Document hosted at JDSUPRA
http://www.jdsupra.com/post/documentViewer.aspx?fid=9183d4d7-871a-45ff-be8a-7811cc843137

manatt

January 2, 2009

Ninth Circuit Holds That a Fixed Fee Is Not Precomputed Interest Under the Federal Refund Law

Brad W. Seiling
Charles E. Washburn, Jr.
Joanna S. McCallum

In a case of first impression, the Ninth Circuit has held that a fixed fee on a loan is not "interest" for purposes of a federal law requiring refunds of precomputed interest when a loan is prepaid. A creditor, therefore, is not obligated to refund a portion of a fixed fee in the event that a loan is repaid earlier than anticipated. A significant example would be points on a mortgage loan that is refinanced. *Davis v. Pacific Capital Bank, N.A.*, Ninth Circuit No. 07-56236, December 24, 2008.

The *Davis* case involved the fee charged on tax refund anticipation loans (a "RAL"), which fees are fixed and not dependent upon the date when the tax refund may be received and the loan repaid. Disclosures under the Truth in Lending Act ("TILA") were provided to Ms. Davis, including the disclosure of an annual percentage rate ("APR") based upon the estimated repayment date of the loan, as required by TILA.

Ms. Davis brought her claim under the California Unfair Competition Law (Section 17200 et seq. of the California Business and Professions Code) based upon an alleged violation of 15 U.S.C. Section 1615. Section 1615 generally provides that, if a consumer prepays a loan, the creditor must "refund any unearned portion of the interest charged to the consumer."

Ms. Davis argued that the APR was the equivalent of an interest rate and the estimated time period used to calculate the APR was the term of her loan. Accordingly, she asserted

NEWSLETTER EDITORS

Katerina Hertzog Bohannon
Partner
kbohannon@manatt.com
650.812.1364

Harold P. Reichwald
Partner
hreichwald@manatt.com
310.312.4148

OUR PRACTICE

Manatt was founded with a special emphasis on advising banking and financial services clients. Today we are one of the leading banking law firms in the United States, representing numerous banks, holding companies, foreign banks, savings institutions, mortgage lenders, finance lenders, credit card issuers, acquirers and processors and industrial loan companies ... more

. Practice Group Overview
. Practice Group Members

Manatt's Government & Regulatory professionals draw on extensive knowledge, experience and contacts to achieve our client's goals. Through its offices in Washington, D.C., Los Angeles, New York City, Sacramento and Albany, Manatt is able to provide an unparalleled breadth of public policy and advocacy services. Our substantive understanding of regulated industries and interrelationships with ... more

. Practice Group Overview
. Practice Group Members

Document hosted at JDSUPRA™
http://www.jdsupra.com/post/documentViewer.aspx?fid=9183d4d7-871a-45ff-be8a-7811cc843137

that Section 1615 requires that a portion of the fixed fee be refunded in the event of any repayment of her loan in advance of that estimated term, with the refund calculated based upon the APR. The District Court rejected her argument, and the District Court's decision was upheld on appeal by the Ninth Circuit.

The term "interest" is not defined in Section 1615. However, the Ninth Circuit noted that Section 1615 was codified within the statutory sections comprising TILA, and Regulation Z issued under TILA distinguishes between "interest," which involves a time element, and "finance charges," which term encompasses interest as well as certain other loan charges that do not involve a time element.

In the absence of further regulatory guidance with respect to Section 1615, the Ninth Circuit reviewed legislative history, and pointed out that the original version of the provision would have required a rebate of "finance charges," but the final version applied only to an "interest charge." The court reasoned that this evidenced a congressional intent to limit the scope of Section 1615 to charges in the nature of interest as that term is used in Regulation Z issued under TILA, and therefore Section 1615 would not apply to a fixed fee not involving a time element, such as the fee imposed on a RAL.

Had the court concluded that Section 1615 would apply to fixed fees, it would have raised significant concerns with respect to many fees imposed by lenders, including, in particular, points charged by a lender on a mortgage loan that may be refinanced or otherwise repaid in advance of its scheduled maturity date. The decision, therefore, is very helpful to creditors in addressing a question that had not been previously resolved by the courts.

The court also noted that fixed fees may be deemed to be "interest" for other purposes, including, among others, the provisions of federal law governing the exportation of interest rate limits by national banks.

The Manatt firm represents Pacific Capital Bank in this case. If you have any questions regarding this decision, please do not hesitate to contact any of the attorneys identified below.

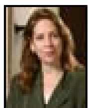
back to top

Document hosted at JDSUPRA
http://www.jdsupra.com/post/documentViewer.aspx?fid=9183d4d7-871a-45ff-be8a-7811cc843137

For additional information on this issue, contact:

Brad W. Seiling Mr. Seiling's practice focuses on complex commercial litigation in state and federal courts at the trial and appellate level. Mr. Seiling has significant bench and jury trial experience in lengthy and complicated commercial litigation matters. His trial and arbitration experience encompasses cases alleging misappropriation of trade secrets, insurance bad faith, legal malpractice, theft from safe deposit boxes, violation of federal law governing wholesale mortgage lenders, breach of a credit card co-branding agreement, forged postal money orders, and wrongful termination.

Charles E. Washburn, Jr. Mr. Washburn advises a broad range of banks, savings associations, mortgage bankers, mortgage and real estate related web sites, builders, direct marketers, telecommunications companies and other entities regarding regulatory matters. His work in this area includes assisting clients in the development of business strategies for compliance with consumer laws (including the Truth in Lending Act, GLBA and state privacy laws, the Fair Credit Reporting Act, ESIGN and Regulation E, RESPA, and Regulation B and other fair lending rules) and the preparation of consumer disclosures and loan documents. Much of his practice over the past few years has involved matters relating to electronic commerce, privacy requirements and "subprime" mortgage loans and credit cards.



Joanna S. McCallum Ms. McCallum's practice focuses on appellate matters and business litigation, specializing in the areas of health law, unfair competition and ERISA. She has represented hospital systems and other healthcare providers, multi-employer pension trusts and insurance companies in a variety of litigation and appellate matters in federal and state courts, as well as participated in environmental, financial services, securities, trade secret and real estate litigation.

ATTORNEY ADVERTISING pursuant to New York DR 2-101(f)
Albany | Los Angeles | New York | Orange County | Palo Alto | Sacramento | San Francisco | Washington, D.C.
© 2009 Manatt, Phelps & Phillips, LLP. All rights reserved.