

THE BEST DEFENSE IS A GOOD OFFENSE

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I. USEFUL CONSUMER PROTECTION STATUTES

A. Cranston-Gonzales National Affordable Housing Act

The Cranston-Gonzales National Affordable Housing Act, Pub.L. No. 101-625, 104 Stat. 4079 (1990), amends the Real Estate Settlement Procedures Act of 1974, and imposes an obligation on mortgage servicers to respond to a “qualified written request” inquiring or complaining about the account. 12 U.S.C. §2605. It is an extremely useful tool for attempting to resolve mortgage servicing related claim, and for setting up a claim which can be filed in federal court. The statute provides as follows:

(1) Notice of receipt of inquiry.

(A) In general. If any servicer of a federally related mortgage loan receives a qualified written request from the borrower (or an agent of the borrower) for information relating to the servicing of such loan, the servicer shall provide a written response acknowledging receipt of the correspondence within 20 days (excluding legal public holidays, Saturdays, and Sundays) unless the action requested is taken within such period.

(B) Qualified written request. For purposes of this subsection, a qualified written request shall be a written correspondence, other than notice on a payment coupon or other payment medium supplied by the servicer, that —

(I) includes, or otherwise enables the servicer to identify, the name and account of the borrower; and

(ii) includes a statement of the reasons for the belief of the borrower, to the extent applicable, that the account is in error or provides sufficient detail to the servicer regarding other information sought by the borrower.

(2) Action with respect to inquiry. Not later than 60 days (excluding legal public holidays, Saturdays, and Sundays) after the receipt from any borrower of any qualified written request under paragraph (1) and, if applicable, before taking any action with respect to the inquiry of the borrower, the servicer shall —

(A) make appropriate corrections in the account of the borrower, including the crediting of any late charges or penalties, and transmit to the borrower a written notification of such correction (which shall include the name and telephone number of a representative of the servicer who can provide assistance to the borrower);

(B) after conducting an investigation, provide the borrower with a written explanation or clarification that includes —

(I) to the extent applicable, a statement of the reasons for which the servicer believes the account of the borrower is correct as determined by the servicer; and

(ii) the name and telephone number of an individual employed by, or the office or department of, the servicer who can provide assistance

to the borrower; or

(C) after conducting an investigation, provide the borrower with a written explanation or clarification that includes —

(I) information requested by the borrower or an explanation of why the information requested is unavailable or cannot be obtained by the servicer; and

(ii) the name and telephone number of an individual employed by, or the office or department of, the servicer who can provide assistance to the borrower.

(3) **Protection of credit rating.** During the 60-day period beginning on the date of the servicer's receipt from any borrower of a qualified written request relating to a dispute regarding the borrower's payments, a servicer may not provide information regarding any overdue payment, owed by such borrower and relating to such period or qualified written request, to any consumer reporting agency (as such term is defined under [§1681a of the Fair Credit Reporting Act, 15 U.S.C. §1681, *et seq.*]). 12 U.S.C. §2605(e).

Practice Pointers:

Make sure to send the request to the correct address. Look on the back of the borrower's monthly statements or on the servicer's web site for the address for inquiries, questions or correspondence relating to the account. Do not simply send it to the payment address. Send it by certified mail or in some other manner that will assure proof of delivery. Include an authorization giving you permission to obtain information on the borrower's behalf signed by your client. Include the account number, and the borrower's name and address. Include a statement of the reasons for your belief that the account is in error, if you have evidence, such as proof of payments made that were not credited, include it with the request.

The request must relate to "servicing." Some consumer attorneys report that servicers have argued that a request raising questions about loan modification applications are not servicing related. A request directed solely to the validity of the mortgage documents has been held not to qualify. *MorEquity, Inc. v. Naeem*, 118 F.Supp.2d 885, 901 (N.D.Ill. 2000); *Moore v. FDIC*, 2009 U.S. Dist. LEXIS 110979 (N.D.Ill. Nov. 30, 2009) (requests for information regarding an alleged reinstatement of a defaulted mortgage loan and the amounts of delinquent mortgage payments due did not relate to servicing). On the other hand, a request that the servicer identify the authority for a fee or charge would relate to servicing, even if the answer is in the note or mortgage.

Make sure to tailor the request so that it relates in some way to receipt of payments due on the loan, or payments made by the servicer using payments made by the borrower. Many borrowers are put on temporary modification plans while their permanent loan modification applications are pending, the modified payments are often put in suspense accounts, and late charges and other default related charges are often added to the account during that period, making it fairly easy to raise issues which are "servicing related."

The recent Dodd Frank Act addresses some of the above caselaw and clarifies that a request may seek "to correct errors relating to allocation of payments, final balances for

purposes of paying off the loan, or avoiding foreclosures, or other standard servicer's duties." Pub.L.No. 111-203, 124 Stat. 1376, §1463, to be codified at 12 U.S.C. §2605(e). A sample qualified written request is included in Section II.

Although the deadlines to respond seem long (they will be shortened under the Dodd Frank Amendments to 5 and 30 days, but there is some uncertainty as to whether the new statute takes effect), servicers will frequently send a nonsensical response well before the deadlines expire, enabling you to file suit on behalf of the borrower. For example, in one case a servicer responded to inquiries about why it wasn't honoring a loan modification implemented by the prior servicer and why it was falsely claiming the borrower was in default, with multiple form letters claiming the inquiry wasn't "servicing related." If the servicer's response doesn't answer the question, or only partially does, consider sending a follow up request. This may help establish a pattern of noncompliance.

Have the borrower check his or her credit report about 30 days after sending the request to see if they suspended reporting, as required. They are required to cease reporting information about alleged late payments for 60 days after receipt of the request.

There is an express private right of action for violation of these obligations, and the borrower can recover actual damages, statutory damages of up to \$1,000 (if there is evidence of a pattern or practice of noncompliance), costs and attorney's fees. 12 U.S.C. §2605(f); *In re Thompspon*, 350 B.R. 842, 851 (Bankr.E.D.Wisc. 2006). We have sometimes been able to secure loan modifications in settlements of this type of suit.

B. FAIR CREDIT REPORTING ACT

15 U.S.C. §1681s-2 of the Fair Credit Reporting Act ("FCRA") creates a private right of action if a consumer complains to a credit bureau that an item is inaccurate, the credit bureau (as it is required to do) contacts that creditor for information about the item, and the creditor furnishes false information to the credit bureau in response to the verification request.

Many mortgage servicers are reporting borrowers who were current when they began a temporary loan modification as if they are now in default, and are making payments 30-60-90 days or more behind, or are reporting other inaccurate information about mortgage payments while a modification is in place. The FCRA can be used to remedy these claims, and get you into Federal Court where a prompt settlement is far more likely if you have a solid case.

Practice Pointers:

Have your clients obtain a copy of their credit report from each major credit bureau to see what the mortgage servicer is reporting about the loan. If a HAMP application is involved, the HAMP regulations contain some specific rules about credit reporting, as do Fannie and Freddie. The FAQ section of the Making Homes Affordable website provided the following as of February 26, 2010:

34. How will the modification affect my credit?

Accepting a loan modification can affect your credit score, but the actual effect will depend on a variety of factors. For more information about your credit score and how to improve it, visit www.ftc.gov/bcp/edu/pubs/consumer/credit/cre24.shtm.

Each month, servicers must describe to the credit reporting agencies the exact status of each mortgage. If you are current with your mortgage payments prior to the trial period and you make each trial period payment on time, your servicer must report you as current and also identify the loan as “modified under federal government plan.”

If you are delinquent (at least 30 days past the due date) prior to the trial period and the reduced payments do not bring the account current, your servicer must report the level of delinquency and also identify the loan as “modified under federal government plan.”<http://www.makinghomeaffordable.gov/borrower-faqs.html#34>

Fannie Mae’s guidelines for implementing HAMP modifications provide the following: “If a borrower is current when they enter the Trial Period, the servicer should report the borrower current but on a modified payment if the borrower makes timely payments by the last business day of each Trial Period month at the modified amount during the “Trial Period.” Frequently Asked Questions, Servicing Guide Announcement 09-05R Making Home Affordable, pg. 12, Q. 51. Freddie Mac has similar language which can be found on page 5 of the Freddie HAMP Guidelines, Publication Number 800, July 13, 2009.

If the servicer is not complying with these rules or is otherwise reporting inaccurate information, send a dispute to the bureaus involved, and copy the mortgage servicer. Send it by certified mail or some other method that will provide proof of delivery. The dispute should be as specific as possible, and you should submit copies of any documentary evidence you have which supports the dispute – for example, such as copies of cancelled checks reflecting timely payments. A sample credit dispute is included in Section II.

The FCRA provides for actual damages, statutory and punitive damages (for willful noncompliance) and attorney’s fees. 15 U.S.C. §1681n and o. FCRA cases can be very difficult to litigate, and are better cases if the client has actual damages. Actual damages can include having a credit application denied based on the faulty reporting, having an existing credit line cut or having the interest rate increased on an existing credit line. Actual damages can be very difficult to prove if the borrower has other derogatory tradelines on his or her credit report, and may require an expert witness.

C. FAIR DEBT COLLECTION PRACTICES ACT AND ILLINOIS COLLECTION AGENCY ACT

In some cases involving consumer loans (as opposed to rental or investment property), the Fair Debt Collection Practices Act, 15 U.S.C. §1692 et seq. (“FDCPA”), may apply. The FDCPA can be a very useful tool for challenging unfair and deceptive collections practices by mortgage companies, and for getting into federal court.

For the FDCPA to apply, the particular defendant’s involvement with the loan must have occurred after it was already in default. Purchasing a defaulted loan, acquiring servicing rights on a defaulted loan, or getting involved with a defaulted loan for purposes of collection are covered. 15 U.S.C. §1692 et seq. *Schlosser v. Fairbanks Capital Corp.*, 323 F.3d 534 (7th Cir. 2003); *Reese v. JPMorgan Chase & Co.*, 2009 U.S. Dist. LEXIS 97301 (S.D. Fla. Oct. 15, 2009); *Carter v. Countrywide Home Loans, Inc.*, 2009 U.S. Dist. LEXIS 75247, 26-31 (E.D. Va. Aug. 24, 2009); *Kimber v. Federal Financial Corp.*, 668 F.Supp. 1480 (M.D. Ala. 1987); *McKinney v. Cadleway Props., Inc.*, 548 F.3d 496 (7th Cir. 2008); *FTC v. Check Investors, Inc.*, 502 F.3d 159 (3rd Cir. 2007); *Pollice v. Nat’l Tax Funding*, 225 F.3d 379 (3rd Cir. 2000);

Zirogiannis v. Dreambuilder Invs. LLC, 10-cv-4742 (ADS)(ARL), 2011 U.S. Dist. LEXIS 48982 (E.D.N.Y., May 7, 2011); *Ballard v. Equifax Check Services*, 27 F.Supp.2d 1201 (E.D. Cal. 1998); *Durkin v. Equifax Check Servs.*, 00 C 4832 , 2002 U.S. Dist. LEXIS 20742 (N.D.Ill., October 24, 2002); *Commercial Service of Perry v. Fitzgerald*, 856 P.2d 58, 62 (Colo.App. 1993) ("[A] company which takes an assignment of a debt in default, and is a business the principal purpose of which is to collect debts, may be subject to the Act, even if the assignment is permanent and without any further rights in the assignor").

Are attorneys and others seeking to enforce mortgages and liens subject to provisions other than 15 U.S.C. §1692f(6), dealing with persons engaged in the business of enforcing security interests.

Decisions answering this question in the affirmative, at least if money is sought: *Gburek v. Litton Loan Servicing LP*, 614 F.3d 380 (7th Cir. 2010) (request for information to evaluate modification covered even if there is no "explicit demand for payment."); *Wilson v. Draper & Goldberg, P.L.L.C.*, 443 F.3d 373, 376 (4th Cir. 2006) (FDCPA applies to actions of attorneys hired to initiate non-judicial foreclosure; concerned over the "enormous loophole" that would result otherwise, but also relying on direct requests for payment to conclude that FDCPA applies); *Kaltenbach v. Richards*, 464 F.3d 524, 528 (5th Cir. 2006) (if money sought); *Brown v. Morris*, No. 04-60526, 243 Fed. Appx. 31; 2007 U.S. App. LEXIS 15396 (5th Cir., June 28, 2007) (same); *Piper v. Portnoff Law Assocs., Ltd.*, 396 F.3d 227, 233-36 (3d Cir. 2005) (FDCPA applies to collection of overdue water and sewer obligations via lien filed against consumer's house; also relied on letters requesting payment); *McDaniel v. South & Assocs.*, 325 F. Supp. 2d 1210, 1217 (D. Kan. 2004) (judicial foreclosure is subject to the FDCPA, because it seeks a personal judgment against the consumer; distinguishing cases finding that non-judicial foreclosures are not subject to FDCPA); *Overton v. Foutty & Foutty, LLP*, 1:07-cv-0274-DFH-TAB, 2007 U.S. Dist. LEXIS 61705 (S.D. Ind. Aug. 21, 2007); *Levin v. Kluever & Platt*, 2003 U.S. Dist. LEXIS 20861, 2003 WL 22757763 (N.D. Ill. Nov. 19, 2003); *Shapiro & Meinhold v. Zartman*, 823 P.2d 120 (Colo. 1992); *Rousseau v. Bank of N.Y.*, 2009 U.S. Dist. LEXIS 90163, 27-26 (D. Colo. Sept. 29, 2009) (extensive discussion of split of authorities); *Kline v. Mortgage Elec. Sec. Sys.*, 2009 U.S. Dist. LEXIS 86042, *32 (SD Ohio Sep. 21, 2009) (FDCPA covers letter from foreclosure plaintiff counsel to foreclosure defense counsel); *Muldrow v. EMC Mortgage Corp.*, 657 F.Supp.2d 171 (D.D.C. 2009); *Pettway v. Harmon Law Offices*, 2005 U.S. Dist. LEXIS 21341 (D.Mass. Sept. 27, 2005) (letters transmitting payoff and reinstatement terms were covered by the FDCPA).

Decisions answering in the negative, at least if only foreclosure of collateral is sought: *Warren v. Countrywide Home Loans, Inc.*, 2009 U.S. App. LEXIS 18191 (11th Cir. Aug. 14, 2009); *Nguyen v. LaSalle Bank Nat'l Ass'n*, 2009 U.S. Dist. LEXIS 99412, *16 (C.D. Cal. Oct. 13, 2009); *Castro v. Executive Trustee Serv., L.L.C.*, 2009 WL 438683 (D.Ariz. Feb. 23, 2009); *Rosado v. Taylor*, 324 F. Supp. 2d 917 (N.D. Ind. 2004) (ruling that issuing a foreclosure summons and complaint did not amount to an attempt to collect a debt); *Hulse v. Ocwen Federal Bank, FSB*, 195 F. Supp. 2d 1188, 1204 (D. Or. 2002) ("[f]oreclosing on a trust deed is distinct from the collection of the obligation to pay money," and is "not an attempt to collect funds from the debtor," therefore the FDCPA does not apply); *Beadle v. Haughey*, 2005 U.S. Dist. LEXIS 2473, 2005 WL 300060, at *3 (D.N.H. Feb. 9, 2005) (attorneys who "conducted a non-judicial foreclosure, and did not seek judgment against the plaintiffs personally," were not subject to the FDCPA); *Golliday v. Chase Home Fin., LLC*, 2011 U.S. Dist. LEXIS 785, 2011 WL 31038, *6 (W.D. Mich. Jan. 5, 2011); *Gathing v. MERS, Inc.*, 2010 U.S. Dist. LEXIS 22139, 2010 WL 889945, *13 (W.D. Mich. March 10, 2010).

Foreclosure should be covered – lender presumably wants debtor to pay, not surrender property. Have rarely seen foreclosure not accompanied by some effort to modify, restructure, induce sale, or otherwise collect money. Section 1692f(6) was intended to cover repossession of vehicles and similar collateral who try not to have any contact with the debtor.

In any event, if defendant regularly seeks deficiencies, it is a debt collector regardless of whether it is doing so in the particular case. In *Kaltenbach v. Richards*, 464 F.3d 524 (5th Cir. 2006), the defendant, an attorney hired to conduct an executory process foreclosure, argued that because he was enforcing a security interest, he was not a debt collector under the FDCPA except for purposes of § 1692f(6). The Fifth Circuit disagreed, noting that under § 1692a(6), "a party's general, not specific, debt collection activities are determinative of whether they meet the statutory definition of a debt collector." 464 F.3d at 529. See *Brooks v. Flagstar Bank*, No. 11-67, 2011 U.S. Dist. LEXIS 74676 (E.D.La., July 12, 2011).

The new Consumer Financial Protection Bureau ("CFPB") has taken the position that all foreclosures are covered in an amicus brief it recently filed in *Birster v. American Home Mortgage Servicing, Inc.*, No. 11-13574-G (11th Cir.)

Lawyers who regularly collect debts by foreclosing on real estate have been held to meet the definition of a "debt collector." *Miller v. McCalla, Raymer, Padrick, Cobb, Nichols & Clark, L.L.C.*, 214 F.3d 872 (7th Cir. 2000); *Littles v. Lieberman (In re Littles)*, 90 B.R. 669, 676 (Bankr. E.D.Pa.), *aff'd as modified sub nom. Crossley v. Lieberman*, 90 B.R. 682 (E.D.Pa. 1988), *aff'd*, 868 F.2d 566 (3d Cir. 1989); *Shapiro & Meinhold v. Zartman*, 823 P.2d 120 (Colo. 1992).

We have argued that "field agents" who visit properties and collect information and secure the collateral are covered by the FDCPA. We lost in the District of New Jersey and the case is pending on appeal to the Third Circuit. *Siwulec v. J. M. Adjustment Services LLC*, No. 11-2086 (3rd Cir.).

The original lender is exempt from being defined as a "debt collector," as is someone who "services" a loan that is not claimed to be in default. 15 U.S.C. §§1692a(6)(A), 1692a(6)(F). A 2007 case found that "obtained" could not be construed to cover a mortgage company which acquired the prior holder of the mortgage by merger or similar corporate reorganization, rather than by transfer or assignment of a loan or portfolio of loans. *Brown v. Morris*, 243 Fed.Appx. 31, 35 (5th Cir. Miss. 2007); *Padgett v. Onewest Bank*, 2010 U.S. Dist. LEXIS 38293, *46-8 (N.D.W.Virg. April 19, 2010) (bank that acquired all assets of another bank from the FDIC, whether in default or no, was not a debt collector under the FDCPA).

The FDCPA imposes certain notification requirements on debt collectors, and many mortgage companies and foreclosure attorneys who qualify as debt collectors do not comply with them. 15 U.S.C. §§1692e(11), 1692g; *Miller, supra*. The FDCPA also prohibits collection practices that are misleading (15 U.S.C. §1692e), unfair (15 U.S.C. §1692f), or harassing or abusive (15 U.S.C. §1692d). Among the common mortgage company practices prohibited by the FDCPA, assuming it applies, are adding attorneys' fees or servicing expenses not authorized by law or contract (15 U.S.C. §§1692e(2)(B), 1692f(1)) and inaccurate credit reporting (15 U.S.C. §1692e(8)).

Multiple cases have been filed concerning "robo-signing" of mortgage related documents, including in some cases FDCPA claims.

If asserted against a defendant who qualifies as a "debt collector," allegations that

false affidavits or documents have been filed may be actionable under the FDCPA and may entitle affected consumers to at least statutory damages. Cases supporting such claims include *Todd v. Weltman, Weinberg & Reis Co., L.P.A.*, 434 F.3d 432 (6th Cir. 2006) (allegation that defendant filed false affidavit, then required by Ohio law, stating that it had reason to believe that assets in garnished bank account were not exempt; court rejects both Rooker-Feldman and immunity arguments); *Sayed v. Wolpoff & Abramson*, 485 F.3d 226 (4th Cir. 2007), summary judgment for defendant granted on remand, 733 F. Supp. 2d 635 (D. Md. 2010) (allegations were that interrogatories and a motion for summary judgment contained false statements; Court of Appeals rejected immunity defense); *Hartman v. Great Seneca Financial Corp.*, 569 F.3d 606 (6th Cir. 2009); *Delawder v. Platinum Financial*, 1:04-cv-680, 2005 U.S. Dist. LEXIS 40139 (S.D. Ohio March 1, 2005); *Griffith v. Javitch, Block & Rathbone, LLP*, 1:04cv238 (S.D. Ohio, July 8, 2004); *Hartman v. Asset Acceptance Corp.*, No. 1:03-cv-113, 2004 U.S. Dist. LEXIS 24845 (S.D. Ohio, Sept. 29, 2004); *Gionis v. Javitch, Block & Rathbone*, 405 F. Supp. 2d 856 (S.D. Ohio. 2005); *Blevins v. Hudson & Keyse, Inc.*, 395 F. Supp. 2d 655 (S.D. Ohio 2004), later opinion, 395 F. Supp. 2d 662 (S.D. Ohio 2004); *Foster v. D.B.S. Collection Agency*, 463 F. Supp. 2d 783 (S.D. Ohio 2006); *Stolicker v. Muller, Muller, Richmond, Harms, Meyers & Sgroi, P.C.*, 1:04cv733 (W.D. Mich., Sept. 8, 2005); *Reyes v. Kenosian & Miele, LLP*, 619 F. Supp. 2d 796 (N.D. Cal. 2008); *Eckert v. LVNV Funding, LLC*, 4:08cv1802, 2009 U.S. Dist. LEXIS 65295 (E.D. Mo., July 28, 2009). See settlement of case against Midland Funding involving allegations of improper affidavits, *Midland Funding, LLC v. Brent*, 3:08 CV 1434, 2011 U.S. Dist. LEXIS 90004 (N.D. Ohio, August 12, 2011); *Franklin v. Midland Funding, LLC*, 3:10 CV 91, 2011 U.S. Dist. LEXIS 89919 (N.D. Ohio, August 12, 2011); and *Vassalle v. Midland Funding*, 3:11 CV 96, 2011 U.S. Dist. LEXIS 90278 (N.D. Ohio, August 12, 2011). See also *McCullough v. Johnson, Rodenburg & Lauinger, LLC*, 637 F.3d 939, 946-947 (9th Cir. 2011) (knowingly serving false requests for admission on debtor).

One problem with such an action is that if the lender or servicer had the right to bring the action, actual damages are hard to show. Furthermore, if a judgment was entered by a state court based on the false affidavit, any claim for actual damages under the FDCPA or otherwise may be barred by res judicata. If filed in federal court, it may also run afoul of the Rooker-Feldman doctrine. The latter is named after *Rooker v. Fidelity Trust Co.*, 263 U.S. 413 (1923); and *District of Columbia Court of Appeals v. Feldman*, 460 U.S. 462 (1983), and was narrowed by *Exxon Mobil Corp. v. Saudi Basic Indus. Corp.*, 544 U.S. 280, 284 (2005). It deprives lower federal courts of jurisdiction over cases brought by state-court losers complaining of injuries caused by state-court judgments rendered before the district court proceedings commenced and inviting district court review and rejection of those judgments. *Davis v. Countrywide Home Loans, Inc.*, 1:10cv1303, 2011 U.S. Dist. LEXIS 22270 (S.D. Ind., March 4, 2011) (“The Davises seek damages based on their belief that Countrywide submitted fraudulent affidavits in state-court litigation that allowed it to prematurely obtain judgment. In doing so, the Davises are asking this Court to review the substance and timing of that judgment.”); *Figueroa v. Merscorp, Inc.*, 766 F. Supp. 2d 1305 (S.D. Fla. 2011) (dismissing claims based on allegedly improper assignments used to obtain foreclosure judgment in state court).

A claim for statutory damages for the filing of a false affidavit should withstand a Rooker-Feldman challenge. *Todd v. Weltman, Weinberg, & Reis Co., L.P.A.*, 434 F.3d 432, 436-37 (6th Cir. 2006) (holding Rooker-Feldman not triggered because the plaintiff did not allege that he was injured by the state-court judgment, but instead filed an independent federal claim that he was injured by the defendant's filing of a false affidavit in the state-court proceeding); see *Naranjo v. Universal Surety*, 679 F. Supp. 2d 787 (S.D. Tex. 2010) (suing on time barred debt actionable notwithstanding Rooker Feldman); *Gutierrez v. LVNV Funding, LLC*, EP-08-CV-225-DB, 2009 U.S. Dist. LEXIS 54479, *42 (W.D. Tex. March 16, 2009) (“Where a debt collector commits an FDCPA violation in the course of state court litigation, the

putative debtor may be barred from recovering actual damages resulting from entry of judgment, but is permitted to recover statutory damages for the violation and any actual damages not caused by entry of judgment.”).

The Seventh Circuit has held that “fraud on the court” is not permissible theory and that FDCPA only applies to representations to debtors and persons standing in shoes of debtors. *O’Rourke v. Palisades Acquisition XVI, LLC*, 635 F.3d 938 (7th Cir. 2011), petition for certiorari pending. Other courts hold that representations to third parties are actionable. *Todd v. Weltman, Weinberg & Reis Co., L.P.A.*, 434 F.3d 432,437-447 (6th Cir. 2006) (debt collector which submitted affidavit to court which falsely attested that the debtor’s assets were not exempt was not immune from FDCPA liability); *Picht v. Jon R. Hawks, Ltd.*, 236 F.3d 446, 448-451 (8th Cir. 2001) (service of garnishment summons, not authorized by law, on a bank holding a debtor’s funds violated the FDCPA); *Sykes v. Mel Harris & Assoc., LLC*, 757 F. Supp. 2d 413, 423-424 (S.D.N.Y. Dec. 29, 2010)(“sewer service” – presenting a court with an affidavit that knowingly and falsely stated that the defendant had been served with process, when the defendant had not been served – was covered by the FDCPA, even though an affidavit of service filed with the court is purely a representation to the court and not the debtor); *Spiegel v. Judicial Attorney Services, Inc.*, 09 C 7163, 2011 U.S. Dist. LEXIS 9350 (N.D.Ill., Feb. 1, 2011) (also involving sewer service); *Bowens v. Mel S. Harris & Assoc., LLC*, 07-CV-459S, 2008 U.S. Dist. LEXIS 16120 (W.D.N.Y., March 3, 2008) (same); *Campos v. Brooksbank*, 120 F. Supp. 2d 1271 (D.N.M. 2000) (same); *Owings v. Hunt & Henriques*, 08-cv-1931, 2010 U.S. Dist. LEXIS 91819 (S.D. Cal. 2010) (filing a false affidavit that a defendant is not protected by the Servicemembers Civil Relief Act).

Defendants argue that a distinction should be drawn for FDCPA purposes between (a) an affidavit which is merely incompetent or inadmissible under state law, i.e., one obviously based on hearsay, and (b) an affidavit which contains false statements, such as a representation that it is based on personal knowledge when the affiant has no personal knowledge.

The FDCPA provides for statutory damages of up to \$1,000, actual damages, and attorney’s fees.15 U.S.C. §1692k. The statutory damages in a class action are 1% of the defendant’s net worth or \$500,000, whichever is less.

Illinois has a Collection Agency Act, 225 ILCS 425/1 et seq., which overlaps the FDCPA.

The ICAA is limited to consumer purpose debts allegedly owed by natural persons. 225 ILCS 425/2.

There are express exclusions for banks, fiduciaries, financing and lending institutions, real estate brokers, attorneys, insurance companies, credit unions, and loan and finance companies. 225 ILCS 425/2.03. However, purchasers of defaulted debts not within one of the exclusions are covered as a result of an amendment which took effect Jan. 1, 2008. Thus, entities which purchase mortgage deficiencies or second mortgages remaining after foreclosure of a first are covered.

Section 425/3(d), as amended effective Jan. 1, 2008, brings debt buyers within its purview by providing that “A person, association, partnership, corporation, or other legal entity acts as a collection agency when he or it . . . Buys accounts, bills or other indebtedness and engages in collecting the same.” Previously coverage was limited to a person who “Buys accounts, bills or other indebtedness with recourse and engages in collecting the same”. By

deleting “with recourse,” the legislature intended to classify as a “collection agency” persons who buy charged-off debts for their own account. In addition, the 2007 amendments repealed the definition of “collection agency” contained in former §425/2.02 and provided a more expansive set of definitions which, among other things, now define a “collection agency” as “any person who, in the ordinary course of business, regularly, on behalf of himself or herself or others, engages in debt collection.” 225 ILCS 425/2 (emphasis added). Thus, one who purchases delinquent debt for himself and engages in any acts defined as “debt collection” is covered.

The ICAA imposes a licensing requirement. If the debt buyer does not have a collection agency license, the proceedings and any judgment are void. *LVNV Funding LLC v. Trice*, 2011 IL App (1st) 092773, 952 N.E.2d 1232, 2011 Ill. App. LEXIS 228 (1st Dist. 2011), leave to appeal denied, 2011 Ill. LEXIS 1886 (Nov. 30, 2011).

D. EQUAL CREDIT OPPORTUNITY ACT

The ECOA and Regulation B require written notice of the denial of credit. 15 U.S.C. §1691(d); 12 C.F.R. §202.9/ 12 C.F.R. §1002.9. [The regulations implementing the various federal consumer protection statutes that were placed under the regulatory jurisdiction of the new Consumer Financial Protection Bureau were all renumbered. Generally, but not always, you add 800 to the old number.] There is an exemption if the creditor makes a counteroffer that is accepted by the consumer, but some cases have required that the counteroffer be similar to the credit initially requested and imposed liability if the creditor makes an offer substantially different from the one requested. *Newton v. United Cos. Financial Corp.*, 24 F.Supp.2d 444, 460-2 (E.D.PA. 1998).

The notification provisions of ECOA may be violated even if there is no substantive discrimination claim. *Costa v. Mauro Chevrolet, Inc.*, 390 F.Supp.2d 720, 728-9 (N.D.Ill. 2005); *Pinkett v. Payday Today Loans, LLC*, No. 99 C 3332, 1999 U.S. Dist. LEXIS 12098 (N.D.Ill. July 22, 1999).

Many lenders are not sending written denials of loan modification applications, making an ECOA claim possible. However, if the loan was in default prior to the application, the lender is not required to send a notice. The ECOA provides for actual and punitive damages and attorney’s fees. 15 U.S.C. §1691e.

E. Illinois Consumer Fraud and Deceptive Business Practices Act

The Illinois Consumer Fraud Act (“CFA”) may also be useful, in addition to one of the above claims. Section 2 of the Consumer Fraud and Deceptive Business Practices Act (CFDBPA), 815 ILCS 505/1, *et seq.*, provides the following:

Unfair methods of competition and unfair or deceptive acts or practices, including but not limited to the use or employment of any deception, fraud, false pretense, false promise, misrepresentation or the concealment, suppression or omission of any material fact, with intent that others rely upon the concealment, suppression or omission of such material fact, or the use or employment of any practice described in [815 ILCS 510/2], in the conduct of any trade or commerce are hereby declared unlawful whether any person has in fact been misled, deceived or damaged thereby. In construing this section consideration shall be given to the interpretations of the Federal Trade Commission and the federal courts relating to [§45(a) of the Federal Trade Commission Act, 15 U.S.C. §41, *et seq.*].

A CFA claim can be made for either a deceptive practice, an unfair practice, or both, and the prohibitions of “unfair” and “deceptive” practices are distinct. *Robinson v. Toyota Motor Credit Corp.*, 201 Ill.2d 403, 775 N.E.2d 951, 266 Ill.Dec. 879 (2002); *Elder v. Coronet Insurance Co.*, 201 Ill.App.3d 733, 558 N.E.2d 1312, 146 Ill.Dec. 978 (1st Dist. 1990).

Mortgage related CFA claims include the following: **Imposition of unauthorized charges.** *Haroco, Inc. v. American National Bank & Trust Company of Chicago*, 747 F.2d 384 (7th Cir. 1984) (prime rate case), *aff’d*, 105 S.Ct. 3291 (1985), *on remand*, 647 F.Supp. 1026 (N.D.Ill. 1986); *Littlefield v. Goldome Bank*, 142 A.D.2d 978, 530 N.Y.S.2d 400 (N.Y.App.Div. 1988) (unauthorized charges); *Leff v. Olympic Federal Savings & Loan Association*, No. 86 C 3026, 1986 U.S.Dist. LEXIS 20198 (N.D.Ill. Sept. 18, 1986) (overescrowing); *Rumford v. Countrywide Funding Corp.*, 287 Ill.App.3d 330, 678 N.E.2d 369, 222 Ill.Dec. 757 (2d Dist. 1997). **Wrongful foreclosure.** *Smith v. Keycorp Mortgage, Inc.*, 151 B.R. 870 (N.D.Ill. 1993). **Requiring excessive escrow payments.** *GMAC Mortgage Corporation of Pennsylvania v. Stapleton*, 236 Ill.App.3d 486, 603 N.E.2d 767, 177 Ill.Dec. 697 (1st Dist. 1992), *appeal denied*, 148 Ill.2d 641 (1993); *Leff, supra*; *Aitken v. Fleet Mortgage Corp.*, No. 90 C 3708, 1991 U.S.Dist. LEXIS 10420 (N.D.Ill. July 29, 1991), and 1992 U.S.Dist. LEXIS 1687 (N.D.Ill. Feb. 12, 1992); *Poindexter v. National Mortgage Corp.*, No. 91 C 4223, 1991 U.S.Dist. LEXIS 19643 (Dec. 23, 1991), *later op.*, No. 94 C 5814, 1995 U.S.Dist. LEXIS 5396 (N.D.Ill. Apr. 18, 1995); *Sanders v. Lincoln Service Corp.*, No. 91 C 4542, 1993 U.S.Dist. LEXIS 4454 (N.D.Ill. Apr. 5, 1993); *Robinson v. Empire of America Realty Credit Corp.*, No. 90 C 5063, 1991 U.S.Dist. LEXIS 2084 (N.D.Ill. Feb. 20, 1991); *In re Mortgage Escrow Deposit Litigation*, No. 90 C 5816, 1994 U.S.Dist. LEXIS 12746 (N.D.Ill. Sept. 8, 1994) (cons.); *Greenberg v. Republic Federal Savings & Loan Association*, No. 94 C 3789, 1995 U.S.Dist. LEXIS 5866 (N.D.Ill. Apr. 28, 1995); *Weinberger v. Bell Federal Savings & Loan Association*, 262 Ill.App.3d 1047, 635 N.E.2d 647, 200 Ill.Dec. 308 (1st Dist. 1994). **Improper allocation of payments between principal and interest.** *Allenson v. Hoyne Savings Bank*, 272 Ill.App.3d 938, 651 N.E.2d 573, 209 Ill.Dec. 395 (1st Dist. 1995). **Making loans that cannot reasonably be expected to be repaid except through foreclosure.** *Fidelity Financial Services, Inc. v. Hicks*, 214 Ill.App.3d 398, 574 N.E.2d 15, 158 Ill.Dec. 221 (1st Dist. 1991).

F. Truth in Lending Act

TILA was originally enacted in 1967 to require disclosures of credit terms in consumer credit transactions. It was intended “to effectively adopt a new national loan vocabulary that means the same in every contract in every state.” *Mason v. General Finance Corporation of Virginia*, 542 F.2d 1226, 1233 (4th Cir. 1976). “The legislative history [of TILA] makes crystal clear that lack of uniformity in the disclosure of the cost of credit was one of the major evils to be remedied by the Act.” 542 F.2d at 1231. TILA was amended in 1994 by the Home Ownership and Equity Protection Act of 1994 (“HOEPA”), Pub.L. No. 103-325, 108 Stat. 2190, adding 15 U.S.C. §§1602(aa) and 1639, which imposed certain substantive regulations of home mortgage transactions with high interest rates or fees. The statute and regulations were substantially amended in 2008-2011, when statutory damages were increased, the substantive regulations of home mortgage transactions were expanded, and both substantive and disclosure provisions governing credit cards were added.

TILA only applies to credit transactions entered into with natural persons primarily for personal, family or household use, as opposed to business use. 15 U.S.C. §1602(h). Generally, this means that over 50% of the proceeds of the transaction must be for personal, family or household use. Agricultural credit is not covered. 15 U.S.C. §1603. The “purpose” refers to what the loan proceeds are used for, not the nature of the security.

TILA and Regulation Z require disclosure of several key credit terms, computed in the precise manner prescribed by the Regulation and using precise terminology. The key disclosures for “closed-end credit” transactions are: the “amount financed”, which is “the amount of credit provided to you [the consumer] or on your behalf,” 12 C.F.R. §226.18(b)/ 1026.18(b); the “finance charge”, which is “the dollar amount the credit will cost you [the consumer],” 12 C.F.R. §226.18(d)/ 1026.18(d), and which includes “any charge payable directly or indirectly by the consumer and imposed directly or indirectly by the creditor as an incident to or a condition of the extension of credit,” 12 C.F.R. §226.4(a)/ 1026.4(a), and the “annual percentage rate” is the finance charge expressed as an annual rate. 12 C.F.R. §226.18(e)/ 1026.18(e).

Tolerances (permissible margins of error) are specified for these items. The TILA tolerance for the APR is 1/8 of 1 percent or rounded to the nearest 1/4 of 1 percent. 12 C.F.R. §226.22/1026.22. An understatement of the APR is a violation. In an irregular transaction, the APR tolerance is 1/4 of 1 percent. An irregular transaction is one that includes one or more of the following features: multiple advances, irregular payment periods, or irregular payment amounts (other than an irregular first period or an irregular first or final payment). Id.

Under 12 C.F.R. §226.23(g)/ 1026.23(g), the finance charge “and other disclosures affected by the finance charge (such as the amount financed and the annual percentage rate) is to be treated as accurate if it is (a) understated by no more than ½ of 1% of the face amount of the note or \$100, whichever is greater, or (b) overstated. If the transaction is the refinancing of a residential mortgage transaction by a new creditor, but not “a transaction covered by § 226.32” [1026.32] (a HOEPA loan), and there is no new advance and no consolidation of existing loans, the finance charge is treated as accurate if it is understated by no more than 1 percent of the face amount of the note or \$ 100, whichever is greater; or is overstated. With respect to overstatements, *see Williams v. Chartwell Fin. Serv.*, 204 F.3d 748 (7th Cir. 2000).

There is a special rule for foreclosures in 12 C.F.R. §226.23/ 1026.23 – the right to rescind may be exercised if a mortgage broker fee was not included or if the finance charge is understated by more than \$35.

TILA gives homeowners rescission rights when their principal residence is used to secure an extension of credit (whether open end or closed end), other than one for the initial purchase or construction of the residence. 15 U.S.C. §1635; 12 C.F.R. §226.23/ 1026.23. Basically, refinancing loans, junior mortgages, home improvement financing, home equity lines of credit, and similar transactions are covered.

A creditor must furnish *two properly filled-out* copies of a notice of the right to cancel to everyone whose interest in the principal residence is subject to the creditor’s security interest. This is *not* limited to the borrower; for example, a spouse or child who is on title has the right to cancel and must be notified of that right.

The rescission right is not limited to real property, but also includes “personal property” used as a principal residence. This would include mobile homes and an interest in a cooperative apartment. A residence held in an Illinois land trust is also covered, if the other requirements (personal purpose, etc.) are satisfied.

The right to cancel normally extends for three business days (*i.e.*, excluding federal holidays and Sundays, but not Saturdays). 15 U.S.C. §1635(a). (Caution should be exercised because this is not the usual lay definition of “business day.”) However, if a creditor fails to furnish the “material disclosures” (those listed at 12 C.F.R. §226.23/ 1026.23 n. 48) and two properly filled-out notices of the right to cancel to each person entitled thereto, the right continues until (a) the

creditor cures the violation by providing new disclosures and a new cancellation period and conforming the loan terms to the disclosures, (b) the property is sold, or (c) three years expire. 12 C.F.R. §226.23(a)(3). The three years is an absolute time limit. *Beach v. Ocwen Federal Bank*, 523 U.S. 410, 140 L.Ed.2d 566, 118 S.Ct. 1408 (1998).

Refinancing of a loan does not cut off the right to rescind. *Handy v. Anchor Mortgage Corp.*, 464 F.3d 760 (7th Cir. 2006); *Barrett v. JP Morgan Chase Bank, N.A.*, 445 F.3d 874 (6th Cir. 2006).

Two complete copies of the notice must be delivered to each person entitled to rescind. "The requirement as to the number of copies is a substantive requirement of the TILA regulations which cannot be altered based on a court's determination of the 'materiality' of the number of copies in a particular transaction. *Davison v. Bank One Home Loan Services*, 01-2511, 2003 U.S. Dist. LEXIS 514, 2003 WL 124542, at *5 (D.Kan. Jan. 13, 2003) (denying lender's motion for summary judgment on consumers' claim for rescission under TILA because of material fact dispute regarding whether lender provided husband and wife each with two copies of notice of right to cancel and finding provision of only one copy each insufficient under TILA). "This requirement is not a mere technicality, because effective exercise of the right to rescind obviously depends upon the delivery of one copy of the rescission form to the creditor and the retention by the obligor of the other copy." *Williams v. BankOne, N.A. (In re Williams)*, 291 B.R. 636, 645 (Bankr.E.D.Pa. 2003) quoting *Stone v. Mehlberg*, 728 F. Supp. 1341, 1353 (W.D.Mich. 1990).

A signed acknowledgment that the required number of copies of the notice of right to cancel have been delivered "does no more than create a rebuttable presumption of delivery." 15 U.S.C. §1635(c). The borrower's testimony is sufficient to rebut the presumption, particularly if the borrower kept all of the documents received at the closing together and the requisite number of copies is not present. *In re Ameriquist Mortg. Co. Mortg. Lending Practices Litigation*, MDL No. 1715, 2006 U.S. Dist. LEXIS 35316, *12-13 (N.D.Ill., May 30, 2006); *Briggs v. Provident Bank*, 349 F. Supp. 2d 1124, 1129 (N.D. Ill. 2004); *In re Rodrigues*, 278 B.R. 683, 687-688 (Bankr. D.R.I. 2002); *Davison v. Bank One Home Loan Services*, 01-2511, 2003 U.S. Dist. LEXIS 514, 2003 WL 124542 (D.Kan., Jan. 13, 2003); *In re Jones*, 298 B.R. 451, 459 (Bankr.D.Kan. 2003); *Cooper v. First Government Mortgage and Investors Corp.*, 238 F.Supp.2d 50, 63-65 (D.D.C.2002); *Williams v. Bank One (In re Williams)*, 291 B.R. 636, 647-48 (Bankr.E.D.Pa.2003); *Hanlin v. Ohio Builders and Remodelers, Inc.*, 212 F.Supp.2d 752, 760-62 (S.D.Ohio 2002) (lender's alleged standard procedure of giving two notices at closing coupled with signature of plaintiffs on the acknowledgment of receipt of notices form was insufficient to overcome deposition testimony to the contrary; and a question of fact was established); *In re Bumpers*, 03 C 111, 2003 U.S. Dist. LEXIS 26255 (N.D.Ill., Sept. 11, 2003). It is therefore important in cases presenting such issues that borrower's counsel segregate (and preferably Bates-number) documents obtained from the borrowers and documents obtained from other sources, so that they may be readily distinguished by source.

Under 15 U.S.C. §1641(c), the borrower is entitled to assert the right to rescind against any assignee of the loan. In addition, the assignee is liable for damages to the extent that "the violation for which such action or proceeding is brought is apparent on the face of the disclosure statement provided in connection with such transaction pursuant to this title" and "the assignment to the assignee was voluntary." 15 U.S.C. §1641(e)(1).

The creditor can apply to a court to condition the removal of the security interest upon the consumer's tender of the loan proceeds. If the creditor does not rescind, the statute provides for forfeiture of the loan proceeds or goods purchased. 15 U.S.C. §1635(b). Again, courts have held that they have discretion whether to enforce the forfeiture. Cases are divided as to whether a court has

this authority, although most acknowledge it. *Williams v. Homestake Mortgage Co.*, 968 F.2d 1137 (11th Cir. 1992); *Regency Savings Bank v. Chavis*, 333 Ill.App.3d 865, 776 N.E.2d 876, 267 Ill.Dec. 504 (2d Dist. 2002); *Lynch v. GMAC Mortgage Corporation of Iowa (In re Lynch)*, 170 B.R. 26, 29 (Bankr. D.N.H. 1994) (requiring borrower to repay principal); *Apaydin v. Citibank Federal Savings Bank (In re Apaydin)*, 201 B.R. 716, 723 – 724 (Bankr. E.D.Pa. 1996) (same). Among the relevant considerations is the willfulness of the creditor's conduct and the creditor's record of compliance with the Truth in Lending Act. *Apaydin, supra*.

Discretion to modify works both ways in that the court's discretion includes requiring the borrower to repay at a future date or in installments. *Federal Deposit Insurance Corp. v. Hughes Development Co.*, 938 F.2d 889, 890 (8th Cir. 1991) (relying on pre-simplification cases to require borrower to repay principal within one year); *Mayfield v. Vanguard Savings & Loan Assoc.*, 710 F. Supp. 143, 148 (E.D.Pa. 1989)(deciding that the borrower's repayment amount should be \$ 16,113.62, payable in monthly payments of \$ 171, which was the amount of the borrower's monthly payments prior to the two loan refinancings), *Shepard v. Quality Siding & Window Factory, Inc.*, 730 F. Supp. 1295, 1308 (D.Del. 1990)(deciding that the borrower's repayment obligation should be the value of the siding to the borrower (\$ 11,361.58), payable in monthly payments of \$ 199 (i.e., the same amount of the consumer's monthly payments prior to rescission)); *Bell v. Parkway Mortg., Inc. (In re Bell)*, 314 B.R. 54, 62 (Bankr. E.D. Pa. 2004); *Serten v. Option One Mortg. Corp. (In re Serten)*, 352 B.R. 380 (Bankr. E.D.Pa. 2006), rev'd other grounds, 479 F. Supp. 2d 479 (E.D.Pa. 2007); *Bookhart v. Mid-Penn Consumer Discount Co.*, 559 F.Supp. 208 (E.D. Pa. 1983) (permitting consumer to tender in monthly installments). Other cases allow tender through a Chapter 13 plan. *Bell v. Parkway Mortg., Inc. (In re Bell)*, 309 B.R. 139 (Bank. E.D.Pa. 2004), modified and rehearing denied, 314 B.R. 54 (Bankr. E.D. Pa. 2004); *In re Dawson*, 411 B.R. 1 (Bankr. D.D.C. 2008) (homeowner could not make payments but was given 18 months to sell property).

The tender amount is the principal, minus all closing costs and all payments made. The borrower's payments are applied entirely to principal. *Semar v. Platte Valley Federal Savings & Loan Ass'n*, 791 F.2d 699 (9th Cir. 1986). *Section 226.23 — Right of Rescission*, Paragraph 23(d)(2)1, Official Staff Interpretation, 12 C.F.R. Part 226, Supp. I, provides that “[t]he consumer cannot be required to pay any amount in the form of money or property,” including “finance charges already accrued, as well as other charges such as broker fees, application and commitment fees, or fees for a title search or appraisal.”

Since rescission voids the security interest, it is a defense to any attempt to foreclose the security. However, the consumer has to pay the tender amount, either be refinancing, selling the property, convincing the court to require the lender to accept the amount in installments, a loan modification, or other means.

Unfortunately, the fact that many homes are underwater, rendering it impossible to refinance, severely limits the utility of the rescission remedy.

Common Truth in Lending Act violations include:

Collection of fees for recording instruments that are not in fact disbursed to governmental agencies. At a minimum, the undisbursed portion of the fees are finance charges.

Failure to include in the finance charge fees for closing the transaction.

Evasion of HOEPA. There was a practice by certain lenders of making mortgage loans that are supposed to be just under the eight-percent HOEPA threshold on fees and points (*e.g.*, 7.99 percent); however, because the governmental fees are inflated or not paid over to governmental

agencies or some other item is not included in the finance charge, the points and fees would be, in fact, 8.005 percent. If HOEPA is not complied with, and it will not have been if the lender is trying to make a loan just under the threshold, the loan is rescindable. Note that there is no “tolerance” applicable in this context.

Use of the wrong “notice of right to cancel” form on refinancings. A refinancing by the same creditor (*i.e.*, the party to whom the note being refinanced is payable on its face is the same as the party to whom the new note is payable on its face) entitles the borrower to rescind only the increased credit. An assignment of the loan does not make the assignee a “creditor” for this purpose (although a merger does). Some mortgagees use the form providing for limited rescission rights in transactions that carry full rescission rights. This gives rise to a continuing three-year right to cancel with all payments applied to principal.

Failure to fill in the notice of right to cancel handed to the borrower. Failing to fill out the rescission notice is a violation. *Williamson v. Lafferty*, 698 F.2d 767, 768 – 769 (5th Cir. 1983) (failure to fill in rescission expiration date violates TILA); *Johnson v. Thomas*, 342 Ill.App.3d 382, 397, 794 N.E.2d 919, 276 Ill.Dec. 669 (1st Dist. 2003); *Semar v. Platte Valley Fed. Sav. & Loan Ass'n.*, 791 F.2d 699, 702 (9th Cir. 1986); *Reynolds v. D & N Bank*, 792 F. Supp. 1035, 1038 (E.D. Mich. 1992); *Johnson v. Chase Manhattan Bank*, 07-526, 2007 U.S. Dist. LEXIS 50569 (E.D.Pa., July 11, 2007) (“Indeed, we were unable to find, nor did Chase cite, a single case excusing a creditor's failure to fill in the blank designated for the rescission deadline.”).

The consumer’s copy is the one that must be filled out. Often the borrower is given a blank copy, and only that retained by the closing agent is filled in. This does not do much for disclosure. Since TILA is a disclosure statute, the operative document is that given to the borrower. *Reese v. Hammer Financial Corp.*, 99 C 0716, 1999 U.S. Dist. LEXIS 18812, 1999 WL 1101677 (N.D. Ill. Nov. 30, 1999); *Smith v. No. 2 Galesburg Crown Finance Corp.*, 615 F.2d 407, 418 (7th Cir. 1980) (borrower’s copy of disclosure illegible); *Rowland v. Magna Millikin Bank, N.A.*, 812 F. Supp. 875 (C.D.Ill. 1992) (where the applicable finance charge and other material disclosures were illegible on the mortgagors' copy, Truth in Lending Act was violated; borrower’s acknowledgment of receipt of documents means that borrower received pieces of paper, not that the contents complied with the law or were correctly filled out).

Having the borrower sign at the closing a document representing that he or she has not rescinded. This contradicts the required notice and renders it ineffective. *Rodash v. AIB Mortgage Co.*, 16 F.3d 1142 (11th Cir. 1994); *Adams v. Nationscredit Fin. Servs. Corp.*, 351 F. Supp. 2d 829 (N.D.Ill. 2004). TILA has very limited provisions for waiver of the right to rescind, basically requiring the borrower to prepare and sign a statement explaining that “the extension of credit is needed to meet a bona fide personal financial emergency,” 12 C.F.R. § 226.23(e)(1), and this method of surrendering TILA rights does not comply.

Providing a correct notice of right to cancel but contradicting the information elsewhere. *Jenkins v. Landmark Mortgage Corporation of Virginia*, 696 F.Supp. 1089 (W.D.Va. 1988); *Apaydin v. Citibank Federal Savings Bank (In re Apaydin)*, 201 B.R. 716, 723 – 724 (Bankr. E.D.Pa. 1996). See *Smith v. Cash Store Management, Inc.*, 195 F.3d 325, 332 (7th Cir. 1999) (concurring and dissenting opinion).

Permitting use of a mortgage broker agreement that requires the borrower to pay the broker fee if the borrower decides to cancel or not proceed with the transaction. This contradicts the rescission notice and is illegal. *Manor Mortgage Corp. v. Giuliano*, 251 N.J.Super. 13, 596 A.2d 763 (App.Div. 1991). All compensation payable by the borrower to mortgage brokers is now defined as a finance charge, and upon exercise of the right to rescind, the borrower is relieved

of any obligation to pay broker fees.

Misdating the notice of right to cancel. *Taylor v. Domestic Remodeling, Inc.*, 97 F.3d 96, 99 (5th Cir. 1996) (incorrect rescission date combined with disbursement of loan constitutes violation of TILA); *Bell v. Parkway Mortg., Inc. (In re Bell)*, 309 B.R. 139, 157 (Bank. E.D.Pa. 2004), modified and rehearing denied, 314 B.R. 54 (Bankr. E.D. Pa. 2004) (delivery of form after date specified for rescission had passed). One court has held that stating a date that is too long, rather than one that is too short, is not actionable if the borrower, in fact, is given the extra period. *Hawaii Community Federal Credit Union v. Keka*, 94 Haw. 213, 11 P.3d 1 (2000). Some lenders attempt to close transactions long-distance, using courier services. It is very easy to violate TILA in this situation by misdating the notice of right to cancel or failing to deliver completed disclosures to the borrower.

Failure to give the financial disclosures, two copies of the notice of right to cancel, and the HOEPA disclosures (if applicable) to each person entitled to rescind. See above.

Failure to provide these documents in a form in which the borrower can keep them prior to consummation. Merely showing the documents to the borrower is not sufficient; the borrower must be free to leave with the documents. *Spearman v. Tom Wood Pontiac-GMC Inc.*, 312 F.3d 848 (7th Cir. 2002); *Lozada v. Dale Baker Oldsmobile, Inc.*, 197 F.R.D. 321, 327 (W.D.Mich. 2000). This was clarified by an April 9, 2002, amendment to the *Section 226.17 — General Disclosure Requirements*, Paragraph 17(b)3, Official Staff Interpretation, 12 C.F.R. Part 226, Supp. I, which added the provisions that (a) prior to becoming obligated, the consumer must be given possession of a copy of the disclosures, which may be the one the consumer signs, that he or she can take away if so desired and (b) upon signing, the consumer must be given a copy of the disclosures to keep. The creditor need not furnish two copies.

Failure to disclose all payment levels on a HOEPA loan. *Jeanty v. Washington Mut. Bank F.A.*, 305 F. Supp. 2d 962 (E.D. Wis. 2004).

Providing disclosures after consummation of the transaction. The consumer must be provided with the requisite disclosure documents before “consummation.” In many refinancing transactions closed at the borrower’s home, the person conducting the closing has the consumer sign, takes away the documents, and sends a copy later. If this can be established, TILA has been violated. *Bell v. Parkway Mortg., Inc. (In re Bell)*, 309 B.R. 139, 157 (Bank. E.D.Pa. 2004), modified and rehearing denied, 314 B.R. 54 (Bankr. E.D. Pa. 2004).

Failure to disclose a balloon payment in a HOEPA notice. 12 C.F.R. §226.32(c)(3) requires disclosure of any balloon payment for a loan with a term of five years or more.

Notice of transfer. Effective May 20, 2009, 15 U.S.C. §1641(g) was added, requiring that not later than 30 days after the date on which a mortgage loan secured by the consumer’s principal residence is sold or otherwise transferred or assigned to a third party, the creditor that is the new owner or assignee of the debt shall notify the borrower in writing of such transfer, including the identity, address, telephone number of the new creditor; the date of transfer; how to reach an agent or party having authority to act on behalf of the new creditor; the location of the place where transfer of ownership of the debt is recorded; and any other relevant information regarding the new creditor, as prescribed by regulation.

Remedies

Rescission right applicable to non-purchase-money mortgage transactions.

Statutory damages are available only for certain violations, specified in 15 U.S.C. §1640. Damages and causation need *not* be shown for recovery of statutory damages or rescission under TILA: “An objective standard is used to determine violations of the TILA, based on the representations contained in the relevant disclosure documents; it is unnecessary to inquire as to the subjective deception or misunderstanding of particular consumers.” *Zamarippa v. Cy’s Car Sales Inc.*, 674 F.2d 877, 879 (11th Cir. 1982). *Accord, Rodash v. AIB Mortgage Co.*, 16 F.3d 1142, 1144 – 1145 (11th Cir. 1994) (violation of TILA concerning disclosure of right to rescission); *Brown v. Marquette Savings & Loan Ass’n*, 686 F.2d 608, 614 (7th Cir. 1982); *Wright v. Tower Loan of Mississippi, Inc.*, 679 F.2d 436, 445 (5th Cir. 1982); *Steinbrecher, supra*; *Shepard v. Quality Siding & Window Factory, Inc.*, 730 F.Supp. 1295, 1299 (D.Del. 1990); *Russell v. Fidelity Consumer Discount Co. (In re Russell)*, 72 B.R. 855 (Bankr. E.D.Pa. 1987). The test is that of the “ordinary consumer.” *Handy v. Anchor Mortgage Corp.*, 464 F.3d 760, 764 (7th Cir. 2006).

In an individual action involving residential real property security, statutory damages are twice the finance charge, with a \$400 minimum and \$4,000 maximum. 15 U.S.C. §1640(a)(2)(A). As a practical matter, the ceiling always applies. The damages are assessed per transaction, and the fact that more than one obligor is involved does not multiply the damages. 15 U.S.C. §1640(d). The “twice the finance charge” language applies to all of the alternatives, although inaptly written. *Koons Buick Pontiac GMC, Inc. v. Nigh*, 543 U.S. 50; 125 S. Ct. 460; 160 L. Ed. 2d 389 (2004).

Special measure of damages under HOEPA – damages equal to all finance charges and fees paid by the consumer, unless the creditor demonstrates that the violation was not material. 15 U.S.C. §1640(a)(4).

In a class action, statutory damages are capped at one percent of the defendant’s net worth or \$1 million, whichever is less. 15 U.S.C. §1640(a)(2)(B). The minimum does not apply. HOEPA statutory damages are not capped. Actual damages are not capped.

Actual damages: probably requires proof of reliance/ causation. *McDonald v. Checks-N-Advance, Inc. (In re Ferrell)*, 539 F.3d 1186 (9th Cir. 2008); *Turner v. Beneficial Corp.*, 242 F.3d 1023, 1024 (11th Cir. 2001); *Vallies v. Sky Bank*, 08-4160, 2009 U.S. App. LEXIS 28762 (3rd Cir. Dec. 31, 2009); *Villasenor v. American Signature, Inc.*, 06 C 5493, 2007 U.S. Dist. LEXIS 49299, *10-11 (N.D. Ill. July 9, 2007).

Attorney’s fees. 15 U.S.C. §1640(a)(3).

Liability of assignees

Rescission rights effective against all assignees

Assignee of HOEPA loans. Purchasers of HOEPA loans take subject to all claims and defenses unless they can show they had no reason to believe they were acquiring a HOEPA loan. 15 U.S.C. §1641(d).

Assignee liability for non-HOEPA mortgage loans. TILA damage liability of an assignee of a mortgage loan that is not under HOEPA is dependent on whether the violation is apparent on the face of the documents transferred. 15 U.S.C. §1641(e).

Statute of limitations

The extended rescission right expires three years after consummation of the transaction. This period cannot be extended. 15 U.S.C. §1635 *Beach v. Ocwen Federal Bank*, 523 U.S. 410, 140 L.Ed.2d 566, 118 S.Ct. 1408 (1998).

The statute of limitations for damage actions is one year. 15 U.S.C. §1640. The Dodd-Frank amendments extend this to three years in certain cases.

A TILA claim for damages may be asserted as a counterclaim or setoff after one year. *Wood Acceptance Co. v. King*, 18 Ill.App.3d 149, 309 N.E.2d 403 (1st Dist. 1974); *Associates Finance, Inc. v. Cedillo*, 89 Ill.App.3d 179, 411 N.E.2d 1194, 44 Ill.Dec. 828 (2d Dist. 1980); *Mt. Vernon Memorial Estates, Inc. v. Wood*, 88 Ill.App.3d 666, 410 N.E.2d 995, 43 Ill.Dec. 862 (1st Dist. 1980); *National Boulevard Bank of Chicago v. Thompson*, 85 Ill.App.3d 1145, 407 N.E.2d 739, 41 Ill.Dec. 241 (1st Dist. 1980); *Public Finance Corp. v. Riddle*, 83 Ill.App.3d 417, 403 N.E.2d 1316, 38 Ill.Dec. 712 (3d Dist. 1980).

II SAMPLE FORMS

A. Complaint for rescission of mortgage

COMPLAINT

INTRODUCTION

1. Plaintiffs AAAA and BBBB bring this action against a “subprime” mortgage lender to rescind a mortgage for violation of the Truth in Lending Act, 15 U.S.C. § 1601 (“TILA”), and implementing Federal Reserve Board Regulation Z, 12 C.F.R. part 226.

JURISDICTION AND VENUE

2. This Court has subject matter jurisdiction under 28 U.S.C. §§ 1331 (general federal question), 1337 (interstate commerce), and 15 U.S.C. §1640 (TILA). Defendant does business in the District and is deemed to reside here.

PARTIES

3. Plaintiffs are husband and wife and own and reside in a home at _____,
4. Defendant DDDD is a corporation that does business in Illinois and Cook County.
5. DDDD is engaged in the business of originating “subprime” mortgages.
6. Defendant John Does 1-5 are any other persons who claim an interest in plaintiff’s mortgage loan.

FACTS RELATING TO PLAINTIFFS

7. On or about XXXX, plaintiffs obtained a \$100,000 mortgage loan from DDDD. Most of the loan proceeds were used for personal, family or household purposes – refinancing of prior debts obtained for that purpose.

8. In connection with the transaction, plaintiffs signed or received the following documents:
- a. A mortgage, Exhibit A;

- b. A settlement statement on form HUD-1, Exhibit B,
- c. A Truth in Lending disclosure statement, Exhibit C,
- d. Two incomplete notices of right to cancel, Exhibit D;
- e. A note, Exhibit E.

RIGHT TO RESCIND

9. Because the transaction was secured by plaintiffs' home, and was not entered into for purposes of the initial acquisition or construction of that home, it was subject to the right to cancel provided by 15 U.S.C. §1635 and 12 C.F.R. §226.23. Section 226.23 provides:

(a) Consumer's right to rescind.

(1) In a credit transaction in which a security interest is or will be retained or acquired in a consumer's principal dwelling, each consumer whose ownership interest is or will be subject to the security interest shall have the right to rescind the transaction, except for transactions described in paragraph (f) of this section.[fn]47

(2) To exercise the right to rescind, the consumer shall notify the creditor of the rescission by mail, telegram or other means of written communication. Notice is considered given when mailed, when filed for telegraphic transmission or, if sent by other means, when delivered to the creditor's designated place of business.

(3) The consumer may exercise the right to rescind until midnight of the third business day following consummation, delivery of the notice required by paragraph (b) of this section, or delivery of all material disclosures,[fn]48 whichever occurs last. If the required notice or material disclosures are not delivered, the right to rescind shall expire 3 years after consummation, upon transfer of all of the consumer's interest in the property, or upon sale of the property, whichever occurs first. In the case of certain administrative proceedings, the rescission period shall be extended in accordance with section 125(f) of the Act. [15 U.S.C. §1635(f)]

(4) When more than one consumer in a transaction has the right to rescind, the exercise of the right by one consumer shall be effective as to all consumers.

(b) Notice of right to rescind. In a transaction subject to rescission, a creditor shall deliver 2 copies of the notice of the right to rescind to each consumer entitled to rescind. The notice shall be on a separate document that identifies the transaction and shall clearly and conspicuously disclose the following:

(1) The retention or acquisition of a security interest in the consumer's principal dwelling.

(2) The consumer's right to rescind the transaction.

(3) How to exercise the right to rescind, with a form for that purpose, designating the address of the creditor's place of business.

(4) The effects of rescission, as described in paragraph (d) of this section.

(5) The date the rescission period expires. . . .

(f) Exempt transactions. The right to rescind does not apply to the following:

(1) A residential mortgage transaction [defined in 15 U.S.C. §1602(w) as one where a "security interest is created or retained against the consumer's dwelling to finance the acquisition or initial construction of such dwelling"].

(2) A credit plan in which a state agency is a creditor.

10. Because the notices of the right to cancel provided to plaintiffs were incomplete, their right to cancel extended for three years.

11. Plaintiffs have given notice of their election to rescind, per Exhibit F.

12. Under 15 U.S.C. §1641, plaintiffs are entitled to assert the right to rescind against any assignee of the loan.

13. 15 U.S.C. §1635(g) provides:

Additional relief

In any action in which it is determined that a creditor has violated this section, in addition to rescission the court may award relief under section 1640 of this title for violations of this subchapter not relating to the right to rescind.

WHEREFORE, plaintiffs request that the Court enter judgment in favor of plaintiffs and against defendants for:

a. A judgment voiding plaintiffs' mortgage, capable of recordation in the public records, and binding on all defendants;

b. Statutory damages for the underlying disclosure violation;

c. If appropriate, statutory damages for failure to rescind;

d. Attorney's fees, litigation expenses and costs.

e. Such other or further relief as the Court deems appropriate.

B. SAMPLE QUALIFIED WRITTEN REQUEST

CERTIFIED AND REGULAR MAIL

LARGE AND CARELESS LOAN SERVICING CO. Attn: Customer Service
P.O. Box 666
Orange, CA xxxxx

Re: Qualified written request, Innocent Borrower, SSN xxx-xx-0000, ,
1234 Main Street, Anytown, IL 00000, loan # 1234567

Ladies/ Gentlemen:

We represent Innocent Borrower. An authorization to obtain information on her behalf is enclosed. You are servicing the mortgage loan on Ms. Borrower's above-referenced property. This is a "qualified written request" under Section 6 of the Real Estate Settlement Procedures Act ("RESPA").

On behalf of our client Innocent Borrower, the borrower on the mortgage loan identified above, we demand that you provide the account history for the above-referenced loan.

Additionally, we request that you answer the following questions:

1. Why was our client's March mortgage payment returned to her? Were any late charges or other penalties imposed as a result of this action, and if so, have those charges been waived?

2. Why has our client's principal balance increased despite the fact she has made her mortgage payments on time? Ms. Borrower has been informed that it was due to the difference between the interest rate under the HAMP temporary loan modification payments and the loan rate, but we do not believe the HAMP regulations permit you to do this.

3. Have late charges or other penalties been imposed while our client has been making payments pursuant to her HAMP temporary loan modification, and if so, have those late charges been waived?

4. How were our client's HAMP temporary loan modification payments credited? Ms. Borrower believes the payments were held in a suspense account, rather than being immediately credited to the loan, as should have been done because Ms. Borrower was not in default when her temporary payment plan began. This would have resulted in increased interest charges accruing. If the temporary payments were held in a suspense account, please confirm that his account has been properly adjusted to eliminate any additional interest which accrued as a result.

5. What is the status of our client's HAMP loan modification? Ms. Borrower has been given conflicting stories regarding the modification by your customer service representatives, and have been sent correspondence and have received phone messages indicating their loan is in default despite the fact that they have been making their HAMP payments in a timely manner. Please provide us with a final executed copy of Ms. Borrower's permanent HAMP loan

modification. If no such document exists, please explain why.

We understand that under Section 6 of RESPA you are required to acknowledge my request within 20 business days and must try to resolve the issues within 60 business days.**

Sincerely,

Justice Seeker, Esq.

** Recent Amendments in Dodd Franklin Title XIV will shorten these deadlines to 5 and 30 days, however it is unclear whether they are in effect yet or not. It is probably safer to wait for either a noncompliant response or for the longer 20/60 day deadlines to expire before filing suit.

C. Sample Credit Dispute

CERTIFIED AND REGULAR MAIL

Experian
P.O. Box 9554
Allen, TX 75013-9554

Re: Innocent Borrower, 1234 Main St., Anytown, IL 00000, SSN 000-00-0000, LCLS Loan # 1234567

Ladies/ Gentlemen:

We represent Innocent Borrower. An authorization to obtain information on her behalf is enclosed.

Ms. Borrower disputes the manner in which Large and Careless Loan Servicing is reporting her mortgage loan payments. Specifically, Large and Careless is reporting that Ms. Borrower is 90 days past due as of March and April, 2009, and 60 days past due as of February, 2009.

In fact, Ms. Borrower has paid her mortgage payments as agreed, pursuant to a loan modification agreement. Ms. Borrower received a temporary loan modification under the HAMP Program. Prior to the temporary modification, Ms. Borrower was current on her mortgage payments. Ms. Borrower submitted all of her temporary payments to Large and Careless in a timely manner, and is not 90 days past due on her mortgage. The fact that her temporary payments were timely is confirmed by the fact that she was recently offered a permanent loan modification under HAMP.

We are enclosing a copy of the permanent loan modification agreement, along with proof of payment of her September, 2008, through February, 2009 mortgage payments.

Given all of the above facts, Ms. Borrower's mortgage should be reported as pays as agreed, and not as 90 or 60 days late.

Sincerely,

cc: Large and Careless Mortgage Servicing Co.
Attn: Customer Service, P.O. Box 666
Orange, CA

Justice Seeker, Esq.

D. SAMPLE RESPA/ FCRA COMPLAINT

**IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION**

INNOCENT BORROWER,)	
)	
Plaintiff,)	
)	JURY DEMANDED
v.)	
)	
LARGE AND CARELESS LOAN)	
SERVICING, CO.)	
Defendant.)	

COMPLAINT

MATTERS COMMON TO MULTIPLE CLAIMS

INTRODUCTION

1. Plaintiff, Innocent Borrower, brings this action to secure redress from unlawful mortgage servicing practices engaged in by Large and Careless Loan Servicing, Co. Plaintiff alleges (1) violation of the Cranston-Gonzales amendments to the Real Estate Settlement Procedures Act, 12 U.S.C. §2601 et seq. (“RESPA”), (2) breach of contract, (3) violation of the Fair Credit Reporting Act, 15 U.S.C. §1681s-2(b), (4) violation of the Illinois Consumer Fraud Act, and (5) violation of the Equal Credit Opportunity Act, 15 U.S.C. §1691 et seq. (“ECOA”).

JURISDICTION AND VENUE

2. This Court has jurisdiction under 28 U.S.C. §§1331, 1337, and 1367, 12 U.S.C. §2605 (RESPA), and 15 U.S.C. §§1681p (FCRA), and 1691e (ECOA).

3. Venue in this District is proper because defendants do or transact business in this District.

PARTIES

4. Plaintiff resides in a home which she owns in Chicago, IL.
5. Defendant Large and Careless Loan Servicing, is a corporation organized under Delaware law. Its principal offices are located at [fill in]. Its registered agent and office is [fill in]
6. Defendant is engaged in the business of servicing residential mortgage loans. It collects loan payments from hundreds of Illinois borrowers.

FACTS

7. On May 1, 2009, Defunct Home Loan Servicing, approved a modification of plaintiff's outstanding mortgage loan. A copy of the modification agreement and cover letter is attached as Exhibit A.
8. As set forth in Exhibit A, plaintiff's new monthly payment obligation was \$650. This was less than her prior payment obligation.
9. Shortly after Defunct entered into the modification, Large and Careless took over Defunct, and the servicing was taken over by Large and Careless.
10. Plaintiff duly made her payments.
11. Defendant has failed or refused to honor the modification, and treated plaintiff's payments as late or short because she has been making payments in the amount required by the modification.
12. Beginning in August, 2009, plaintiff received telephone calls and letters from Defendant asserting that she was in default.
13. In one phone call, plaintiff was told that she had to be making payments of \$850 per month.
14. One of the Defendant's representatives plaintiff spoke to asserted that plaintiff's loan had not been modified.
15. On other occasions, Defendant's representatives told plaintiff that her loan

had been modified and that she should disregard communications claiming that she was in default.

16. On or about October 1, 2009, Defendant sent plaintiff a “Notice of Intent to Accelerate.” A copy of this notice is attached as Exhibit B.

17. On information and belief, the “default” claimed in the October 1, 2009 notice resulted entirely from Defendant’s error concerning plaintiff’s payment obligation.

18. Defendant also reported plaintiff as in default to the major credit bureaus, including at least Experian, Equifax, Trans Union and Innovis. On information and belief, such reports were submitted at least monthly, by electronic means.

19. Defendant asserted that plaintiff was 120-180 days past due in plaintiff’s Experian, Trans Union, and Equifax credit reports.

20. Plaintiff communicated with several of the credit bureaus disputing Defendant’s reports.

21. On information and belief, the credit bureaus contacted Defendant, who verified that plaintiff was indeed late.

22. On or about November 1, 2009, Defendant sent plaintiff another “notice of intent to accelerate,” a copy of which is attached as Exhibit C.

23. On November 10, 2009, plaintiff, through counsel, sent Defendant a qualified written request, asking for (1) a complete account history, (2) an explanation as to why Defendant was demanding more than \$650 per month, (3) an explanation why plaintiff was receiving correspondence and telephone calls claiming that her loan was past due, and (4) correction of erroneous credit reporting. A copy of this letter is attached as Exhibit D.

24. Also on November 10, 2009, plaintiff, through counsel, wrote to each of the major credit bureaus, requesting deletion of the erroneous information that plaintiff was past due. A copy of this letter is attached as Exhibit E.

25. On November 20, 2009, Innovis wrote to counsel reporting that Defendant had confirmed that plaintiff’s loan was 180 days past due. A copy of this correspondence is attached

as Exhibit F.

26. By correspondence of November 25, 2009, Trans Union reported that Defendant had confirmed that plaintiff's loan was over 120 days past due. A copy of this correspondence is attached as Exhibit G.

27. By correspondence of November 20, 2009, Equifax reported that Defendant had confirmed that plaintiff's loan was over 120 days past due. A copy of this correspondence is attached as Exhibit H.

28. By letter of November 25, 2009, plaintiff, through counsel, sent Defendant a qualified written request asking for an explanation of the claimed default in the "notice of intent to accelerate" of October 1, 2009. A copy of this letter is attached as Exhibit I.

29. On or about December 1, 2009, Defendant sent plaintiff's counsel an account history, attached as Exhibit J, which shows that plaintiff is being expected to pay more than the modification amount, but provides no answers to the other questions posed to Defendant. The account history did not arrive until some time after December 5, 2009.

30. Also on or about December 5, 2009, Defendant sent plaintiff's counsel the letter attached as Exhibit K, enclosing a note, mortgage, and loan application. The documents provided did not include the modification agreement.

31. Exhibit K further states that "Defendant has carefully reviewed the information you provided and has determined that your inquiry does not appear to be specifically related to a servicing concern related to the above referenced loan."

32. On or about December 5, 2009, Defendant sent plaintiff's counsel another letter, attached as Exhibit L. This letter again stated that "Defendant has carefully reviewed the information you provided and has determined that your inquiry does not appear to be specifically related to a servicing concern related to the above referenced loan."

33. On December 10, 2009, plaintiff, through counsel, sent another qualified written request to Defendant, asking for a response to plaintiff's prior complaints regarding the

servicing of the loan. A copy of this letter is attached as Exhibit M.

34. On December 20, 2009, plaintiff, through counsel, sent another qualified written request to Defendant, asking for a response to plaintiff's prior complaints regarding the servicing of the loan. A copy of this letter is attached as Exhibit N.

35. On December 26, 2009, plaintiff, through counsel, sent another qualified written request to Defendant, questioning the receipt of another payment notice that did not respond to plaintiff's prior complaints regarding the servicing of the loan. A copy of this letter is attached as Exhibit O.

36. On or about December 30, 2009 and December 31, 2009 Defendant sent plaintiff's counsel two more letters, attached as Exhibits P and Q. Each of these letters again stated that "Bank of America has carefully reviewed the information you provided and has determined that your inquiry does not appear to be specifically related to a servicing concern related to the above referenced loan."

37. Also, on December 29, 2009, Defendant sent plaintiff's counsel another loan history, Exhibit R. This also did not answer any of the questions posed.

38. As a result of the adverse credit reports, plaintiff was damaged, in that other creditors decreased credit limits or increased rates, as set forth in Exhibits S, T and U.

39. At no time has Defendant definitely stated in writing whether it intends to honor or repudiate plaintiff's loan modification, Exhibit A.

40. Defendant's course of conduct amounts to a repudiation of the loan modification, Exhibit A.

41. Plaintiff was harassed and suffered distress as a result of defendant's conduct.

42. Defendant's conduct was wanton, malicious and intentionally evasive.

Substantial punitive damages are warranted.

COUNT I – RESPA

43. Plaintiff incorporates paragraphs 1-42.

44. Exhibits D, I, M, N and O are each a “qualified written request” as defined in the Cranston-Gonzales amendment to RESPA, 12 U.S.C. §2605(e).

45. In violation of its obligations under the Cranston-Gonzales amendment, Defendant refused to answer such requests.

46. Defendant’s canned statement that “Defendant has carefully reviewed the information you provided and has determined that your inquiry does not appear to be specifically related to a servicing concern related to the above referenced loan” represents an intentional evasion of its obligation to respond to qualified written requests.

47. On information and belief, based on the repeated use of the quoted statement in letters, Defendant regularly uses it to “respond” to borrowers.

48. Plaintiff has been injured as a result of Defendant’s taking adverse action regarding the subject of plaintiff’s requests without meaningfully responding to those requests.

49. The Cranston-Gonzales amendment to the Real Estate Settlement Procedures Act, 12 U.S.C. §2605(e), provides:

(e) Duty of loan servicer to respond to borrower inquiries.

(1) Notice of receipt of inquiry.

(A) In general. If any servicer of a federally related mortgage loan receives a qualified written request from the borrower (or an agent of the borrower) for information relating to the servicing of such loan, the servicer shall provide a written response acknowledging receipt of the correspondence within 20 days (excluding legal public holidays, Saturdays, and Sundays) unless the action requested is taken within such period.

(B) Qualified written request. For purposes of this subsection, a qualified written request shall be a written correspondence, other than notice on a payment coupon or other payment medium supplied by the servicer, that—

(I) includes, or otherwise enables the servicer to identify, the name and account of the borrower; and

(ii) includes a statement of the reasons for the belief of the borrower, to the extent applicable, that the account is in error or provides sufficient detail to the servicer regarding other information sought by the borrower.

(2) Action with respect to inquiry. Not later than 60 days (excluding legal public holidays, Saturdays, and Sundays) after the receipt from any borrower of any qualified written request under paragraph (1) and, if applicable, before taking any action with respect to the inquiry of the borrower, the servicer shall–

(A) make appropriate corrections in the account of the borrower, including the crediting of any late charges or penalties, and transmit to the borrower a written notification of such correction (which shall include the name and telephone number of a representative of the servicer who can provide assistance to the borrower);

(B) after conducting an investigation, provide the borrower with a written explanation or clarification that includes–

(I) to the extent applicable, a statement of the reasons for which the servicer believes the account of the borrower is correct as determined by the servicer; and

(ii) the name and telephone number of an individual employed by, or the office or department of, the servicer who can provide assistance to the borrower; or

(C) after conducting an investigation, provide the borrower with a written explanation or clarification that includes--

(I) information requested by the borrower or an explanation of why the information requested is unavailable or cannot be obtained by the servicer; and

(ii) the name and telephone number of an individual employed by, or the office or department of, the servicer who can provide assistance to the borrower.

(3) Protection of credit rating. During the 60-day period beginning on the date of the servicer's receipt from any borrower of a qualified written request relating to a dispute regarding the borrower's payments, a servicer may not provide information regarding any overdue payment, owed by such borrower and relating to such period or qualified written request, to any consumer reporting agency (as such term is defined under section 603 of the Fair Reporting Act [15 USC §1681a]).

50. 12 U.S.C. §2605(f) provides:

(f) Damages and costs. Whoever fails to comply with any provision of this section shall be liable to the borrower for each such failure in the following amounts:

(1) Individuals. In the case of any action by an individual, an amount equal to the sum of--

(A) any actual damages to the borrower as a result of the failure; and

(B) any additional damages, as the court may allow, in the case of a pattern or practice of noncompliance with the requirements of this section, in an amount not to exceed \$ 1,000. . . .

(3) Costs. In addition to the amounts under paragraph (1) or (2), in the case of any successful action under this section, the costs of the action, together with any attorneys fees incurred in connection with such action as the court may determine to be reasonable under the circumstances.

...

WHEREFORE, plaintiff requests that the Court enter judgment in favor of the plaintiff and against defendant for:

- (1) Compensatory damages;
- (2) Statutory damages;
- (3) Injunctive relief, including correction of credit reporting;
- (4) Attorney's fees, litigation expenses and costs of suit;
- (5) Such other or further relief as the Court deems proper.

COUNT II – FAIR CREDIT REPORTING ACT

51. Plaintiff incorporates paragraphs 1-42.

52. Defendant violated the Fair Credit Reporting Act, 15 U.S.C. §1681s-2(b), by falsely verifying to the credit bureaus that plaintiff was 120 to 180 days late when the credit bureaus contacted Defendant in response to plaintiff's complaints.

53. Section 1681s-2(b) provides:

(b) Duties of furnishers of information upon notice of dispute.

(1) In general. After receiving notice pursuant to section 611(a)(2) [15 USC §1681i(a)(2)] of a dispute with regard to the completeness or accuracy of any information provided by a person to a consumer reporting agency, the person shall

(A) conduct an investigation with respect to the disputed information;

(B) review all relevant information provided by the consumer reporting agency pursuant to section 611(a)(2) [15 USC §1681i(a)(2)];

(C) report the results of the investigation to the consumer reporting agency; and

(D) if the investigation finds that the information is incomplete or inaccurate, report those results to all other consumer reporting agencies to which the person furnished the information and that compile and maintain files on consumers on a nationwide basis.

(2) Deadline. A person shall complete all investigations, reviews, and reports required under paragraph (1) regarding information provided by the person to a consumer reporting agency, before the expiration of the period under section 611(a)(1) [15 USC §1681i(a)(1)] within which the consumer reporting agency is required to complete actions required by that section regarding that information.

54. Defendant committed such violations willfully or negligently, thereby violating 15 U.S.C. §1681n and/or §1681o.

55. Section 1681n provides:

§1681n. Civil liability for willful noncompliance

(a) In general. Any person who willfully fails to comply with any requirement imposed under this title with respect to any consumer is liable to that consumer in an amount equal to the sum of—

(1)

(A) any actual damages sustained by the consumer as a result of the failure or damages of not less than \$ 100 and not more than \$ 1,000; or

(2) such amount of punitive damages as the court may allow; and

(3) in the case of any successful action to enforce any liability under this section, the costs of the action together with reasonable attorney's fees as determined by the court. . . .

56. Section 1681o provides:

§1681o. Civil liability for negligent noncompliance

(a) In general. Any person who is negligent in failing to comply with any requirement imposed under this title with respect to any consumer is liable to that consumer in an amount equal to the sum of--

(1) any actual damages sustained by the consumer as a result of the failure;

(2) in the case of any successful action to enforce any liability under this section, the costs of the action together with reasonable attorney's fees as determined by the court.

WHEREFORE, plaintiff requests that the Court enter judgment in her favor and against defendant for:

- (1) Appropriate actual, punitive and statutory damages;
- (2) Attorney's fees, litigation expenses and costs of suit;
- (3) Such other or further relief as the Court deems proper.

COUNT III – BREACH OF CONTRACT

57. Plaintiff incorporates paragraphs 1-42.

58. Defendant violated the loan modification agreement (Exhibit A) by failing or refusing to apply plaintiff's payments in accordance with the agreement and by reporting payments made in accordance with the agreement as late.

WHEREFORE, plaintiff requests that the Court enter judgment in her favor and against defendants for:

- (1) Appropriate damages;
- (2) Appropriate injunctive relief, including an injunction prohibiting defendant from repudiating the loan modification and an injunction requiring correction of false credit reporting;
- (3) Costs of suit;
- (4) Such other or further relief as the Court deems proper.

COUNT IV -- ILLINOIS CONSUMER FRAUD ACT

59. Plaintiff incorporates paragraphs 1-42.

60. Defendant engaged in unfair and deceptive acts and practices, in violation of §2 of the Illinois Consumer Fraud Act, 815 ILCS 505/2, by:

- a. Ignoring its obligations under RESPA.

- b. Using bogus form responses to avoid answering plaintiff's inquiries.
- c. Defaming plaintiff's credit.
- d. Refusing to honor plaintiff's loan modification.
- e. Refusing to state whether it was honoring or dishonoring plaintiff's loan modification.

61. Defendant engaged in such conduct in the course of trade and commerce, and for the purpose of or with the knowledge that it was injuring plaintiff.

WHEREFORE, plaintiff requests that the Court enter judgment in favor of plaintiff and against defendant for:

- (1) Compensatory damages;
- (2) Punitive damages;
- (3) Appropriate injunctive relief, including an injunction prohibiting defendant from repudiating the loan modification and an injunction against false credit reporting;
- (4) Attorney's fees, litigation expenses and costs of suit;
- (5) Such other or further relief as the Court deems proper.

COUNT V – EQUAL CREDIT OPPORTUNITY ACT

62. Plaintiff incorporates paragraphs 1-42.

63. The ECOA requires that notice of adverse action on a request for credit be timely provided to the applicant.

64. Plaintiff's request for a loan modification was an application subject to the ECOA and implementing Federal Reserve Board Regulation B.

65. Defendant's course of conduct amounts to a repudiation of the loan modification and constitutes adverse action.

66. No written statement of the reasons for such action was furnished to plaintiff.

67. 15 U.S.C. §1691(d) provides:

Reason for adverse action; procedure applicable; "adverse action" defined.

(1) Within thirty days (or such longer reasonable time as specified in regulations of the Board for any class of credit transaction) after receipt of a completed application for credit, a creditor shall notify the applicant of its action on the application.

(2) Each applicant against whom adverse action is taken shall be entitled to a statement of reasons for such action from the creditor. A creditor satisfies this obligation by--

(A) providing statements of reasons in writing as a matter of course to applicants against whom adverse action is taken; or

(B) giving written notification of adverse action which discloses (i) the applicant's right to a statement of reasons within thirty days after receipt by the creditor of a request made within sixty days after such notification, and (ii) the identity of the person or office from which such statement may be obtained. Such statement may be given orally if the written notification advises the applicant of his right to have the statement of reasons confirmed in writing on written request.

(3) A statement of reasons meets the requirements of this section only if it contains the specific reasons for the adverse action taken.

(4) Where a creditor has been requested by a third party to make a specific extension of credit directly or indirectly to an applicant, the notification and statement of reasons required by this subsection may be made directly by such creditor, or indirectly through the third party, provided in either case that the identity of the creditor is disclosed.

(5) The requirements of paragraph (2), (3), or (4) may be satisfied by verbal statements or notifications in the case of any creditor who did not act on more than one hundred and fifty applications during the calendar year preceding the calendar year in which the adverse action is taken, as determined under regulations of the Board.

(6) For purposes of this subsection, the term "adverse action" means a denial or revocation of credit, a change in the terms of an existing credit arrangement, or a refusal to grant credit in substantially the amount or on substantially the terms requested. Such term does not include a refusal to extend additional credit under an existing credit arrangement where the applicant is delinquent or otherwise in default, or where such additional credit would exceed a previously established credit limit.

68. Defendant receives more than 150 credit applications, including requests for loan modifications, per year.

69. 15 U.S.C. §1691a provides:

Definitions; rules of construction

(a) The definitions and rules of construction set forth in this section are applicable for the purposes of this title [15 USCS §§1691 et seq.].

(b) The term "applicant" means any person who applies to a creditor directly for an extension, renewal, or continuation of credit, or applies to a creditor indirectly by use of an existing credit plan for an amount exceeding a previously established credit limit.

(c) The term "Board" refers to the Board of Governors of the Federal Reserve System.

(d) The term "credit" means the right granted by a creditor to a debtor to defer payment of debt or to incur debts and defer its payment or to purchase property or services and defer payment therefor.

(e) The term "creditor" means any person who regularly extends, renews, or continues credit; any person who regularly arranges for the extension, renewal, or continuation of credit; or any assignee of an original creditor who participates in the decision to extend, renew, or continue credit.

(f) The term "person" means a natural person, a corporation, government or governmental subdivision or agency, trust, estate, partnership, cooperative, or association.

(g) Any reference to any requirement imposed under this title [15 USCS §§1691 et seq.] or any provision thereof includes reference to the regulations of the Board under this title [15 USCS §§1691 et seq.] or the provision thereof in question.

70. Implementing Federal Reserve Board Regulation B, 12 C.F.R. §202.9,

provides:

Notifications.

(a) Notification of action taken, ECOA notice, and statement of specific reasons

--

(1) When notification is required. A creditor shall notify an applicant of action taken within:

(I) 30 days after receiving a completed application concerning the creditor's approval of, counteroffer to, or adverse action on the application;

(ii) 30 days after taking adverse action on an incomplete application, unless notice is provided in accordance with paragraph (c) of this section;

(iii) 30 days after taking adverse action on an existing account; or

(iv) 90 days after notifying the applicant of a counteroffer if the applicant does not expressly accept or use the credit offered.

(2) Content of notification when adverse action is taken. A notification given to an applicant when adverse action is taken shall be in writing and shall contain: a statement of the action taken; the name and address of the creditor; a statement of the provisions of section 701(a) of the Act; the name and address of the Federal agency that administers compliance with respect to the creditor; and either:

(I) A statement of specific reasons for the action taken; or

(ii) A disclosure of the applicant's right to a statement of specific reasons within 30 days, if the statement is requested within 60 days of the creditor's notification. The disclosure shall include the name, address, and telephone number of the person or office from which the statement of reasons can be obtained. If the creditor chooses to provide the reasons orally, the creditor shall also disclose the applicant's right to have them confirmed in writing within 30 days of receiving a written request for confirmation from the applicant.

71. 15 U.S.C. §1691e provides:

Civil liability

(a) Individual or class action for actual damages. Any creditor who fails to comply with any requirement imposed under this title [15 USCS §§1691 et seq.] shall be liable to the aggrieved applicant for any actual damages sustained by such applicant acting either in an individual capacity or as a member of a class.

(b) Recovery of punitive damages in individual and class action for actual damages; exemptions; maximum amount of punitive damages in individual actions; limitation on total recovery in class actions; factors determining amount of award. Any creditor, other than a government or governmental subdivision or agency, who fails to comply with any requirement imposed under this title [15 USCS §§1691 et seq.] shall be liable to the aggrieved applicant for punitive damages in an amount not greater than \$ 10,000, in addition to any actual damages provided in subsection (a), except that in the case of a class action the total recovery under this subsection shall not exceed the lesser of \$ 500,000 or 1 per centum of the net worth of the creditor. In determining the amount of such damages in any action, the court shall consider, among other relevant factors, the amount of any actual damages awarded, the frequency and persistence of failures of compliance by the creditor, the resources of the creditor, the number of persons adversely affected, and the extent to which the creditor's failure of compliance was intentional.

(c) Action for equitable and declaratory relief. Upon application by an aggrieved applicant, the appropriate United States district court or any other court of competent jurisdiction may grant such equitable and declaratory relief as is necessary to enforce the requirements imposed under this title [15 USCS §§1691 et seq.].

(d) Recovery of costs and attorney fees. In the case of any successful action under subsection (a), (b), or (c), the costs of the action, together with a reasonable attorney's fee as determined by the court, shall be added to any damages awarded by the court under such subsection.

(e) Good faith compliance with rule, regulation, or interpretation of Board or interpretation or approval by an official or employee of Federal Reserve System duly authorized by Board. No provision of this title [15 USCS §§1691 et seq.] imposing liability shall apply to any act done or omitted in good faith in conformity with any official rule, regulation, or interpretation thereof by the Board or in conformity with any interpretation or approval by an official or employee of the Federal Reserve System duly authorized by the Board to issue such interpretations or approvals under such procedures as the Board may prescribe therefor, notwithstanding that after such act or omission has occurred, such rule, regulation, interpretation, or approval is amended, rescinded, or determined by judicial or other authority to be invalid for any reason.

(f) Jurisdiction of courts; time for maintenance of action; exceptions. Any action under this section may be brought in the appropriate United States district court without regard to the amount in controversy, or in any other court of competent jurisdiction. No such action shall be brought later than two years from the date of the occurrence of the violation

72. Defendant's failure to give written notice of the adverse action represented by repudiation of the loan modification violates the ECOA.

WHEREFORE, plaintiff requests that the Court enter judgment in favor of plaintiff and against defendant for:

- (1) Statutory damages as provided by 15 U.S.C. §1691e.
- (2) Appropriate injunctive relief, including an injunction prohibiting defendant from repudiating the loan modification and an injunction against false credit reporting;
- (3) Attorney's fees, litigation expenses and costs of suit.
- (4) Such other or further relief as is appropriate.

E. SAMPLE DISCOVERY

**IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION**

INNOCENT BORROWER,)

)
Plaintiff,)
)
v.)
)
LARGE AND CARELESS LOAN SERVICING,)
CO.)
Defendant.)

**PLAINTIFF’S FIRST SET OF REQUESTS FOR ADMISSION, INTERROGATORIES
AND REQUESTS FOR PRODUCTION TO DEFENDANT**

Plaintiff Innocent Borrower hereby requests that Defendant respond to these Requests for Admission, Interrogatories, and Requests for Production of Documents to be returned in 30 days from service.

Throughout this request:

1. Unless otherwise specified in a particular paragraph, the time period covered by this request is January 1, 2007 to the present.
2. If you find any word ambiguous, you should define the word for yourself and then answer the interrogatory using that definition of the word. If you do this, expressly state that you find a certain word ambiguous and define the word in your response to the interrogatory. If the word as defined by you is not the definition we intended we will re-state the interrogatory clarifying the ambiguous word.
3. If you are declining to produce any document or respond to any paragraph in whole or in part because of a claim of privilege, please: (a) identify the subject matter, type (e.g., letter, memorandum), date, and author of the privileged communication or information, all persons that prepared or sent it, and all recipients or addressees; (b) identify each person to whom the contents of each such communication or item of information have heretofore been disclosed, orally or in writing; (c) state what privilege is claimed; and (d) state the basis upon which the privilege is claimed.
4. If any document requested was, but no longer is, in your possession or subject to your control, please state: (a) the date of its disposition; (b) the manner of its

disposition (e.g., lost, destroyed, transferred to a third party); and (c) an explanation of the circumstances surrounding the disposition of the document.

5. Other instructions and definitions to be used in making your response are attached hereto as Appendix 1.

7. If any paragraph of this request is believed to be ambiguous or unduly burdensome, please contact the undersigned and an effort will be made to remedy the problem.

I. REQUESTS FOR ADMISSION

1. Exhibit A is a true and correct copy of a loan modification agreement between plaintiff and Defunct dated [date], and cover letter.

2. As set forth in Exhibit A, Plaintiff's new monthly payment obligation was \$650.

3. Shortly after [date], Large and Careless took over Defunct, and the servicing of plaintiff's loan was taken over by Defendant.

4. Plaintiff made her payments under the loan modification agreement in a timely fashion.

5. Defendant treated Plaintiff's payments as late or short because she was making modified payments.

6. Beginning in [date] Defendant called Plaintiff and sent her letters asserting that she was in default.

7. Defendant received several phone calls from plaintiff after the [date] letters were sent.

8. On or about October 28, 2009, Defendant sent Plaintiff a "Notice of Intent to Accelerate."

9. Exhibit B is a true and correct copy of the October 28, 2009 "Notice of Intent to Accelerate."

10. Defendant reported Plaintiff as in default to the major credit bureaus,

including Experian, Equifax, Trans Union and Innovis.

11. Defendant reported plaintiff's loan as 120-180 days past due to Experian, Trans Union, and Equifax.

12. Defendant was notified by the credit bureaus that plaintiff disputed the fact that it was reporting her loan as being paid 120-180 days late.

13. In response, Defendant verified that the manner in which it was reporting Plaintiff's loan was correct.

14. On or about [date], Defendant sent Plaintiff another "Notice of Intent to Accelerate,"

15. Exhibit C is a true and correct copy of the [date] "Notice of Intent to Accelerate."

16. On or about [date], Defendant received a letter from Plaintiff, through counsel, asking for (1) a complete account history, (2) an explanation as to why Defendant was demanding more than \$658.61 per month, (3) an explanation why Plaintiff was receiving correspondence and telephone calls claiming that her loan was past due, and (4) correction of erroneous credit reporting.

17. Exhibit D is a true and correct copy of the [date] letter Defendant received from Plaintiff.

18. On or about [date], Defendant received a letter from Plaintiff, through counsel, asking for an explanation of the claimed default in the "notice of intent to accelerate" of [date],

19. Exhibit E is a true and correct copy of the [date] letter Defendant received from Plaintiff.

20. On or about [date], Defendant sent Plaintiff's counsel an account history, attached as Exhibit F, which provides no answers to the other questions posed to Defendant.

21. Exhibit F is a true and correct copy of the [date] letter Defendant sent to Plaintiff's counsel.

22. Also on or about [date], Defendant sent Plaintiff's counsel a letter enclosing a note, mortgage, and loan application. The documents provided did not include the modification agreement. This [date] letter states that "Defendant has carefully reviewed the information you provided and has determined that your inquiry does not appear to be specifically related to a servicing concern related to the above referenced loan."

23. Exhibit G is a true and correct copy of the [date] letter Defendant sent to Plaintiff's counsel which enclosing a note, mortgage, and loan application.

24. On or about [date] and [date] Defendant sent Plaintiff's counsel two more letters, attached as Exhibits L and M. Each of these letters again stated that "Defendant has carefully reviewed the information you provided and has determined that your inquiry does not appear to be specifically related to a servicing concern related to the above referenced loan."

25. Exhibits L and M are true and correct copies of the [date] and [date] letters Defendant sent Plaintiff's counsel.

26. At no time has Defendant definitely stated in writing whether it intends to honor or repudiate Plaintiff's loan modification, Exhibit A.

II. INTERROGATORIES

1. State the name and current or last known address and job title of each Defendant employee who was directly involved in handling plaintiff's account and/or any disputes and correspondence relating to that account.

2. Identify the name and address of the current owner of plaintiff's mortgage loan.

3. List, explain and describe your response to each of Plaintiff's disputes, and identify each employee involved in the activities as well as any supervising employee overseeing each notice, phone call, transaction and/or event.

4. Identify all individuals known to you or your attorney who are witnesses to the events described in Plaintiff's Complaint or to any event which is the subject of any defense you intend to raise to this lawsuit. For each such person, state the following: (a) whether the person is affiliated with, employed by, or related to any party to this lawsuit (or its agents, servants, officers or employees); (b) Explain and describe each such person's knowledge of the facts.

5. List, explain and describe all documents known to you or believed by you to exist concerning any of the events described in Plaintiff's complaint or concerning any of the events which are the subject of any defense you intend to raise to the lawsuit.

6. State the policy number and carrier of any and all insurance policies that may cover this lawsuit, together with information on if and when notice was given to each carrier.

7. Describe all document destruction and retention policies of Defendants in regard to account records, including account applications, and records of credit disputes, account histories, records of electronic payments, communications with credit bureaus, and credit reporting.

8. List, explain, and describe all documents known to you or believed by you to have been destroyed concerning Plaintiff's account, Plaintiff and/or any of the events described in Plaintiff's Complaint or concerning any of the events which are the subject of any defense you intend to raise to the lawsuit.

9. Identify the name and address of witnesses who will testify at trial or evidentiary hearings and for each of the following categories of witnesses provide the additional information: For each lay witness, identify the subjects on which the witness will testify; For each independent expert witness, identify the subjects on which the witness will testify and opinions you expect to elicit; For each controlled expert witness, identify: the subject matter on which the witness will testify; the conclusions and opinions of the witness and bases therefore;

the qualifications of the witness; any reports prepared by the witness about the case.

10. List and describe in detail all communications between Plaintiff and Defendants, including the date of the communication, the persons involved and the substance of the communication, and identify any documents relating to each such communication.

11. List and describe all communications between Defendants and any credit bureaus or agencies regarding Plaintiff including the date of the communication, the persons involved and the substance of the communication, and identify any documents relating to each such communication.

12. State the dates and exact content of each of your credit reportings, which bore any of Plaintiff's personal identifiers, which you made to any person or entity, which contained information regarding plaintiff's account.

13. State the names, addresses, and telephone numbers of any agent or employee of Defendant who authorized, approved, or created the correspondence attached to the Complaint as Exhibits A-C, F-H, and L-N.

14. Explain in detail Defendant's procedures for reinvestigating consumer disputes of your account and consumer credit data forwarded by the national credit reporting agencies for Defendant's response.

15. Describe in detail every step taken by Defendant to investigate Plaintiff's disputes of her account and consumer credit data which was reported to the national consumer credit reporting agencies, including the identity, job title, address and phone number of any witnesses interviewed and persons conducting the investigation, documents requested and reviewed, communications with the national consumer credit reporting agencies, description of any computer systems.

16. Describe in detail every step taken by Defendant to respond to the letters attached as Exhibits D-E and I-K, and/or to resolve the problems identified in those exhibits, and state the name and title of any individuals involved in either the responses or any attempts to

resolve the problems.

17. State all the reasons Defendants failed to take corrective action in response to the letters attached as Exhibits D-E and I-K.

18. Describe the compliance policy, or procedure of Defendant to ensure that customers are not reported delinquent to one or more credit bureaus after that customer made a "qualified written request" as defined in 12 U.S.C. §2605 to Defendant as well as the name and address of any person with knowledge of any fact identified in the answer to this interrogatory and produce any documents relating to any facts in the answer to this interrogatory.

19. Describe the compliance policy, or procedure of Defendant to ensure that "qualified written requests" as defined in 12 U.S.C. §2605 to Defendant are properly handled as well as the name and address of any person with knowledge of any fact identified in the answer to this interrogatory and produce any documents relating to any facts in the answer to this interrogatory.

20. All documents relating to any complaint, criticism or inquiry, by any person, concerning Defendants' compliance with 12 U.S.C. §2605.

21. All documents relating to any judicial or administrative proceeding (irrespective of date) in which Defendants were accused of violating 12 U.S.C. § 2605.

III. REQUESTS FOR PRODUCTION OF DOCUMENTS

Please produce:

1. All contracts, documents, histories, consumer reports, credit reports, consumer disclosures, updates or other compilation of information in any file which contains Plaintiff's social security number or other identifying information that Defendants possess, including any historical or archived documents.

2. All information currently listed under Plaintiff's name, loan number or social security number.

3. All records of communications between Plaintiff and/or her counsel and

Defendants, including all documents of telephonic or electronic or written communications, log books or other records.

4. All records of communications between Defendants and any credit bureaus or reporting agency or third party regarding Plaintiff's account.

5. All documents relating to any investigation of any information in any files containing Plaintiff's name or social security number, including, but not limited to, any notes, screens, logs, internal memorandum, correspondence or supporting documentation.

6. A complete copy of any communications, including, but not limited to, any supporting documentation, specific requests for information, instructions, notes, screens, logs, policies or legal requirements, relating to Plaintiff, any file containing Plaintiff's name or social security number, plaintiff, plaintiff's files, and/or any investigation of any information contained in any of those files.

7. All documents relating to Plaintiff's property address.

8. All documents purporting to transfer any interest or rights in Plaintiff's note or mortgage, including assignments, contracts, sales agreements and agreements for the servicing of debts.

9. All manuals, memoranda, instructions and other documents which discuss, describe or set forth standards, criteria, guidelines, policies or practices relating to responding to clients' account inquiries.

10. All manuals, memoranda, instructions and other documents which discuss, describe or set forth standards, criteria, guidelines, policies or practices relating to compliance with the Real Estate Settlement Procedures Act (RESPA).

11. All manuals, memoranda, instructions and other documents which discuss, describe or set forth standards, criteria, guidelines, policies or practices relating to compliance with the Fair Credit Reporting Act (FCRA).

12. All manuals, memoranda, instructions and other documents which discuss,

describe or set forth standards, criteria, guidelines, policies or practices relating to compliance with the Equal Credit Opportunity Act (ECOA).

13. All documents transmitted to Plaintiff by Defendant with respect to Plaintiff's loan modification application.

14. All documents relating to plaintiff's loan modification.

15. All correspondence between defendant, the owner of plaintiff's loan and/or Defunct regarding plaintiff's loan and/or plaintiff's loan modification agreement.

16. The servicing agreement which covers plaintiff's loan.

17. All of Defendant account notes relating to Plaintiff.

18. All manuals, memoranda, instructions and other documents which discuss, describe or set forth standards, criteria, guidelines, policies or practices relating to responding to applications for loan modification

19. All documents (irrespective of date) that discuss or relate to Defendants' compliance or lack of compliance with the ECOA through not properly responding to applications for loan modification.

20. All documents (irrespective of date) which constitute or reflect communications between Defendants and public or private agencies that receive consumer complaints (such as an Attorney General's office, the Federal Trade Commission, HUD, a Better Business Bureau or newspaper column), relating to compliance with 12 U.S.C. §2605.

21. All documents (irrespective of date) that discuss Defendants' compliance or lack of compliance with 12 U.S.C. §2605.