No. 15-17188

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

KEVIN J. KEEN, TAMRA E. KEEN,
CURT CONYERS, KELLY E. CONYERS,
individually and on behalf of all others similarly situated,
Plaintiffs-Appellants

v.

JPMORGAN CHASE BANK, N.A.,
a national banking association,
Defendant-Appellee

On Appeal from the United States District Court
For the Northern District of California
Case No. 3:15-cv-01806-WHO
The Honorable William H. Orrick, III, United States District Judge

---

APPELLANTS' REPLY TO RESPONSE TO MOTION AND RESPONSE TO CROSS-MOTION

William McGrane [SB57761]
McGrane PC
4 Embarcadero Center, Suite 1400
San Francisco, CA 94111
Telephone: 415.292.4807
Email: william.mcgrane@mcgranepc.com

Attorneys for Plaintiffs-Appellants
KEVIN J. KEEN, TAMRA E. KEEN,
CURT CONYERS, KELLY E. CONYERS,
individually and on behalf of all others similarly situated

Table of Contents

Quick Review 1

Argument 5

I. The Defenses to a Truth in Lending Act Claim for Statutory Damages Pursuant to 15 U.S.C. § 1640(a) are as Stated in 15 U.S.C. §§ 1640(b) and 1640(c) and Those Defenses do Not Include Loan Payoffs. 5

II. In Any Case, a Truth in Lending Act Claim for Statutory Damages Pursuant to 15 U.S.C. § 1640(a) Accrues at Loan Consummation and is Thus Unaffected by any Subsequent Loan Payoff. 6

III. Additional Argument in Favor of Article III Jurisdiction in Light of *Spokeo II*. 9

Conclusion 13

Table of Authorities

Federal Cases

Abubo v. Bank of N.Y. Mellon,
977 F. Supp. 2d 1037 (D. Haw. 2013) 8

Brooklyn Savings Bank v. O'Neil,
324 U.S. 697 (1945) 8

Cardiello v. Money Store, Inc.,
2001 U.S. Dist. LEXIS 7107 (S.D.N.Y. May 31, 2001) 6

DeMando v. Morris,
206 F.3d 1300 (9th Cir. 2000) 7

Dixey v. Idaho First Nat'l Bank,
677 F.2d 749 (9th Cir. 1982) 7

Eby v. Reb Realty,
495 F.2d 646 (9th Cir. 1974) 8

Havens Realty Corp. v. Coleman,
455 U.S. 363 (1982) 9

King v. California,
784 F.2d 910 (9th Cir. 1986) 6, 9

Mourning v. Family Publ'ns Serv.,
411 U.S. 356 (1973) 7

Palmer v. Wilson,
502 F.2d 860 (9th Cir. 1974) 7, 8

Plascencia v. Lending 1st Mortg.,
583 F. Supp. 2d 1090 (N.D. Cal. 2008) 8

Silvers v. Sony Pictures Entm't, Inc.,
402 F.3d 881, 885 (9th Cir. 2005) 6

Spokeo, Inc. v. Robins,
__ U.S. __, 2016 U.S. LEXIS 3046 (May 16, 2016) ....*passim*

Sutherland v. Diversified Capital, Inc.,
2008 U.S. Dist. LEXIS 61016, *8 (N.D. Cal. July 24, 2008) 6

Taub v. World Fin. Network Bank,
950 F. Supp. 2d 698 (S.D.N.Y. 2013) 7

Federal Statutes

15 U.S.C. § 1635 .... 8, 9
15 U.S.C. § 1640(a) 5, 6, 7, 8, 9, 11
15 U.S.C. § 1640(a)(2)(B) 2
15 U.S.C. § 1640(b) 5
15 U.S.C. § 1640(c) 5
15 U.S.C. § 1640(e) 6

Federal Regulations

12 C.F.R. § 1026.4(a) 12
12 C.F.R. § 1026.17(c)(1) 12
12 C.F.R. § 1026.18(d)(1)(i) 10
12 C.F.R. pt. 1026, Supp. I, ¶ 17(c)(1)-1 12

State Statutes

Cal. Civ. Code § 2943(d) 1

Other

The Law of Truth in Lending (Alvin C. Harrell ed. 2014) 6
Diane E. Thompson, *et al.*, Truth in Lending (9th ed. 2015) 8

Quick Review

On June 3, 2016, borrowers moved this court to determine its own subject matter jurisdiction in light of *Spokeo II*.[1]

On June 13, 2016, Chase responded to borrowers' motion by, *inter alia*, filing a cross-motion to dismiss. CMB 1–2. That cross-motion asserts that borrowers' admitted payoff of $199,643.84 in loan principal on December 28, 2015, eliminated any possible Article III jurisdiction irrespective of *Spokeo II*. CMB 3–14.[2]

Chase's assertion that borrowers' payment of $199,643.84 in loan principal moots the need for this court to address *Spokeo II* is frivolous. The operative

---

[1] This motion adopts all abbreviations previously employed in Dkt 23-1 (the Borrowers Motion Brief or BMB). Dkt 24-1 is hereafter described as the Chase Motion Brief or CMB. Dkt 28-2 is hereafter referred to as the Amicus Motion Brief or AMB. Unless otherwise indicated, other pleadings on file herein are identified solely by their docket number.

[2] The $199,643.84 principal balance stated on Exhibit 1 to Exhibit C to the CMB is $375.68 less than the $200,019.52 principal balance otherwise shown as due using a 365/360 bank interest calculation as of January 1, 2015 by 3 ER 352. This minor difference is accounted for by the mathematical effect of borrowers' making an extra $1,015.94 combined payment of principal and interest on December 15, 2015, plus two other loan pre-payments of $44.06 on December 15, 2015, and $201,567.99 on December 28, 2015. Exhibit 1 to Exhibit C to the CMB. These three early loan payments resulted in an overpayment by borrowers of $1,167.28, which sum Chase then refunded to borrowers without then offsetting the $175.76 otherwise due it consistent with 3 ER 352. *Id.* Under the terms of the borrowers' loan, however, Chase—whether acting as the owner or merely the servicer of borrowers' loan—was entitled to (and remains entitled to) collect that $175.76 under Cal. Civ. Code § 2943(d), all as is otherwise set forth in Dkt 23-2 at 1. That $175.76 has previously been tendered to Chase. *Id.*

complaint does not seek anything but statutory damages on account of the $7,600+ under-disclosed finance charge alleged here. 3 ER 319, ¶¶ 11–12. This is consistent with the fact that the Truth in Lending Act doesn't allow recovery of anything but statutory damages in cases where, as here, a plaintiff does not claim actual reliance on any disclosures made by a lender pursuant to the Act. BMB 2 n.2, 7.

Consistent with the above, all the operative complaint alleges is a pattern of significantly understated finance charges permitting a class recovery of up to $1,000,000 in statutory damages on a strict liability basis pursuant to 15 U.S.C. § 1640(a)(2)(B) (3 ER 321, ¶ 23). Borrowers' personal entitlement to statutory damages on a strict liability basis (qualifying borrowers to act as class representatives) is alleged to have fully accrued as of the November 2014 date when Chase first made its $203,115 loan to them. 3 ER 317, ¶ 5; 318, ¶ 9.

As demonstrated, *infra*—and short of Chase's demonstrating it holds a written release by borrowers of their individual statutory damages claims (there is none)—the December 2015 payoff of $199,643.84 in loan principal does not and cannot moot a statutory damages claim which otherwise fully accrued in November 2014.[3]

[3] The district court properly rejected Chase's analogous ripeness defense. 1 ER 009:11–12; *see also* 2 ER 271:1–11, 278:4–15; *compare* 3 ER 304–306.

The Chase Motion Brief ignores the *Spokeo II* conundrum. That conundrum may be summarized as follows: how should *Spokeo II* cut from a subject matter jurisdiction standpoint (i) when Congress has created a statutory scheme dependent on administrative regulations so convoluted they are decipherable only by legal and financial experts; (ii) where, given the opacity of those administrative regulations, lay borrowers can't prove actual reliance on same and, as a result, statutory damages are all that is recoverable by such borrowers; and (iii) where the statutory damages being sought are based on a strict liability theory of recovery and are otherwise entirely penal in nature?

There are two possible ways to resolve the *Spokeo II* conundrum:

- If being given a Truth in Lending Act disclosure statement containing a $7,600+ understated finance charge is found harmless then, under *Spokeo II*, there is not (and never has been) any Article III subject matter jurisdiction to decide this case in the federal courts. In such case the district court's decision must be vacated for lack of case or controversy jurisdiction and this case otherwise dismissed without prejudice to its being refiled in the state court. That would be consistent with the harmlessly bad zip code result alluded to in *Spokeo II*.

- If, on the other hand, understating a finance charge by $7,600+ is *not* found harmless then, under *Spokeo II*, there is Article III subject matter jurisdiction to decide this case in the federal courts and the district court's clearly erroneous determination that Chase's subjective intent at the time of loan consummation is somehow a defense to Truth in Lending Act liability here must be considered on the merits by this court. And, in that limited context only, the fact borrowers are now legally exposed to an unbargained for $175+ additional interest payment may well be relevant additional evidence of such harmfulness. Last, but certainly not least, finding Article III jurisdiction here avoids poking a serious hole in the law when it comes to enforcing the Truth in Lending Act in those states which themselves have a case or controversy requirement as part of their jurisprudence.

Argument

I. The Defenses to a Truth in Lending Act Claim for Statutory Damages Pursuant to 15 U.S.C. § 1640(a) are as Stated in 15 U.S.C. §§ 1640(b) and 1640(c) and Those Defenses do Not Include Loan Payoffs.

15 U.S.C. § 1640(b) reads, in full:

> **Correction of errors.** A creditor or assignee has no liability under this section or section 1607 of this title or section 1611 of this title for any failure to comply with any requirement imposed under this part or part E, if within sixty days after discovering an error, whether pursuant to a final written examination report or notice issued under section 1607(e)(1) of this title or through the creditor's or assignee's own procedures, and prior to the institution of an action under this section or the receipt of written notice of the error from the obligor, the creditor or assignee notifies the person concerned of the error and makes whatever adjustments in the appropriate account are necessary to assure that the person will not be required to pay an amount in excess of the charge actually disclosed, or the dollar equivalent of the annual percentage rate actually disclosed, whichever is lower.

15 U.S.C. § 1640(c) reads in full:

> **Unintentional violations; bona fide errors.** A creditor or assignee may not be held liable in any action brought under this section or section 1635 of this title for a violation of this subchapter if the creditor or assignee shows by a preponderance of evidence that the violation was not intentional and resulted from a bona fide error notwithstanding the maintenance of procedures reasonably adapted to avoid any such error. Examples of a bona fide error include, but are not limited to, clerical, calculation, computer malfunction and programing, and printing errors, except that an error of legal judgment with respect to a person's obligations under this subchapter is not a bona fide error.

The above quoted sections of the Truth in Lending Act state the only available defenses to a violation by a lender of 15 U.S.C. § 1640(a). The doctrine of *expressio unius est exclusio alterius* otherwise precludes Chase's present effort to—out of whole cloth (CMB 9–11)—create a non-statutory defense to a violation by a lender of 15 U.S.C. § 1640(a) based on a post-closing loan payoff. *See, e.g., Sutherland v. Diversified Capital, Inc.*, 2008 U.S. Dist. LEXIS 61016, *8 (N.D. Cal. July 24, 2008), *citing Silvers v. Sony Pictures Entm't, Inc*., 402 F.3d 881, 885 (9th Cir. 2005), (applying the doctrine of *expressio unius est exclusio alterius* to the Truth in Lending Act), *see also* The Law of Truth in Lending 1067 (Alvin C. Harrell ed. 2014) (same).

II. In Any Case, a Truth in Lending Act Claim for Statutory Damages Pursuant to 15 U.S.C. § 1640(a) Accrues at Loan Consummation and is Thus Unaffected by any Subsequent Loan Payoff.

The Truth in Lending Act is a remedial statute meant to get accurate and truthful information to the borrower. *King v. California*, 784 F.2d 910, 915 (9th Cir. 1986). The one year limitations period for a 15 U.S.C. § 1640(a) statutory damages claim begins—that is, the claim first accrues—on "the date of the occurrence of the violation." 15 U.S.C. § 1640(e). *See, e.g., King* at 914 (holding the one year statute of limitations applicable to violations of 15 U.S.C. § 1640(a) runs from the date of loan consummation); *see also Cardiello v. Money Store, Inc.*, 2001 U.S. Dist. LEXIS 7107 at *11 (S.D.N.Y. May 31, 2001) (same, collecting cases).

It is not necessary—either for purposes of the accrual of the present claim for relief for statutory damages or for purposes of ever making any sort of award of damages for violation of the Truth in Lending Act—that the borrower have actually relied on the misinformation. *See, e.g., DeMando v. Morris*, 206 F.3d 1300, 1303 (9th Cir. 2000) ("a lender [is] liable for a TILA violation is subject to statutory damages even in the absence of any actual damages"). The statutory damages are a 'civil penalty' for failing to follow the rules. *Mourning v. Family Publ'ns Serv.*, 411 U.S. 356, 376 (1973); *Dixey v. Idaho First Nat'l Bank*, 677 F.2d 749, 751 (9th Cir. 1982) ("Section 130 of the Act mandates civil penalties"); *Palmer v. Wilson*, 502 F.2d 860, 861 (9th Cir. 1974) ("The liability provision of section 1640 is a 'civil penalty,' which, unlike section 1635 [rescission], is not intended to make the borrower whole.").

The Chase Motion Brief does not cite any statutory or case authority supporting Chase's claim that any subsequent loan payoff can even possibly affect the right to 15 U.S.C. § 1640(a) statutory damages.[4] CMB at 9–11. Our research

[4] Naturally, a release of a previously accrued 15 U.S.C. § 1640(a) claim would be a subsequent act that relieved the lender from liability. An advance release of any possible Truth in Lending Act claim, however, is not effective. *Taub v. World Fin. Network Bank*, 950 F. Supp. 2d 698, 703 (S.D.N.Y. 2013) ("Any waiver of the right to bring a TILA claim is thus unenforceable, because 'a statutory right

also discloses no case law specifically addressing Chase's present claim of mootness based on loan payoff.[5]

Analogous case law, however, demonstrates that a subsequent loan payoff cannot and does not moot a statutory damages claim under 15 U.S.C. § 1640(a), albeit that, in the Ninth Circuit, it does moot a rescission claim brought under 15 U.S.C. § 1635. Thus, in *Abubo v. Bank of N.Y. Mellon*, 977 F. Supp. 2d 1037, 1052 (D. Haw. 2013) the court explained why 15 U.S.C. § 1640(a) claims for statutory damages stand apart from 15 U.S.C. § 1635 claims for rescission:

> [T]he Ninth Circuit long ago held that damages under § 1640 and rescission under § 1635 are distinct remedies:
>
>> In *Eby v. Reb Realty, Inc.* [495 F.2d 646, 651-52 (9th Cir. 1974)], [it] rejected defendants' contention that plaintiffs cannot successfully pursue both damages under section 1640 and rescission under section 1635. No election of remedies is required. The liability provision of section 1640 is a 'civil penalty,' which, unlike section 1635, is not intended to make the borrower whole.
>
> *Palmer* at 861.

---

conferred on a private party, but affecting the public interest, may not be waived or released if such waiver or release contravenes the statutory policy.' *Brooklyn Savings Bank v. O'Neil*, 324 U.S. 697, 704, 65 S. Ct. 895, 89 L. Ed. 1296 (1945)").

[5] In *Plascencia v. Lending 1st Mortg.*, 583 F. Supp. 2d 1090, 1097 (N.D. Cal. 2008), the loan at issue was refinanced. The court held that this mooted the rescission claim (per *King*), but the possibility that the refinancing affected the plaintiffs' statutory damages claim did not even occur to the court or the parties. *See also* Diane E. Thompson, *et al.*, Truth in Lending § 12.5.7 (9th ed. 2015) ("It is also no defense [to a statutory damage claim under 15 U.S.C. § 1640(a)] that the loan in which the violation occurred has been paid off.")

Since 15 U.S.C. § 1635 and 15 U.S.C. § 1640(a) remedies can be claimed simultaneously—and since the only Ninth Circuit precedent for finding a subsequent loan payoff moots a Truth in Lending Act claim is *King* at 913 (holding that in a 15 U.S.C. § 1635 context a trust deed reconveyance leaves nothing to rescind)—Chase's claim that borrowers' December 2015 payment of $199,643.84 moots the need for this court to address *Spokeo II* in a 15 U.S.C. § 1640(a) context is insupportable.

III. Additional Argument in Favor of Article III Jurisdiction in Light of *Spokeo II*.

As the recently filed Amicus Motion Brief makes clear, a private person's denying another private person truthful information—when the latter has a statutory right to get such truthful information—has previously been held (without requiring proof of anything more than the mere fact of such denial of truthful information) to satisfy Article III's injury in fact standard. *See* AMB 8–13. (citing *Havens Realty Corp. v. Coleman*, 455 U.S. 363 (1982)).[6]

[6] Borrowers Motion Brief confined itself to analyzing cases specifically mentioned in *Spokeo II*, and thus neglected to address *Havens*. Regarding *Havens* borrowers agree with the contention made at AMB 5–6, 12 that *Spokeo II* didn't *sub silentio* overrule *Havens* by limiting standing in a private party context to only (i) tangible concrete injury or (ii) a risk of tangible concrete injury. Instead, consistent with the AMB's proper construction of *Havens*, it is both of those things *plus* intangible concrete injury that may confer (separately or together) Article III standing in light of *Spokeo II*. *Id.* The only way in which borrowers differ with the Consumer Financial Protection Bureau is borrowers' continuing contention that *Spokeo II*

The only possible contrary implication in *Spokeo II* is that case's suggestion that—for lack of a better description—a $101 understated finance charge might not remain as serviceable a tool for establishing Article III standing as evidence of a flat lie about housing availability previously proved to be in connection with a tester's attempt to enforce the Fair Housing Act. In this regard, the Amicus Motion Brief correctly notes that an understatement of more than $100 is all that is forbidden by Regulation Z (12 C.F.R. § 1026.18(d)(1)(i)). AMB at 14.

This aspect of the Amicus Motion Brief demonstrates that borrowers' characterization of the relevant Truth in Lending Act's disclosure obligations as requiring a "down to the last penny calculation of hypothetical finance charges" (BMB at 12) was an overstatement. For which mistake the borrowers apologize to the court and the parties. But what was not a mistake was the borrowers' related claim that the amount of the understatement alleged was not some small error. It was a huge error, i.e., $7,600+. 3 ER 357.

---

may well have created new law *regarding just how serious any deprivation of truthful information needs to be for such untruthfulness to confer Article III standing*. Here, and as is demonstrated, *infra*, a $7,600+ understated finance charge (when only a $100 margin of error is otherwise allowed by the Official Interpretations of Regulation Z (12 C.F.R. § 1026.18(d)(1)(i)) surely meets any possible new burden of proof regarding degree of seriousness imposed by *Spokeo II* in any case.

Moreover, borrowers' 15 U.S.C. § 1640(a) claim for relief for statutory damages based on that understated finance charge of $7600+ is solidly grounded in law.

Thus:

- It is hornbook law that, absent express waiver, a yearly rate may always be calculated using 365/360 bank interest (Dkt 14 at 3–4, 10–11 compare Dkt 25 at 35);
- It is apparent from the face of borrowers' loan documents that the drafter of those loan documents neglected to have them unambiguously specify a fully amortizing loan obligation and nothing else (Dkt 14 at 12, 18, *compare* Dkt 25 at 3, 32–33); and
- It is apparent from the face of borrowers' loan documents that borrowers are made subject to a broad dragnet clause that exposes borrowers, *ab initio*, to liability for paying up to $7,600+ in previously undisclosed finance charges (Dkt 14 at 12, 18, *compare* Dkt 25 at 15–17, 33, 35).

The only thing supporting Chase's position in this appeal is the district court's erroneous conclusion that Chase's intent at the outset of the loan transaction to *itself* forbear from taking advantage of borrowers' loan documents so as not to *itself* charge them 365/360 bank interest (an intent in no way binding on any holder in due course of the type recently portrayed in *The Big Short*) excuses bank's otherwise indisputable breach of the Truth in Lending Act. Dkt. 25 at 4, 6, 23, 30; *see also* 1 ER 010.

The district court's unprecedented ruling that a lender's intent to forbear from exercising its full contract rights to collect money excuses that lender's failure to comply with its Truth in Lending Act disclosure obligations is entirely at odds with what the Amicus Motion Brief says must be done to properly calculate a finance charge under the Truth in Lending Act. Thus:

> TILA requires creditors to disclose, "before the credit is extended," information about the terms and cost of the loan—such as the "finance charge," i.e., "the cost of consumer credit as a dollar amount," 12 C.F.R. § 1026.4(a) … *Under the Act's implementing regulation, Regulation Z, these disclosures must "reflect the terms of the legal obligation between the parties," 12 C.F.R. § 1026.17(c)(1), as "determined by applicable State law or other law," 12 C.F.R. Pt. 1026, Supp. I, ¶ 17(c)(1)-1.*
>
> AMB at 3 (*emphasis* added); *compare* Dkt 14 at 15–19 *with* Dkt 25 at 20–24.

Given the above, borrowers contend that (using a $100 margin of error) a mere $1, or 1%, understatement might hypothetically raise a *Spokeo II* 'untruthful but harmless' problem. However, a $7,600+, or 760%+, understatement is so completely off-base as to be a prime example of what the Amicus Motion Brief had in mind by repeatedly citing *Havens* in support of borrowers' Article III subject matter jurisdiction here.

Conclusion

Borrowers respectfully petition the motion panel assigned to this matter to itself decide this court's own subject matter jurisdiction rather than defer deciding the matter. Otherwise, the parties could easily wind up delayed by several years only to discover that the merits panel considers itself unable to render any substantive decision due to an ultimate conclusion that it lacks Article III jurisdiction to decide this case in light of *Spokeo II*.

Dated: June 23, 2016

McGRANE PC

By s/ *William McGrane*

William McGrane

Attorneys for Appellants Kevin J. Keen, Tamra E. Keen, Curt Conyers and Kelly E. Conyers on behalf of themselves and all others similarly situated

PROOF OF SERVICE

STATE OF CALIFORNIA, COUNTY OF SAN FRANCISCO

I am employed in the County of San Francisco, State of California. I am over the age of eighteen years. I am not a party to the action within. My business address is Four Embarcadero Center, Suite 1400, San Francisco, California 94111. On June 23, 2016, I served the forgoing document, described as:

APPELLANTS' REPLY TO RESPONSE TO MOTION AND RESPONSE TO CROSS-MOTION

on the following parties in this action via the Ninth Circuit ECF system:

Jonathan S. Massey
Massey & Gail LLP
Suite 500
1325 G Street, N.W.
Washington, DC 20005
JMassey@masseygail.com

Leonard Gail
Massey & Gail LLP
Suite 400
50 East Washington Street
Chicago, IL 60602
LGail@masseygail.com

Attorneys for JPMorgan Chase Bank, N.A.

Executed on June 23, 2016, at San Francisco, California.

I declare that I am employed by the office of a member of the bar of this court at whose direction the service was made.

s/ *Adrian Butler*
Adrian Butler