No TILA Right to Cancel for Failure to Disclose Assignment of Loan

The U.S. Court of Appeal for the Sixth Circuit recently confirmed that a mortgagee's alleged failure to notify borrowers of an assignment of the loan does not give rise to a right to cancel under the federal Truth In Lending Act (TILA).

A copy of the opinion in *Robertson v. US Bank, NA* is available at: **Link to Opinion.**

A mortgagee initiated a foreclosure action, and the borrowers responded with a "notice of rescission" to the mortgagee and the mortgagee's counsel, alleging that the mortgagee had violated the federal Truth in Lending Act and that the mortgagee lacked standing to foreclose.

Prior to the foreclosure sale, the borrowers sued the mortgagee and the mortgagee's counsel in state court, reiterating the allegations in their notice of rescission. The mortgagee removed the case to federal court, where the parties agreed to dismiss the mortgagee's counsel from the lawsuit.

The trial court subsequently granted the mortgagee's motion for summary judgment, from which borrowers appealed.

As you may recall, Congress added subsection (g) to 15 U.S.C. § 1641 in the Helping Families Save their Homes Act of 2009. Pub. L. 111-22, 123 Stat. 1658. **Section 1641(g) provides that "not later than 30 days after the date on which a mortgage loan is sold or otherwise transferred or assigned, the new owner or assignee of the debt shall notify the borrower in writing of such transfer."** See 15 U.S.C. § 1641(g).

In reaching its decision, the Sixth Circuit addressed four alleged errors raised by the borrowers:

First, the borrowers alleged that the mortgagee waived its right to remove the case to federal court by filing papers in state court, which included two written objections to borrowers' motions and an answer to the complaint.

Rejecting this argument, the Appellate Court held that the mortgagee's counsel's filings in state court did not constitute a waiver, as waiver of the right to remove "must be clear and unequivocal." See *Regis Assocs. v. Rank Hotels (Mgmt.) Ltd.*, 894 F.2d 193, 195 (6th Cir. 1990). Here, the defensive actions taken by the mortgagee's counsel did not constitute a "clear and unequivocal" waiver. The

Sixth Circuit noted that the Federal Rules of Civil Procedure contemplate the filing of an answer prior to the time for filing a removal motion. See Fed. R. Civ. P. 81(c)(2).

Going further, the Court noted that even if the mortgagee's counsel had waived its right to remove, this waiver would not be binding on the mortgagee, as **the "rule of unanimity" requires that each defendant consent to removal.** See 28 U.S.C. Section 1446(b)(2)(A); *Loftis v. United Parcel Serv., Inc.*, 342 F.3d 509, 516 (6th Cir. 2003).

Second, the borrowers alleged that they had the right to rescind the loan under TILA due to mortgagee's failure to notify them of the assignment of the deed of trust. The borrowers asserted that TILA's right of rescission should be applicable to a violation of § 1641(g).

Here, the Sixth Circuit held that **the notice requirement of § 1641(g) applies only to an assignment of the underlying debt, not to the debt instrument itself, which in this case was the deed of trust.**

Section 1641(g) would apply to the transfer of the note, but the Court noted that the note here was transferred in 2006, more than three years before § 1641(g) became law. At the time of the 2006 note transfer, there was no notice requirement in effect.

Moreover, the Court stated, even if the mortgagee had violated § 1641(g) through its assignment of the deed of trust in 2012, the borrowers still would not be permitted to rescind the loan, but rather would be limited to recovering money damages in an amount between $400 and $4,000 (although more could be recovered upon a showing of actual damages exceeding $4,000 due to the failure to notify). See 15 U.S.C. § 1640(a)(2)(A)(iv), (e).

In addition, the Court added that although the initial loan agreement in December 2005 constituted a consumer credit transaction subject to § 1635(a) of the Truth in Lending Act, **the assignment of the deed of trust from MERS to the mortgagee in 2012 did not constitute a consumer credit transaction, as neither party to the 2012 assignment was a consumer, nor was either party extended credit**. The Sixth Circuit noted that the borrowers were not a party to the 2012 assignment from MERS to the mortgagee, and this assignment did not affect the terms of the borrowers' mortgage loan.

Third, the borrowers argued that the mortgagee lacked standing because the loan documentation was allegedly inadmissible hearsay evidence.

The Sixth Circuit upheld the mortgagee's standing, holding that **the mortgagee's loan documentation was not hearsay under the "verbal acts" doctrine, as the relevant documentation, in the form of writings and statements, such as contracts, "affect the legal rights of the parties" and thus are not hearsay.** See Fed. R. Evid. 801(c). Nor was authentication an issue, the Court held, as the documents were recorded in the public records. See Fed. R. Evid. 902(1). The Court held that the endorsements on the note and allonge were sufficient to prove the mortgagee's standing.

Fourth, the borrowers alleged that the mortgagee forfeited its right to foreclose when it failed to bring a compulsory breach of contract counterclaim in response to the borrowers' Truth in Lending Act complaint.

Here, the Sixth Circuit held that the mortgagee did not forfeit its right to foreclose by failing to bring a counterclaim because ***foreclosure is not a judicial remedy*** **in Tennessee, and thus there was no reason to bring a counterclaim.** In Tennessee, a trustee may conduct a foreclosure sale without filing any court papers.

Accordingly, the trial court's summary judgment ruling in favor of the mortgagee was affirmed on all counts.