Practical Guidance

Regulation of Seller Financing for Residential Real Estate (TX)

A Practical Guidance® Practice Note by Ian D. Ghrist, Ghrist Law Firm PLLC

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This practice note provides an overview of federal and state regulations governing seller financing of residential real estate in Texas with a focus on avoiding lender liability. Although this note is directed to lenders and their counsel, it also provides information that is helpful to borrowers and their counsel.

For further guidance, see Residential Mortgage Loan Origination Liability under Federal Law Chart (Seller Financing).

Background and Legal Framework

The Dodd-Frank Wall Street Reform and Consumer Protection Act (Dodd-Frank) was signed into law on July 21, 2010, in response to the 2008 mortgage loan crisis. See 111 P.L. 203. Dodd-Frank made sweeping changes to the Truth in Lending Act (TILA), first codified in 1968. Dodd-Frank, together with the Secure and Fair Enforcement for Mortgage Licensing Act of 2008 (SAFE Act), created the licensing requirements for Registered Mortgage Loan Originators (RMLOs). Before Dodd-Frank and the SAFE Act, mortgage loan officers often needed no licensure to practice their trade and generally had no legal duty to formally verify a borrower's ability to repay the loan. The SAFE Act requires all states to pass mortgage licensing laws meeting or exceeding federal standards. Texas passed the Texas Secure & Fair Enforcement for Mortgage Licensing Act (Texas SAFE Act or "T-Safe") in 2009 in response to the federal SAFE Act.

Dodd-Frank also made over the Real Estate Settlement Procedure Act (RESPA). RESPA was enacted in 1974 and was originally administered by the Department of Housing and Urban Development (HUD), but Dodd-Frank turned RESPA administration over to the Consumer Financial Protection Bureau (CFPB).

Codification

TILA is contained in Title I of the Consumer Credit Protection Act, as amended, found in 15 U.S.C. § 1601 et seq. RESPA, as amended, can be found in 12 U.S.C. § 2601 et seq. However, attorneys do not always cite to the U.S. Code when referring to these laws, which can cause confusion. For example, you might be reading an article about the Ability-to-Repay (ATR) rules that Dodd-Frank created and where they are referred to as Section 129C of TILA; as Title 15, Section 1639c of the U.S. Code (15 U.S.C. § 1639c); or as Section 1411 of Dodd-Frank. Those all refer to the same law. In connection with Dodd-Frank, you may also read about Regulation X (Real Estate Settlement Procedures Act) and Regulation Z (mostly TILA). Title 12, Part 1026 of the Code of Federal Regulations is also known as Regulation Z (hereinafter, Reg Z). So, if you see a citation for 12 C.F.R. § 1026, then you know that the citation comes from Reg Z. Similarly, Title 12, Part 1024 of the Code of Federal Regulations is known as Regulation X, so, 12 C.F.R. § 1024 refers to regulations related to the Real Estate Settlement Procedures Act.

In addition, the Code of Federal Regulations contains different, yet often identical, sections of TILA and Reg Z

for different agencies. So, there are, in fact, two versions of Reg Z—one for the Federal Reserve System and one for the CFPB. This gets very confusing when you are doing legal research and see both sections being cited. Chapter II of Title 12 of the Code of Federal Regulations is titled "Federal Reserve System" while Chapter X of Title 12 of same is titled "Bureau of Consumer Financial Protection." Section 226 of Title 12 is Reg Z for the Federal Reserve System while Section 1026 of Title 12 is Reg Z for the CFPB. But, if you look at the definitions, like the definition of "creditor," in 12 C.F.R. § 1026.2, you will see that it is nearly identical to the definitions in 12 C.F.R. § 226.2.

Implications for Seller Financing

Complying with this labyrinth of regulations can pose challenges to any lender, even a large bank with significant resources and compliance department. Despite the exceptions for small lenders and parties offering seller financing (see below), any lender, even one that finances only a single seller-financed transaction, can theoretically trigger liability.

When Does Dodd-Frank Apply?

The private causes of action available under TILA apply only to "any creditor who fails to comply . . . ." 15 U.S.C. § 1640(a). So, if you are not a creditor, as defined by the Code, then you can escape liability. The definition of creditor is found in 15 U.S.C. § 1602(g) (formerly 1602(f)); 12 C.F.R. § 1026.2(a)(17). Note that Section 1602(g) of the U.S. Code appears to currently refer to high-cost loans as "subsection (aa)" loans, but subsection (aa) was changed to (bb) apparently without updating Section 1602(g). A person is a creditor for Reg Z purposes when:

- A person (1) "regularly extends" consumer credit . . . and (2) is the person "to whom the obligation is initially payable"
- A person regularly extends consumer credit if it extended credit . . . "more than 5 times for transactions secured by a dwelling" in "the preceding calendar year," or a person regularly extends consumer credit if, in any 12-month period, the person "originates more than one" high-cost loan (i.e., Section 32 loan or "one or more such credit extensions through a mortgage broker")

12 C.F.R. § 1026.2(a)(17).

So, basically, Dodd-Frank applies if you do more than five owner-finance deals annually, or you do two high-cost loans in a year or one high-cost loan through a broker.

The creditor definition applies only to the "person to whom the debt arising from the consumer credit transaction is initially payable . . . ," which has been interpreted as not applying to mortgage brokers even when the broker was a creditor in an unrelated transaction. Cetto v. LaSalle Bank Nat. Ass'n, 518 F.3d 263, 269 (4th Cir. 2008). Attorneys are also generally not creditors under the TILA definition. Mauro v. Countrywide Home Loans, Inc., 727 F. Supp. 2d 145, 157 (E.D.N.Y. 2010).

Seller-Financing Exemptions for the TILA

There are two Reg Z exceptions that specifically apply to seller financing. First, anyone who seller finances three or fewer properties in any 12-month period who is not a developer and who does fully amortizing loans with good-faith ATR and meets the adjustable rate requirements is "not a loan originator." 12 C.F.R. § 1026.36(a)(iii)(4). Second, anyone who provides seller financing for only one property in any 12-month period is not a loan originator when the person is not a developer, meets the adjustable rate requirements, and "[t]he financing has a repayment schedule that does not result in negative amortization." 12 C.F.R. § 1026.36(a)(iii)(5)(iii)(A). So, basically, if you only do one seller-finance deal in a year, you do not have to do ATR. Note that the seller-finance exemptions to "loan originator" status only relate to the loan originator rules. Status as a creditor to which a TILA private cause of action can apply is different from status as a loan originator to which the loan originator rules apply.

High-Cost Home Loans and Higher-Priced Home Loans

The Difference between High-Cost Loans and Higher-Priced Loans and Why It Matters

The Home Ownership and Equity Protection Act (HOEPA) was enacted in 1994 as an amendment to TILA to address abusive practices in refinances and closed-end home equity loans with high interest rates or high fees. See Small Entity Compliance Guide – 2013 Home Ownership and Equity Protection Act (HOEPA) Rule, Consumer Financial Protection Bureau (May 2, 2013). The Dodd-Frank Act expanded HOEPA coverage to include purchase money mortgages and home equity lines of credit. Dodd-Frank also imposed extensive new requirements for HOEPA loans, like the requirement that all HOEPA loan borrowers must complete an approved homeownership counseling program. The Dodd-Frank Act uses the term "high-cost mortgages," in Title XIV, Subtitle C, to refer to loans subject to HOEPA. These high-cost HOEPA loans are also referred to as "Section 32 loans" because the section of Reg Z

covering such loans is 12 C.F.R. § 1026.32. Reg Z has another category of loans called "higher-priced mortgage loans" found in 12 C.F.R. § 1026.35. (These are sometimes referred to as "Section 35 loans.")

For purposes of this practice note, you need only to understand that high-cost loans have much higher interest rates and fees than higher-priced loans. High-cost loans also have much more burdensome rules and regulations attached. While lenders generally consider the rules and regulations for higher-priced loans to be an annoyance, they typically consider the rules and regulations for high-cost loans to be extremely cumbersome and potentially deal-breaking. High-cost loan deals often fall apart due to the borrower's inability to complete all requirements, like obtaining a homeownership counseling program completion certificate and delivering it to the lender. Because doing even one high-cost loan can break a small lender's de minimis Dodd-Frank exemption, many seller financiers avoid high-cost loans like the plague.

Pre-loan Counseling and Unintentional HOEPA Violations

The pre-loan counseling requirements are found in 15 U.S.C. § 1639(u). The Section 1640(a)(4) damages can apply to the failure to meet the counseling requirement, so even though counseling certificates are likely the easiest HOEPA rule to overlook, they can be important. Creditors and assignees in high-cost mortgages can, generally, cure violations of Section 129 of the Dodd-Frank Act by the procedures in 12 C.F.R. § 1026.31(h) if the creditor acted in good faith or the violation was unintentional.

Damages in a TILA Private Cause of Action

A private cause of action exists for TILA violations. Generally, mortgage lending damages are actual damages plus twice the amount of any "finance charge," capped at $4,000.00. 15 U.S.C. § 1640(a)(2)(A)(i). The term finance charge in TILA is a term of art, defined in 12 C.F.R. § 1026.4 and 15 U.S.C. § 1605. Finance charge generally means whatever the borrower pays to get the loan, including interest, points, origination fees, etc. Attorney's fees and costs are also generally recoverable by the borrower on a TILA claim. The Section 1640(a)(2)(A)(i) damages are not particularly scary due to the cap on potential liability. Lenders have something to fear, however, in the uncapped Section 1640(a)(4) damages. The (a)(4) damages are "[A]n amount equal to the sum of all finance charges and fees paid by the consumer, unless the creditor demonstrates that the failure to comply is not material." Section (a)(4) damages only apply for violations of Section 129 of TILA (codified at 15 U.S.C. § 1639) (laundry list of TILA requirements), Section 129B(c) ¶ (1) or (2) (codified at 15 U.S.C. § 1639b(c)) (prohibition on steering incentives for mortgage originators), or Section 129C(a) (codified at 15 U.S.C. § 1639c(a)) (ATR requirements). The standard TILA damages (15 U.S.C. § 1640(a)(1) and (a)(2)) have a class action damages cap for the statutory portion of damages.

Creditor Defenses

Borrower fraud or deception can be a defense to a TILA cause of action. 15 U.S.C. § 1640(l). Creditors cannot be liable, generally, if the violation results from a bona fide error, despite reasonable procedures designed to avoid such errors. 15 U.S.C. § 1640(c). This generally includes clerical and calculation errors, but not errors of legal judgment. Id. Good-faith compliance with CFPB rules or interpretations can also be a defense. 15 U.S.C. § 1640(f).

Statute of Limitations on TILA Claims

TILA claims related to mortgage loan origination have a one-year statute of limitations, unless the three-year exception applies. TILA § 130; 15 U.S.C. § 1640(e). The three-year exception applies to TILA Section 129 (codified at 15 U.S.C. § 1639) (a laundry list of various TILA requirements), TILA Section 129B (codified at 15 U.S.C. § 1639b) (mostly the prohibition on steering incentives for mortgage originators), and TILA Section 129C (codified at 15 U.S.C. § 1639c) (mostly the ATR rules).

From the foregoing information on private causes of action damages under TILA and the statute of limitations on those damages, you probably figured out which parts of TILA lenders worry most about—Sections 129, 129B, and 129C. In other words, lender's primary liability concerns include (1) the ATR rules, (2) the steering incentives, and (3) the laundry list of TILA requirements.

The Ability-to-Repay (ATR) Rules

In a nutshell, these rules require lenders to investigate whether their borrowers have the ability to repay a loan before the lender gives the loan. Congress found that lenders gave loans to borrowers who had no hope of ever repaying the loan only to sell the loan to a securitized fund and, thus, escape liability when the borrower inevitably defaulted. Congress found that putting such bad debt into securities that retirement funds purchased put the American public's nest eggs in jeopardy. The ATR rules are intended to address this problem. Now, doing ATR, generally, means checking the borrower's income, assets, credit, expenses,

and ability to repay the loan. Lenders must do this or face a private cause of action under TILA.

Credit Checks

Credit checks are part of the ATR rule. 15 U.S.C. § 1639c(a). However, credit checks are not necessarily required if the lender uses other reasonably reliable third-party sources like rental payment history or public utility payments. 12 C.F.R. § 1026.43 requires that third-party records be used to verify ability to repay. Official interpretation 12 C.F.R. § 1026.43(c)(3)–(7) states that "to verify credit history, a creditor may, for example, look to credit reports from credit bureaus or to reasonably reliable third-party records that evidence nontraditional credit references, such as evidence of rental payment history or public utility payments."

Steering Incentives

"Before the financial crisis, many mortgage borrowers were steered towards risky and high-cost loans because it meant more money for the loan originator," said CFPB Director Richard Cordray. "These rules will hold loan originators more accountable by banning the incentives that led so many of them to direct consumers toward disaster."

Qualified Mortgage Loans (QM Loans)

QM loans are presumed to comply with the ATR rules. Accordingly, the QM loan rules create a safe harbor for lenders. If lenders generate QM loans, then generally, such lenders have no need to fear ATR-related TILA lawsuits. The QM rules are largely found at 12 C.F.R. § 1026.43(e) (Reg. Z) and 15 U.S.C. § 1639c. Generally, QM loans cannot have an interest-only period, negative amortization, balloon payments, or terms longer than 30 years, among other things. Checking a borrower's debt-to-income ratio (DTI) is particularly important for small creditors hoping to generate QM loans. Generally, higher-priced loans (as defined in 12 C.F.R. § 1026.43(b)(4)) receive only a rebuttable presumption of ATR compliance while non-higher-priced loans receive a conclusive presumption of compliance—a true safe harbor. A comprehensive explanation of the QM loan rules goes beyond the scope of this article. Hire a competent RMLO to help you generate QM loans.

Appraisal Rules

Appraisal requirements are in 15 U.S.C. § 1639e and 12 C.F.R. § 1026.35. They are generally not required for QM loans. 15 U.S.C. § 1639c.

For further discussion, see Ability to Repay Rule and Qualified Mortgage Standard.

Mortgage Note Buyers/ Assignees

Mortgage note buyers care greatly about the statute of limitations on TILA claims. Even badly originated loans with subpar paperwork can become marketable after enough time passes. In the mortgage loan buying industry, sometimes referred to as the secondary market, this passage of time is referred to sometimes as "seasoning." Prospective note buyers look favorably on the purchase of seasoned notes not just because the passage of time can cure origination deficiencies, but also because a solid payment history in the initial years demonstrates the borrower's ability to repay better than any form of pre-origination underwriting. Mortgage underwriting generally refers to the process of measuring risk exposure from the lender's standpoint, including analysis of the borrower's ability to repay the loan.

If you do a large volume of owner financing and hope to resell notes or packages of notes into the secondary market, then paying attention to assignee liability is of critical importance. Assignees never totally escape exposure due to limitations because, under 15 U.S.C. § 1640(k), the borrower can always raise a Section 1639b(c) (steering incentives) or Section 1639c(a) (ATR) claim, regardless of limitations. However, borrowers can only raise a claim under Section 1640(k) that would normally be barred by limitations "as a matter of defense by recoupment or set off" in a creditor's or assignee's "judicial or nonjudicial foreclosure . . . or any other action to collect the debt." In other words, the borrower cannot file a private cause of action that survived limitations due to Section 1640(k) against the lender. The borrower can only use such a claim to offset the amount owed to the lender in a foreclosure or other suit by the lender against the borrower.

Assignee Liability

Assignees of mortgage loans are generally only liable for TILA violations when "the violation for which such action or proceeding is brought is apparent on the face of the disclosure statement." 15 U.S.C. § 1641(a), (e). Under Section 1641(c), assignees always take the mortgage subject to rescission claims under Section 1635. Assignees of HOEPA high-cost loans (TILA § 103(bb)) (15 U.S.C. § 1602(bb)) are "subject to all claims and defenses" that the original creditor is subject to "unless the . . . assignee demonstrates . . . that a reasonable person exercising ordinary due diligence, could not determine" that the loan was a high-cost mortgage. 15 U.S.C. § 1641(d)(1). Any person who assigns a high-cost loan "shall include a prominent notice of the potential liability." 15 U.S.C. § 1641(d)(4).

Seller-Finance Exemptions for the Truth in Lending Act

There are two Reg Z exceptions that specifically apply to seller finance. First, anyone who seller finances three or fewer properties in any 12-month period who is not a developer and who does fully amortizing loans with good-faith ATR and meets the adjustable rate requirements is not a loan originator. 12 C.F.R. § 1026.36(a)(iii)(4). Second, anyone who provides seller financing for only one property in any 12-month period is not a loan originator when the person is not a developer, meets the adjustable rate requirements, and "[t]he financing has a repayment schedule that does not result in negative amortization." 12 C.F.R. § 1026.36(a)(iii)(5). So, basically, if you only do one seller-finance deal in a year then you do not have to do ATR. Note that the seller-finance exemptions to loan originator status only relate to the loan originator rules. Status as a creditor to which a TILA private cause of action can apply is different from status as a loan originator to which the loan originator rules apply.

What Are the SAFE Acts and Registered Mortgage Loan Originators (RMLOs)?

As noted above, the federal SAFE Act went into effect on July 30, 2008. This law requires all states to pass mortgage licensing laws meeting or exceeding federal standards. Texas passed the Texas SAFE Act in 2009 in response to the federal SAFE Act. Tex. Fin. Code § 180.051 et seq.; see also Tex. Fin. Code § 156.001 (Residential Mortgage Loan Company Licensing and Registration Act). The SAFE Act gave rise to the Nationwide Mortgage Licensing System and Registry (NMLS). The NMLS is a database for licensure to conduct mortgage lending business. A licensee in Texas under the NMLS is commonly referred to as an RMLO. Generally, to become an RMLO requires education, testing, and a background check.

When Do I Need an RMLO to Provide Seller Financing in a Sale of Residential Real Estate?

Usually, when you seller finance "no more than five residential mortgage loans" in "any 12-consecutive-month period" then you are exempt from T-Safe. Tex. Fin. Code § 180.003(a)(5), (6); Tex. Fin. Code § 156.202(a-1)(3). If you are exempt and do not have to use an RMLO, then you should seriously consider using an RMLO anyway, to ensure you comply with the myriad of other laws that may apply, even if T-Safe does not. Under Tex. Fin. Code § 156.201(a), "A person may not act in the capacity of, engage in the business of, or advertise or hold that person out as engaging in or conducting the business of a residential mortgage loan company in this state unless the person holds an active residential mortgage loan company license, is registered under Section 156.2012, or is exempt under Section 156.202." Essentially, if you "engage in business as a residential mortgage loan originator with respect to a dwelling located in [Texas]," you must have a Texas RMLO license registered with the NMLS. Tex. Fin. Code § 180.051(a). Attorneys are exempt from RMLO registration, but only when they negotiate the terms of a residential mortgage loan on behalf of a client as an ancillary matter unless the attorney takes "a residential loan application," and "offers or negotiates the terms of a residential mortgage loan." Tex. Fin. Code § 180.003(a)(3). You can also offer or negotiate the terms of a residential mortgage loan "with or on behalf of an immediate family member" without needing to become an RMLO. Tex. Fin. Code § 180.003(a)(2). In sum, if you do more than five owner-finance deals in a year, then you have to use an RMLO. If you use an RMLO, you should avoid taking applications and negotiating the loan terms with the borrowers—let the RMLO do that. Tex. Fin. Code § 180.002(19)(A) (defining an RMLO as an individual that takes a residential mortgage loan application or offers or negotiates the terms of a residential mortgage loan).

Texas has a plethora of options for enforcement of T-Safe violations. Mortgage applicants, however, are limited to the statutorily authorized private civil cause of action, under T-Safe, for "recovery of actual monetary damages and reasonable attorney's fees and court costs" together with "an action to enjoin a violation." Tex. Fin. Code § 156.402. (These actions are not commonly brought, however, because the damages model is not attractive and even though an action to enjoin a violation can be brought by a private person, such an action is really designed with the attorney general's office in mind.)

RESPA

When Does the RESPA Apply?

RESPA was enacted in 1974 and, like many statutes, received a makeover from the Dodd-Frank Act in 2010. RESPA was originally administered by HUD, but Dodd-Frank turned RESPA administration over to the CFPB. The CFPB promptly replaced the HUD-1 Statements and Good Faith Estimates (GFEs) that everyone had become accustomed to seeing at nearly every real estate closing with the descriptively named Closing Disclosure and Loan Estimate. While RESPA primarily governs the Closing

Disclosures and Loan Estimates used at most real estate closings, RESPA also, in 12 U.S.C. § 2605, regulates mortgage loan servicers, particularly servicers of "federally related mortgage loans." 12 U.S.C. § 2605. A federally related mortgage loan is defined at 12 U.S.C. § 2602(1); 12 C.F.R. § 1024.2. Federally related mortgage loans mostly consist of loans for residential property that are insured by the federal government or originated by an entity regulated by the federal government but can also consist of loans by any creditor (including seller financiers) that makes or invests in residential real estate loans aggregating more than $1,000,000.00 per year. 12 C.F.R. § 1024.2(1)(ii)(D). A mortgage broker can originate a seller-financed loan without the loan becoming a "federally related loan" if the loan is not intended for assignment to an entity that originates federally related loans. 12 C.F.R. § 1024.2(1)(ii)(E).

RESPA Exemptions

Business purpose loans, temporary financing (like certain construction loans), vacant land loans, and some loan modifications where a new note is not required are all exempt from RESPA coverage. 12 C.F.R. § 1024.5(b).

Private Causes of Action under RESPA

Private causes of action exist only for certain categories of RESPA violations. Section 6 of RESPA (12 U.S.C. § 2605) (rules regarding mortgage loan servicing and qualified written requests for information from borrowers) allows a private action to recover actual damages and "any additional damages, as the court may allow, in the case of a pattern or practice of noncompliance . . . in an amount not to exceed $2,000" and costs and attorney's fees. 12 U.S.C. § 2605(f). The circuit courts are split over whether Section 10 of RESPA (12 U.S.C. § 2609) (limiting lender requirements for advance escrow deposits) creates a private cause of action. The Fifth Circuit, which includes Texas, subscribes to the majority view that no private cause of action exists for violations of Section 10 of RESPA. State of La. v. Litton Mortg. Co., 50 F.3d 1298, 1301 (5th Cir. 1995). An express private cause of action exists for violations of Section 8 of RESPA (12 U.S.C. § 2607) (Prohibition against kickbacks and unearned fees), including recovery of "three times the amount of any charge paid for such settlement service" and "court costs of the action together with reasonable attorney's fees." 12 U.S.C. § 2607(d)(2), (5). Section 9 of RESPA (12 U.S.C. § 2608) prohibits sellers from telling the buyer which title company to purchase title insurance from and provides a private cause of action to buyers of "three times all charges made for such title insurance." 12 U.S.C. § 2608(b). Limitations on RESPA private causes of action are one year for Section 2607 or 2608 violations and three years for Section 2605 violations. 12 U.S.C. § 2614. While private causes of action under RESPA are limited to certain sections of RESPA, the government has broad authority to enforce RESPA.

TILA-RESPA Integrated Disclosure Rule (TRID)

TRID is a rule created by the CFPB, pursuant to Dodd-Frank, to combine existing disclosure requirements, implement new Dodd-Frank disclosure requirements, and guide entities making the transition to the new disclosures. TRID essentially created and governs, together with amendments to Reg Z and Reg X, the Closing Disclosure and the Loan Estimate. Most of the rules regarding the use of these forms are part of TRID. TRID can be found in the Federal Register at 78 Fed. Reg. 79730. TRID aims to simplify and clarify real estate closings for borrowers. TRID requires that the Loan Estimate be delivered or placed in the mail no later than the third business day after receiving the consumer's application and that the Closing Disclosure be provided to the consumer at least three business days prior to consummation of the transaction. TRID applies to creditors as defined by Reg Z, so persons making five or fewer mortgages in a year are generally exempt, though RESPA would still apply to them if the deal involves a "federally related mortgage loan."

For further discussion, see TRID Loan Estimate, TRID Closing Disclosures, and TRID Disclosure and Closing Process.

TRID Rescission Claims

Borrowers have, under 15 U.S.C. § 1635, "an unconditional right to rescind for three days, after which they may rescind only if the lender failed to satisfy the Act's disclosure requirements. But this conditional right to rescind does not last forever. Even if a lender never makes the required disclosures, the 'right of rescission shall expire three years after the date of consummation of the transaction or upon the sale of the property, whichever comes first.' 15 U.S.C. § 1635(f)." Jesinoski v. Countrywide Home Loans, Inc., 135 S. Ct. 790, 792 (2015). The borrower does not need to file suit to rescind. Id. The borrower can rescind merely by notifying the creditor of the borrower's intention to rescind. Id.

For a full discussion, see TILA-RESPA Right of Rescission.

Liability for Unfair, Deceptive, or Abusive Acts and Practices (UDAAPs)

"Under § 5536(a)(1)(B)[of Title 12 of the U.S. Code], '[i]t shall be unlawful for any *covered person or service provider* to engage in any unfair, deceptive, or abusive act or practice' (emphasis added)." Consumer Fin. Prot. Bureau v. Access Funding, LLC, 270 F. Supp. 3d 831, 845 (D. Md. 2017). What constitutes an unfair, deceptive, or abusive act and practice remains open to some debate. See 11 U.S.C. § 5531 (providing limitations on what the CFPB may declare to be "unfairness" or "abusive" yet not on whether a particular act or practice is "deceptive"). Arguments that the legal standard for unfair, abusive, or deceptive conduct is unconstitutionally vague have failed. Consumer Fin. Prot. Bureau v. ITT Educ. Services, Inc., 219 F. Supp. 3d 878, 904 (S.D. Ind. 2015). There is no "language of Dodd-Frank explicitly providing for a private cause of action for unfair, deceptive, or abusive acts or practices." Beider v. Retrieval Masters Creditors Bureau, Inc., 146 F. Supp. 3d 465, 472 (E.D.N.Y. 2015). Moreover, "courts have commonly declined to read private causes of action into provisions of Dodd-Frank that do not explicitly provide for them." Beider v. Retrieval Masters Creditors Bureau, Inc., 146 F. Supp. 3d 465, 472 (E.D.N.Y. 2015). UDAAP civil penalties can reach $5,000 per day for violations, $25,000 per day for reckless violations, and $1,000,000 per day for knowing violations. 12 U.S.C. § 5565(c)(2). For small lenders, however, the CFPB is supposed to take into account "the size of financial resources . . . of the person charged" as well as "the number of products or services sold or provided." 12 U.S.C. § 5565(c)(3)(A), (C). So, despite the lack of a private cause of action for UDAAP violations and the relative lack of interest of the CFPB in cracking down on small and local seller-finance lenders given their much larger concerns, the potential size of a UDAAP civil fine causes some degree of cause for concern.

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