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Federal Loan and Loan Servicing Regulations

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RESPA

The Real Estate Settlement Procedures Act ("RESPA") applies only in cases involving a "federally related mortgage loan" as defined by 12 U.S.C. 2602(1). Pursuant to 12 U.S.C. 2602(1)(A) and (B), federally related mortgage loans are defined as those which "are secured by a first or subordinate lien on residential real property (including individual units of condominiums and cooperatives) designed principally for the occupancy of from one to four families" and fall into one of the four following categories:

> (1) those made, in whole or in part, by lenders that are regulated or insured by any agency of the Federal Government;
> (2) those made, in whole or in part, with an agency of the Federal Government or housing and urban development program or any officer connected with any agency of the Federal Government or federal housing program;
> (3) those made by any lender that intends to sell them directly or indirectly, to the Federal National Mortgage Association or the Government National Mortgage Association; and
> (4) those made by certain private lenders that loan or invest more than $1,000,000 annually in residential real estate, except that for the purpose of the Act, lenders do not include any agency or instrumentality of any State.

An individual who makes a federally related mortgage loan under RESPA is required to provide certain disclosure "to each person who applies for the loan, at the time of application for the loan, whether the servicing of the loan may be assigned, sold, or transferred to any other person at any time while the loan is outstanding." 12 U.S.C. § 2605(a). The regulations under Title 24 (Housing and Urban Development) require a disclosure statement be given within three business days from the time an application for a mortgage servicing loan is submitted. 24 C.F.R. § 3500.21(b). The following information must be disclosed within three business days pursuant to 24 C.F.R. § 3500.21(b)(3): i) whether the servicing of the loan may be assigned, sold or transferred to any other person at any time while the loan is outstanding and ii) the percentages (rounded to the nearest quartile (25%)) of mortgage servicing loans originated by the lender in each calendar year for which servicing has been assigned, sold, or transferred for such calendar year.

In addition to the preliminary disclosure mandated by 24 C.F.R. § 3500.21(b)(3), lenders (transferors) are required to notify borrowers of any "assignment, sale, or transfer of the servicing rights . . . not less than 15 days before the effective date of transfer." See, 12 U.S.C. § 2605(b) and 24 C.F.R. § 3500.21(d). The notice must be made at least 15 days prior to the effective date of the transfer of servicing (12 USC § 2605(b)(2)(A)), but can be within 30 days after if the transfer follows termination of a servicing contract for cause, bankruptcy of the servicer, or appointment of a receiver or conservator. 12 USC § 2605(b)(2)(B) and 24 C.F.R. § 3500.21(d)(2)(ii). No notice is required to be given if the notice is given at the closing thereby satisfying the requirements of 12 USC § 2605(b)(2)(C) and 24 C.F.R. § 3500.21(d)(2)(iii).

The notice must contain the date of the transfer, the name, address, and toll-free number of the transferee, a toll-free number of the transferor and transferee where the borrower can ask questions, the date on which payments are to go to the transferee instead of the transferor, information related to disability and other optional insurance, and a statement that no terms of the loan not directly related to servicing will be changed. 12 USC § 2605(b)(3) and 24 C.F.R. § 3500.21(d)(3).

Similarly, a transferee to whom the servicing of a federally related mortgage loan is assigned, sold, or transferred must notify the borrower of any such assignment, sale, or transfer within 15 days after the effective date of the transfer with the same exceptions that apply to the transferor's notice requirements. 12 U.S.C. § 2605(c)(2)(a) and (b). Notice must contain the same contents as the transferors notice. 12 U.S.C. § 2605(c)(3). The transferor and the transferee of the loan are permitted to combine notices if the notice is sent not less than fifteen days before the effective date of the transfer of loan servicing. 24 C.F.R. § 3500.21(d)(2)(i)(C).

No late fees may be assessed for 60 days after the transfer for timely payments made by the borrower to the transferor rather than the transferee. 12 USC § 2605(d). Moreover, all servicers have duties to acknowledge written inquiries from borrowers within 20 days. 12 USC § 2605(e).

Damages recoverable in suits brought by individuals under RESPA are the actual damages to the borrower and additional damages for a pattern of noncompliance capped at $1,000. 12 USC § 2605(f)(1). For class actions, damages are actual damages to each borrower of the plaintiff class and additional damages for a pattern of noncompliance capped at $1,000 per class member, with total damages capped at the lesser of $500,000 or 1% of the servicer's net worth. 12 USC § 2605(f)(2).

There are certain exemptions to the requirements of RESPA and the regulations under Title 24 (Housing and Urban Development). 24 CFR 3500.5(b). Specifically, a bona fide transfer of a loan obligation in the secondary market is not covered RESPA. 24 CFR 3500.5(b)(7). Pursuant to 24 CFR 3500.5(b)(7), "[i]n determining what constitutes a bona fide transfer, HUD will consider the real source of funding and the real interest of the funding lender. Mortgage broker transactions that are table-funded are not secondary market transactions. Neither the creation of a dealer loan or dealer consumer credit contract, nor the first assignment of such loan or contract to a lender, is a secondary market transaction." A table funded loan is one in which "a loan is funded by a contemporaneous advance of loan funds and an assignment of the loan to the person advancing the funds." 24 C.F.R. § 3500.2. See also, *Moreno v. Summit Mortg. Corp.*, 364 F.3d 574 (5th Cir. 2004).

In *Moreno*, the Morenos closed their loan with Summit Mortgage Corporation**.** 364 F.3d at 575**.** Summit assigned the loan to First Nationwide Mortgage Corporation. *Id.* Summit and First Nationwide had an agreement governing the sale of loans by Summit to Nationwide. *Id.* Summit and First Nationwide had an agreement whereby First Nationwide issued a "commitment confirmation" if the parties agreed on a purchase price. *Id.* After issuance of the commitment, Summit was obligated to tender the loan for purchase to First Nationwide, but First Nationwide was not required to purchase the loan and could reject the loan for failure to meet the requirements of a "Lender Guide." *Id.* The court held that the assignment of the loan to First Nationwide was a secondary market transaction. *Id.* at 577**.** In so holding, the court noted that the original lender did not fund the loan with money from the assignee but instead took out a loan for which it was solely responsible and the loan was closed in the name of the original lender and not in the name of the assignee. *Id.* Therefore, the court concluded that the sale of a loan was a secondary market transaction even though the lender and the purchaser of the loan may have agreed to the sale before closing. *Id*.

Accordingly, the factors to be considered in determining whether a purchase of a mortgage constitutes a bona fide secondary market transaction are as follows: whether the lender closed in its own name, whether the lender used its own line of credit or was solely responsible for the funds used to close the loan, and whether the purchaser was obligated to purchase the mortgage. *Pierce v. Novastar Mortg*., Inc., 2007 U.S. Dist. LEXIS 28944, 11-12 (D. Wash. 2007).

TILA

The Truth-in-Lending Act ("TILA"), 15 U.S.C.S. § 1601 et seq., is a federal statutory scheme governing the terms and conditions of consumer credit. Its purpose is "to assure a meaningful disclosure of credit terms so that the consumer will be able to compare more readily the various credit terms available to him and avoid the uninformed use of credit, and to protect the consumer against inaccurate and unfair credit billing and credit card practices." 15 U.S.C.S. § 1601. Pursuant to TILA, creditors are required to make certain disclosures in writing. 15 U.S.C. § 1638.

TILA requires written disclosure of the annual percentage rate, the amount financed, the finance charge, and certain other features of the loan. 15 U.S.C. § 1638(a). The required disclosures also include, but are not limited to, descriptions of the payment schedule, any demand feature, the total sale price, the presence of a prepayment penalty, late fees, the security interest, and certain other fees. 15 U.S.C. § 1638(a) and 12 C.F.R. § 226.18.

For loans used to buy homes that are governed by RESPA, the lender normally must deliver or mail good faith estimates of these TILA disclosures within three business days after receiving a written loan application. 15 U.S.C. § 1638(b)(2), 12 C.F.R. §§ 226.17, 226.19(a). For most closed-end refinance mortgages, however, a lender can postpone making TILA disclosures until any time before the credit is extended 15 U.S.C. § 1638(b) and 12 C.F.R. § 226.17(b).

However, lenders under TILA must provide individual disclosures pertaining to variable-rate transactions before the customer pays application fees or before the consumer pays a non-refundable fee, whichever is earlier. 12 C.F.R. § 226.19(b). These disclosure requirements include copious generic disclosures about every variable product in which the customer expresses an interest as well as notice to the customer that she/he has inquired about a variable-rate loan. 12 C.F.R. § 226.19(b). When a creditor solicits a loan application by phone or through an intermediary agent or broker, however, it may deliver the disclosures or put it in the mail no later than three business days following receipt of the application. 12 C.F.R. § 226.19(b).

There is generally no ongoing duty of disclosure under TILA, but if disclosures given prior to the loan become inaccurate prior to the loan, the creditor must update the disclosures prior to consummating the transaction. 12 CFR 226.17(e) and (f). If any of the initial disclosures required by 15 USC §§ 1631 et. Seq. become inaccurate as a result of subsequent events or agreements, the inaccuracy does not create liability under the Act. 12 CFR 226.17(e) and 15 USC § 1634.

However, under 15 USC § 1639 special disclosures are required for certain home mortgages and the creditor must make new disclosures regarding them. Under the Home

Ownership and Equity Protection Act ("HOEPA"), federal disclosure law imposes stricter disclosure requirements on certain high-cost residential mortgages. Specifically, this act covers mortgages with an "annual percentage rate at consummation of the transaction that will exceed by more than 10 percentage points the yield on Treasury securities having comparable periods of maturity on the fifteenth day of the month immediately preceding the month in which the application for the extension of credit is received by the creditor; or the total points and fees payable by the consumer at or before closing will exceed the greater of (i) 8 percent of the total loan amount; or (ii) $ 400." 15 USCS § 1602(aa).

Such loans require added disclosures at least three days before closing. 15 USC § 1639(b). The advance disclosures include the final APR, the amount of individual monthly payments, the amount of any balloon payment, the principal borrowed and fees for any credit insurance or debt-cancellation policy. 15 USC § 1639(a) and 12 C.F.R. § 226.32(c). Lenders must notify borrowers in writing that they could lose their homes upon default. 15 USC § 1639(a)(1)(B) and 12 C.F.R. § 226.32(c)(1). Similarly, borrowers must be advised that they do not have to accept the loans just because they submitted loan applications or received disclosures. 15 USC § 1639(a)(1)(A). For variable-rate HOEPA loans, lenders must also advise borrowers that their interest rates and monthly payments could increase and provide them with their maximum monthly payment if the loan becomes fully indexed. 15 USC § 1639(a)(2).

It is illegal for HOEPA loans to contain certain terms, because these terms create an unreasonable risk of foreclosure when combined with an already high-cost, high-fee loan. 15 USC § 1639(c) – (l). Prohibited terms include points on loan amounts refinanced, default interest rates above the pre-default rate, balloon payments, negative amortization, prepayment penalties and extension of credit without consideration of the borrowers' ability to repay. 15 USC § 1639(c) – (l).

The liability of assignees is governed by 15 U.S.C.S. § 1641. An action against an assignee of a loan secured by real property for damages can be maintained only if the alleged violations are "apparent on the face" of the TILA disclosure statement. 15 U.S.C.S. § 1641(a). However, a loan servicer is not treated as an assignee. 15 USC § 1641(f).

Question 3

ARE THERE ANY FEDERAL LAWS OR REGULATIONS THAT APPLY TO FORBEARANCE AGREEMENTS A LENDER MIGHT ENTER INTO WITH A BORROWER, AND DOES A PURCHASER OF A MORTGAGE HAVE ANY OBLIGATION UNDER FEDERAL LAW (APART FROM GENERAL CONTRACT PRINCIPALS) TO HONOR A FORBEARANCE AGREEMENT?

A forbearance agreement is subject to the principles governing contractual interpretation. *Bank United v. United States*, 80 Fed. Appx. 663 (Fed. Cir. 2003). In *Bank United*, the plaintiff bank and its holding companies sued the federal government, alleging that the government breached promises it made in a forbearance agreement. *Id*. at 664. The court applied principles of contractual interpretation in holding that defendant breached the forbearance agreement it had with plaintiff. *Id*. at 665. Similarly, in *Tydings-Monsour v. EMC Mortg. Co*. (In re Tydings-Monsour), 2006 Bankr. LEXIS 2455 (Cent. Dist. Ca. 2006), the court dismissed plaintiff's claim that the foreclosure sale was invalid because the sale was repeatedly postponed. The dismissal was based upon the Court's application of state contractual principles to the terms of the forbearance agreement. *Id*. at 15.

The concept of forbearance agreements also applies to thrifts. However, such agreements lost their sanctity after the passing of the Financial Institutions Reform and Recovery Act (FIRREA). Congress, under the Garn-St. Germain Depository Institutions Act of 1982, undertook a program to encourage private parties to take over ailing thrifts. In *Ensign Financial Corp. v. Federal Deposit Ins. Corp*., 785 F. Supp. 391 (D.N.Y. 1992) the plaintiffs entered into an agreement with Federal Savings and Loan Insurance Corporation to acquire ailing thrifts. Defendant government recognized the goodwill created through the acquisitions as an asset and undertook to allow for its repayment through a forbearance agreement. *Id*. at 396. Eventually, on the enactment of the Financial Institutions Reform and Recovery Act (FIRREA), the Defendant failed to adhere to its forbearance agreements. *Id*. at 397-398. The court held that the FIRREA allowed the defendant to abrogate the forbearance agreements. *Id*. at 402. Nevertheless, the court reserved the plaintiffs' rights to proceed against the defendant under contract law (frustration of purpose and rescission). *Id*. at 406.

Because forbearance agreements are treated under standard contracts doctrines, these principles can be applied to the question of whether an assignee of a loan is legally obligated to abide by the terms of a forbearance agreement entered into by the assignor with the debtor. In *Art Metal Const. Co., etc. v. Lehigh Structural Steel Co.*, 116 F.2d 57 (3 Cir. 1940), the Court dealt with the basic doctrines surrounding an obligor's rights under an assigned contract, quoting the Restatement of Contracts, Section 164:

> "(1) Where a party to a bilateral contract which is at the time wholly or partially executory on both sides, purports to assign the whole contract, his action is interpreted, in the absence of circumstances showing a contrary intention, as an assignment of the assignor's rights under the contract and a delegation of the performance of the assignor's duties.

> (2) Acceptance by the assignee of such an assignment is interpreted, in the absence of circumstances showing a contrary intention, as both an assent to become an assignee of the assignor's rights and as a promise to the assignor to assume the performance of the assignor's duties."

Applying the principles enunciated in *Art Metal*, an assignee of a loan is legally obligated to abide by the terms of forbearance entered into by the assignor with the debtor.

Further, 15 USCS § 1641 sets forth the liability of assignees of mortgages. Specifically, 15 USCS § 1641(d) states the rights of a consumer upon assignment of certain mortgages. Pursuant to the provision, a consumer can assert all claims and defenses against any person who purchases or is otherwise assigned a mortgage referred to in section 15 USCS § 1602(aa).

Question 4

ARE THERE ANY FEDERAL LAWS OR REGULATIONS THAT GOVERN THE AMOUNTS OF FEES A LOAN SERVICER CAN IMPOSE?

There are no strict laws that regulate the amount of fees that a loan servicer can impose. RESPA prohibits kickbacks and unearned fees, 12 U.S.C. § 2607 and 24 C.F.R. § 3500.14, but it does not prohibit the amount of fees a loan servicer can impose. The loan servicer can impose any fee and it cannot be brought under the purview of 12 U.S.C. § 2607 and 24 C.F.R. § 3500.14.

The Second, Third, Fourth, Seventh, and Eighth Circuits have each found that based on a plain reading of its text, 12 U.S.C. § 2607 does not prohibit overcharges. In *Kruse v. Wells Fargo Home Mortg., Inc.*, 383 F.3d 49, 56 (2d Cir. 2004), the Second Circuit held that 12 U.S.C. § 2607 clearly and unambiguously does not extend to overcharges. The Second Circuit reasoned that the text of 12 U.S.C. § 2607 indicates that it extends only to charges where no services were performed. *Id.* Therefore, it concluded that whatever its size, a fee that is "for the services rendered by the institution and received by the borrower, does not violate 12 U.S.C. § 2607." *Id.* The court also observed that it would be odd to read the statute as instructing courts to award treble damages without giving the courts "so much as a hint" on how to differentiate between reasonable and unreasonable components of a charge for services. *Id.* Finally, the court noted that the legislative history of RESPA indicates that Congress had declined to enact a bill directing HUD to set regulations limiting the amount of closing costs that may be charged. *Id.* at 56-57. Thus, the court concluded that because Congress did not intend for RESPA to impose price controls, Congress did not intend for RESPA to cover overcharges.

Similarly, in *Santiago v. GMAC Mortgage Group, Inc.*, 417 F.3d 384, 387 (3d Cir. 2005), the Third Circuit found that the text of 12 U.S.C. § 2607, as a whole, "states that no person can accept a fraction of a charge for services provided, unless they have actually provided services." Like the Second Circuit, the Third Circuit found that the text of the section does not support making a distinction between a reasonable and an unreasonable portion of a charge for services performed, no language in the statute provides for making such a distinction, and it would be unusual for Congress to provide for treble damages without also providing for a definition of what constitutes an unreasonable charge. *Id.*

The Seventh and Fourth Circuits have held that based on the plain language of the statute, 12 U.S.C. § 2607 does not apply to overcharges unless "a 'portion' or 'percentage' of that overcharge is kicked back to or 'split' with a third party." *See Boulware v.*

Crossland Mortg. Corp., 291 F.3d 261, 265 (4th Cir. 2002); *Echevarria v. Chicago Title & Trust Co.,* 256 F.3d 623, 626-28 (7th Cir. 2001). The Seventh Circuit's holding relies primarily on its conclusion that 12 U.S.C. § 2607 is an anti-kickback provision, not a price control statute. *Echevarria*, 256 F.3d at 627. Similarly, the Fourth Circuit's holding rests on its determination that "Congress was clearly aiming at a sharing arrangement rather than a unilateral overcharge by its use of the statutory language 'portion, split, or percentage' and 8(b) is not meant to impose price controls. *Boulware*, 291 F.3d at 268.

Apart from overcharges, the courts have also looked at the concept of mark-ups. Mark-ups refer to fees that a loan servicer allegedly charges to the borrower for settlement services provided by third party vendors in excess of the fees that the third-party vendors charge to the loan servicer for those services, without performing any additional services. Courts are split on this issue. The Fourth, Seventh, and Eighth Circuits have held that the text of 12 U.S.C. § 2607 clearly and unambiguously does not prohibit mark-ups. *Haug v. Bank of Am.*, 317 F.3d 832 (8th Cir. 2003); *Krzalic v. Republic Title Co.*, 314 F.3d 875 (7th Cir. 2002); *Boulware v. Crossland Mortgage Corp.,* 291 F.3d 261 (4th Cir. 2002).

12 U.S.C. § 2607 (b) reads as follows:

> (b) Splitting charges. No person shall give and no person shall accept any portion, split, or percentage of any charge made or received for the rendering of a real estate settlement service in connection with a transaction involving a federally related mortgage loan other than for services actually performed.

These courts have reasoned that the words in the section "no person shall give *and* no person shall accept" requires that there be both one or more persons who give *and* one or more persons who receive a settlement services fee other than for services actually performed for there to be a violation of the statute. *Haug*, 317 F.3d 836. Therefore, unless there is at least one giver and one acceptor who simultaneously violate the law, there can be no violation of the section. *Id*. These courts conclude that reading 12 U.S.C. § 2607 to apply to mark-ups is thus absurd because it renders givers of mark-ups (the consumers ostensibly protected by the statute) as well as acceptors (the financial institutions from whose sometime-predatory practices they are being protected) simultaneously guilty of violating the statute. *Boulware*, 291 F.3d 265.

However, in *Sosa v. Chase Manhattan Mortgage Corp.*, 348 F.3d 979 (11th Cir. 2003), the Eleventh Circuit found nothing absurd about a conclusion that 12 U.S.C. § 2607 covers mark-ups. *Sosa* involved a case with a markup on courier services that were performed by a third-party vendor. The court held that violations of § 8(b) do not require the presence of a third party who receives a kickback. *Id*. at 983. Rather, "a single party can violate subsection 8(b)" when imposing certain unilateral charges. *Id*. The court came to this conclusion through its interpretation of the statutory phrase "no person shall give and no person shall accept." *Id*. at 982. Relying on a definition for the word "and" provided from the American Heritage Dictionary, the court determined that "the word 'and' in subsection 8(b) . . . operates to create two separate prohibitions:" one for giving unearned fees and another for accepting them. *Id*. .

Additionally, the court rejected the theory that this interpretation would lead to the absurd result of imposing liability on consumers who pay overcharges or markups. *Sosa*, 348 F.3d 983. Instead, a giver of unearned fees only violates the statute when he provides them for unperformed services, whereas "a consumer would always pay a fee to a settlement service provider intending that it be used for a service actually performed." *Id*. at 983. Accordingly, the Court found that consumers could never be liable for violating the statute. *Id*.

After presenting its interpretation of § 8(b), however, the court actually dismissed the case because the complaint failed to allege "that the portion of the charge that [the defendant] retained was accepted other than for services actually performed." *Sosa*, 348 F.3d 983. The court also expressed doubt as to whether "the borrowers could credibly make such an allegation" because the defendant could argue that it provided an ancillary service by connecting the borrower to the third-party vendor, which justified the markup. *Id*. at 983-984.

Question 5

IF A CONSUMER HAS ALREADY HAD A JUDGMENT OF FORECLOSURE ENTERED AGAINST HIM OR HER ON A RESIDENTIAL HOME MORTGAGE LOAN, DOES THAT FORECLOSURE JUDGMENT PRECLUDE THAT PARTICULAR CONSUMER FROM SUING THE FORECLOSURE JUDGMENT CREDITOR FOR VIOLATIONS OF THE ABOVE OCCURRING PRIOR TO FORECLOSURE JUDGMENT?

The doctrine of *res judicata* has been held to apply to claims under TILA under certain circumstances. In *R-G Fin. Corp. v. Garcia (In re Garcia),* 340 B.R. 680 (Bankr. D.P.R. 2006), defendant bankruptcy debtor and the mortgagee (plaintiff corporation's subsidiary) entered into a non-purchase loan transaction guaranteed by debtor's residence. The debtor defaulted in making the monthly payments and the assignee of the mortgagee filed a collection of money and foreclosure action against debtor in the

Superior Court of Puerto Rico. *Id*. at 683. The debtor failed to answer the complaint, a default judgment was entered against her and the court ordered the public sale of the property for July 10, 2002. *Id*. The debtor did not appeal the judgment and instead filed a petition for reorganization under Chapter 13 of the Bankruptcy Code on July 9, 2002, thereby staying the public sale of the property. *Id*. The debtor then alleged in a letter to the plaintiffs that the plaintiffs failed to provide disclosures under TILA and HOEPA, or provided inaccurate disclosures, and sought rescission of the loan transaction. *Id*. The creditors responded by filing a complaint and contended that *res judicata* barred the debtor from rescinding the loan since her nondisclosure claims could have been, but were not, raised in the foreclosure action. *Id*. The debtor argued that *res judicata* did not apply because only the assignee, and not the mortgagee or the bank, initiated the foreclosure action. *Id*. at 686.

The Court held that although the parties differ, *res judicata* applied since the interests of the creditors were identical. *R-G Fin. Corp*., 340 B.R. 688. "The test for identity of 'things' is whether a decision in the second action may contradict the prior adjudication" and in spite of some differences in the parties listed in the two actions, identity of persons may be found, if the parties on each side, in each action, have identical interests. *Id.* at 687.

As to the identity of cause of action, the court found that if a defendant fails to file a compulsory counterclaim, that cause of action is waived and the facts and claims constituting said cause of action are deemed adjudicated by the ensuing judgment thereby barring the defendant from later initiating a claim based on the same events. *R-G Fin. Corp.,* 340 B.R. at 688. In such circumstances, the doctrine of *res judicata* would apply to issues that could have been raised in the counterclaim but were not. *Id.* According to the court, the debtor's failure to repay the mortgage loan was the underlying cause for the foreclosure and collection of monies action. *Id.* The debtor's TILA claims were also rooted in the same cause of action. *Id.* Hence the court found that the TILA claims should have been raised as compulsory counterclaims in the foreclosure proceedings. *Id.* Since the debtor failed to raise his claim, he was precluded from raising the same claims once again. *Id.*

Similarly, in *Albano v. Norwest Financial Hawaii, Inc.*, 244 F.3d 1061, 1063 (9th Cir. 2001), the doctrine of *res judicata* was found to bar TILA claims. There, a suit was filed by the debtor to rescind a mortgage agreement for noncompliance with statutory loan disclosure requirements. The 9th Circuit Court held that *res judicata* applies when there is a final state court judgment in which the borrowers had an opportunity to participate, the borrowers and the lender were both parties to the state court foreclosure proceeding, and there was identity of issues. *Id*. at 1063. In *Albano* there was identity of issue because the TILA claims arose out of the same loan transaction as the debtor's suit. *Id*.

However, in *In re Weinraub,* 361 B.R. 586 (Bankr. D. Fla. 2007), a different result was reached. There, the creditor obtained a Default Final Judgment of Possession and a Writ of Eviction in state court when the debtors failed to keep up their repayment obligations to the creditor. *Id*. at 587. The debtor then sought to exercise a right of rescission under TILA in the Bankruptcy Court and the creditor argued that the TILA claims were barred by *res judicata*. *Id*. However, the Court held that *res judicata* did not apply to bar the TILA claims because the TILA claims were not compulsory counterclaims during the state court proceedings. *Id*. at 591-592. The Court noted that just because TILA authorizes a borrower to raise claims in state court, it is not required that the borrower do so. *Id.* at 592. Moreover, according to the Court the TILA rescission claims go "to the making of the loan, rather than a dispute as to the obligations under the loan as was the issue in the state court foreclosure action." *Id.* Therefore, the Court held that because the claims are not the same, *res judicata* does not bar the TILA claim. *Id.*

The court also examined the *Rooker-Feldman* doctrine and held that the *Rooker-Feldman* doctrine was inapplicable to this case because the TILA claims, if valid, were a result of actions or omissions of creditor, not due to the state court eviction judgment. *In re Weinraub,* 361 B.R. 593-94. The *Rooker-Feldman* doctrine applies only in limited circumstances, where a party in effect seeks to take an appeal of an unfavorable state-court decision to a lower federal court. *Id*. at 593. The *Rooker-Feldman* doctrine only bars claims of legal injury caused by a state court judgment, not injuries caused by an adverse party. *Id*. The Court held that the doctrine was inapplicable to the TILA claims because the claims are separate and unique from the eviction proceedings in so far as they are injuries caused by the actions or omissions of the creditor, namely, the failure to make the proper disclosures. *Id.* at 594.

Question 6

CAN STATE LAW VIOLATIONS FORM THE BASIS OF THE PREDICATE ACTS UNDER RICO?

Only state statutes prohibiting crimes listed in section 1961(1) can serve as predicate offenses for a Racketeer Influenced and Corrupt Organizations Act (RICO) charge. *Fuller v. Harrah's Entm't, Inc*., 2004 U.S. Dist. LEXIS 22097, 18-19 (D. La.

2004). In *Calabrese v. CSC Holdings, Inc.*, 283 F. Supp. 2d 797 (D.N.Y. 2003), the plaintiffs alleged that defendants violated 18 U.S.C. §§ 875, 876, 880 and New York Penal Code section 190.65 (Fraud) and that these violations served as predicate acts under RICO. The court held that the offenses which may serve as predicate acts for a RICO claim are exclusively listed in 18 U.S.C. § 1961(1). *Id.* at 811. The court further held that in order to plead a pattern of racketeering activity under § 1962(c), a plaintiff must allege that a defendant committed two or more acts of racketeering activity, which means any act or threat involving specified state-law crimes, any act indictable under various specified federal statutes, and certain federal offenses. *Id.* at 807. The state-law crimes that are considered racketeering activities under 1961(1) include "any act or threat involving murder, kidnapping, gambling, arson, robbery, bribery, extortion, dealing in obscene matter, or dealing in a controlled substance or listed chemical ... and punishable by imprisonment for more than one year." 18 U.S.C. § 1961(1) (A). *Id.* at 807. The court went on to find that Sections 875, 876, 880 and New York Penal Code section 190.65 are not listed in § 1961(1) and are therefore not among those offenses which may constitute a predicate act for a RICO claim. *Id.* at 811.

Federal courts have consistently said that the list of predicate acts under RICO's list is exhaustive and courts will not randomly include all state law violations under RICO. *Annulli v. Panikkar*, 200 F.3d 189, 200 (3d Cir. 1999) ("RICO's list of acts constituting predicate acts of racketeering activity is exhaustive"). In *Annulli*, the court further stated that to read the list otherwise would be to usurp the role of Congress in drafting statutes. *Id*. at 200. Moreover, the court held that if garden-variety state law crimes, torts, and contract breaches were to constitute predicate acts of racketeering (along with mail and wire fraud), civil RICO law, which is already a behemoth, would swallow state civil and criminal law whole. *Id*. As such, the court found that virtually every litigant would have the incentive to file their breach of contract and tort claims under the federal civil RICO Act, as treble damages and attorney's fees would be in sight. *Id*. The court refused to read language into § 1961 so as to federalize every state tort, contract, and criminal law action. *Id.*