Lenders Compliance Group

Thursday, September 15, 2011

MERS, Fraudulent Practices, and TILA Time Limits to Foreclosure

A recent ruling by the U.S. Court of Appeals (Ninth Circuit), on September 7, 2011, rejected a claim by consumers to have been the victims of fraudulent mortgage loan practices because they were unable to avoid the effects of the statute of limitations on their Truth in Lending Act (TILA) claims.

The essence of the consumers' charges was that they were never properly informed of the operations of the Mortgage Electronic Registration System (MERS) and that some of MERS's activities were fraudulent. Their efforts to invoke equitable tolling and equitable estoppel were both rejected by the Court.

This class action lawsuit, Cervantes (et al) v. Countrywide (et al), is available in our Library.

The following outline is a brief description of this case.

Synopsis

- Spanish speaking consumers who were given mortgage loan documents in English were not entitled to have the statute of limitations on the Truth in Lending Act claims tolled.
- Equitable tolling was possible only for consumers who exercised due diligence but still were unable to discover the basis of their claims.
- There was no reason the consumer could not have obtained a translation of the loan documents at an earlier time.

MERS

This class action challenges origination and foreclosure procedures for home loans maintained within the Mortgage Electronic Registration System (MERS).

It is worth noting the lengthy and detailed description of MERS that the Court provides in its finding.

MERS was described by the court as a private electronic database used by lenders and servicers to track the assignment of changes in loan ownership and servicing rights.

MERS becomes the legal owner of the mortgage loan and tracks successive assignments of the loan's beneficial ownership in the database so that it is unnecessary to record the later assignments in the county land records.

However, according to the consumers, this practice impermissibly separated the trust deed or other security instrument from the loan note.

They also claimed that MERS' asserted beneficial ownership of the security instrument was a "sham" because MERS had no financial interest in the instrument. This prevented MERS from being involved in any foreclosure activities.

In addition to their state-law (Arizona) claims objecting to the foreclosure, the consumers asserted claims under the Truth in Lending Act.

Statute of Limitations in TILA

TILA claims are subject to a one-year statute of limitations that begins to run when the loan documents are signed.

According to the Court, the lawsuit had not been filed until three years after the loans were made.

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This meant that the suit was untimely unless there was some reason to excuse the lateness.

The consumers put forward two theories for this tardiness:

- equitable tolling, and
- equitable estoppel.

Equitable Tolling

The statute of limitations could be tolled - that is, suspended - for a period during which the consumers were unable to obtain information vital to their claims despite making appropriate efforts.

According to the consumers, equitable tolling was appropriate because they spoke only Spanish and were given loan documents only in English.

The court rejected this position because they had not described any circumstances beyond their control that prevented them from having the loan documents translated.

Equitable Estoppel

Equitable estoppel could have actually helped the consumers if they could show that the mortgage companies being sued had engaged in conduct over and above the claimed fraudulent scheme that prevented the consumers from filing suit within the one-year limit, the court said.

However, the consumers had merely claimed that the lenders had fraudulently misrepresented and concealed the "true facts." They had not described what those "true facts" were or how the concealment or misrepresentation exceeded the basis of their TILA claims.

As a result, the Court decided that the TILA claims were time-barred.

Conclusions

Through the filing of an amended complaint, the suit further sought to include a claim for wrongful foreclosure. The Court held that, although the consumers allege that aspects of the MERS system are fraudulent, they cannot establish that they were misinformed about the MERS system, relied on any misinformation in entering into their home loans, or were injured as a result of the misinformation.

Indeed, the Court asserted that, if anything, "the allegations suggest that the plaintiffs were informed of the exact aspects of the MERS system that they now complain about when they agreed to enter into their home loans." In effect, the claim is without basis.

Finally, the Court held that the consumers' claim "depends upon the conclusion that any home loan within the MERS system is unenforceable through a foreclosure sale," but that conclusion is "unsupported by the facts and law" on which they rely.

Thus, the Court dismissed the complaint.

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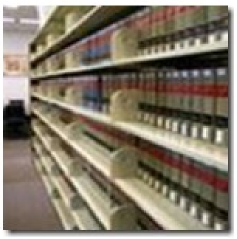

Truth in Lending - Civil Liability

Statute of Limitations - Equitable Tolling

Cervantes v. Countrywide

U.S. Court of Appeals, Ninth Circuit, No. 09-17364

September 7, 2011

Commentary: Jonathan Foxx, President and Managing Director of Lenders Compliance Group.

Labels: Cervantes v. Countrywide, Civil Liability, Equitable Estoppel, Equitable Tolling, MERS,

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Mortgage Electronic Registration Systems, Statute of Limitations, TILA, Truth in Lending Act

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