argued that section 1641(g) purportedly applied retroactively.

The Ninth Circuit disagreed and held that the section 1641(g) disclosure requirements did not apply retroactively because Congress did not express any clear intent for retroactive application.

The Court held that retroactive application of statutes is generally disfavored. And, citing controlling U.S. Supreme Court precedent, the Ninth Circuit also held that the "presumption against retroactive legislation…can only be overcome where Congress expresses a clear and unambiguous intent to do so."

As the Ninth Circuit further explained, the legal effect of a statute "should ordinarily be assessed under the law that existed when the conduct took place." Thus, the Court held that if a new statutory provision, such as section 1641(g), would "impair rights a party possessed" when it previously acted, or otherwise "increase a party's liability for past conduct, or impose new duties with respect to transactions already completed," then courts may not apply a statute retroactively absent a "clear congressional intent favoring such a result."

Applying these standards to the Homeowners claims, the Ninth Circuit examined the history of section 1641(g)'s enactment and the text of the statute itself.

The Court held that retroactive application of § 1641(g) would plainly impair the Banks rights when they acted because, consistent with the law in 2006 (and the loan documents), the Banks "had a right to sell or transfer the loan without notice to the Borrower." Also, the Ninth Circuit held that retroactive application of the law would increase the Banks' liability for damages because the 2009 amendment imposed new duties, a private right of action for failure to comply with those duties, statutory damages, and the ability for a borrower to recover attorneys' fees and costs.

Given the presence of these substantial factors weighing against retroactive application of section 1641(g), the Ninth Circuit examined whether there as any evidence in the statute itself or its legislative history showing that "Congress expressed a clear and unambiguous intent" that it apply retroactively.

As the Court explained, when section 1641(g) was introduced in the U.S. Senate, the bill's sponsors stated that the TILA amendment was necessary because existing law only required notice to a borrower of a change in the servicer of their loan, and not a change in the owner of the loan.

The Ninth Circuit found "no clear indication in Section 1641(g)'s text or in its legislative history that Congress intended for it to apply to loans that had been transferred before its enactment." In addition, the Court noted that retroactive application of the statute would be absurd because if it were "given retroactive effect, the 30-day reporting period would have already lapsed for all loan transfers that occurred more than a month before enactment, and it would have been impossible for those creditors to comply with the reporting requirement."

Thus, the Court held it was unlikely that Congress would have subjected creditors to such broad liability "without at least giving them a way to comply with section 1641(g) for loan transfers that predated its enactment."

Accordingly, the Ninth Circuit held that section 1641(g) does not apply retroactively, and affirmed the lower court's ruling.