Westlaw Journal

# BANK & LENDER LIABILITY

Litigation News and Analysis • Legislation • Regulation • Expert Commentary

VOLUME 24, ISSUE 5 / JULY 23, 2018

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## TELEPHONE CONSUMER PROTECTION ACT

### Capital One, debt collector hit with TCPA suit over robocalls

A Florida man has alleged in a federal lawsuit that Capital One Bank and a debt collector have disregarded at least 10 requests that they stop making automated calls to his cellphone to collect a debt he says is owed by someone else.

***Hall v. Capital One Bank (USA) NA et al., No. 18-cv-1586, complaint filed, 2018 WL 3358536 (M.D. Fla. July 2, 2018).***

Sammie Hall says Capital One and its collections agent Portfolio Recovery Associates LLC made an "exorbitant" number of calls to him even though he is not a bank customer and told them multiple times to stop contacting him.

Hall, of Land O' Lakes, Florida, alleges the defendants violated the Telephone

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REUTERS/Brendan McDermid

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# As small-business lending soars, know when to take a loan and when to raise money online

**By Dan Baird**
***Wrench.ai and Crack the Crowd***

By all measures, the current economic outlook[1] for 2018 is strong despite some recent steep stock market drops. In fact, indicators for gross domestic product growth, unemployment, inflation and manufacturing growth are all in ideal ranges[2] and signal that it may be a great year for investors and businesses alike.

When these economic measures are strong, there is usually a surge in consumer spending as well as a marked increase in bank lending activity.

The change in lending activity is a radical departure from the super-cautious approach that many banks and financial institutions adopted for small-business loans after the 2007-2008 financial crisis. In the years following the recession, large banks approved fewer than 10 percent[3] of the applications submitted by small-business owners seeking credit.[4]

Even the smaller banks and credit unions, which had been stable lending sources for small-business owners, scaled back on the number of loans they granted and made it more difficult to qualify.

## CURRENT LENDING ATMOSPHERE

Fast forward to the start of 2018 and the markets started performing phenomenally, causing many entrepreneurs to assume debt or increase the amount of debt they are willing to take on to open or expand a business.

The business loan approval rate[5] at large banks now exceeds 25 percent, and for institutional lenders it is almost 65 percent.[6] This willingness to lend has opened a financing stream that had been very hard for small businesses to access.

While bank financing is gaining popularity, it must now compete with a number of alternative funding options — and small-business owners may not even know about some of them. These alternative sources emerged as a result of banks' low approval rates over the years, as numerous small businesses were turned down for loan funding.

> The business loan approval rate at large banks now exceeds 25 percent, and for institutional lenders it is almost 65 percent.

Some of the most popular currently available alternatives include crowdfunding — specifically Regulation A+ and Regulation D equity raises,[7] which were made possible by the JOBS Act[8] — and the buzzy initial coin offerings, which I consider to be a subset of Regulation A+ raises.

All these solutions offer a significant increase in access to capital. Because this economic climate is now empowering small businesses with more financing options, however, it is imperative that they understand the full ramifications of tapping into capital through either traditional means or alternative methods prior to making a decision.

## RESPONSIBLE BORROWING

While business owners must make many decisions every day, few hold the gravity of financial decisions that can ultimately create a path to success or result in hindrances and even failure. I know that firsthand.

Financial literacy is absolutely vital to success. Since it is now easier to obtain approval for a loan, it may be tempting to seek large amounts while you can get them.

But borrowing simply because money is available, without a comprehensive understanding of the pros and cons, could hurt your business over the long haul.

Here's why: Financing should be sought only when it is necessary or clearly advantageous to the company. This means that there should be a well-defined purpose for financing, as well as a plan to repay it.

Furthermore, extensive research should be conducted and careful consideration should be given to any debt or equity financing decision.

Leading finance expert Yuen Yung, CEO of Casoro Capital, a family office and private equity fund that often serves as a lead investor in debt and equity investments, agrees. As part of a team that has executed over $1 billion in debt and equity investments, Yuen said there should be a balance between debt and equity to maximize returns.

If the business is successful, debt will always be the cheaper option. Too many business owners give away too much upfront and are left with little if and when they sell the company.

**Dan Baird** is co-founder and CEO of **Wrench.ai**, a Salt Lake City fintech startup that works with enterprises to build models for marketing, sales and operations using artificial intelligence. He is also the co-founder of **Crack the Crowd**, a marketing agency focusing on fintech firms and crowdfunding platforms. He can be reached at Dan@wrench.ai.

| Borrowing | Online Fundraising |
|---|---|
| *Pros* | *Pros* |
| • Uniform process with expected results | • Process is easier |
| • Pitching to one lender, rather than many | • Repayment is not required |
| • No outside ownership interest | • Reduced regulatory requirements |
| • Amount of financing is capped | • Typically, faster than banks |
| | • Lower credit requirements |
| *Cons* | *Cons* |
| • Must be repaid | • Variable process |
| • Can be out of reach to many | • Funding is not guaranteed |

## TO BORROW OR TO RAISE MONEY ONLINE

### *Borrowing*

Borrowing through a bank or financial institution ensures that, once a loan is approved, the process will be uniform and the business owner can anticipate the steps they will have to take. They will also know at the outset how much funding they will ultimately receive.

Additionally, owners seeking a traditional loan only have to present their business plan to the lender. While this task can involve quite a bit of work, it does not require spending huge amounts of time marketing the business or product to convince large numbers of investors to fund you. It also means owners retain control of the company, which is not a small consideration.

Borrowing allows a financial relationship to develop organically between the business owner and the financial institution without the risk of outside influences or naysayers. Raising capital online can open the door to input from many types of investors. This input may be positive or negative, and it may support or hinder the funding campaign.

It should also be noted that while the atmosphere for small-business lending is better than it has been in years, there is still no guarantee that funding will be secured. Loan approval can still be out of reach for many small-business owners, making alternative funding options a desirable choice — especially now that so many other companies have used those options successfully (but don't forget the ones that didn't).

### *Online funding*

Online funding options gained popularity at a time when securing a bank loan was incredibly difficult. Now that bank lending is back on the rise, it should be noted that there are still numerous benefits to seeking funding through this method rather than through a loan.

Online funding can sometimes provide faster and easier access to capital than the traditional lending process. In some cases, the credit report requirements are more lenient, and in some instances they may not even have a bearing on the company's ability to raise funds.

The other huge benefit of online funding is that equity raises are widely available and may be less burdensome, especially if the raise is being done as a private placement offering.

Borrowing allows a financial relationship to develop organically between the business owner and the financial institution without the risk of outside influences or naysayers.

Private placements have a number of advantages over other equity financing methods, including less stringent regulatory requirements. Private placements can also be a lot less costly than doing an initial public offering raise, which have historically been wrought with numerous expenses and legal hurdles that have caused some companies to fail.

Despite the benefits of online equity fundraising, there is no guarantee that the capital will be raised. In fact, one study[9] indicates that fewer than one-third of campaigns reach their goal.[10]

Another point to consider is that some online fundraising campaigns can take 15 to 20 hours a week[11] to manage. Furthermore, you should facilitate an equity raise only when your company is strong enough to take on investors.

At least one expert agrees. Monte Lee-Wen is the co-founder of the PPA Group family of companies and has built five businesses that employ over 160 people — all without outside capital. He says successful entrepreneurs often stress the importance of taking money only when it is necessary.

As a mentor with Entrepreneurs' Organization, Lee-Wen teaches budding business owners to live by the rule that you take investors in a company only when you absolutely need them — and when you can show them a clear path to a return on their investment.

Companies that are built using cash flow for as long as possible will often be much stronger, will encounter less conflict, and will end up giving up a lot less if they become successful and this is in large part due to revenue-based decision-making, which leads to more lean business operations and a laser focus on sales.

## LENDING TRENDS IN 2018

2018 is likely to go down as a year in which small-business owners had more financing options than ever before. This will undoubtedly be a boon to small businesses, but one can never lose sight of the risks.

Online fundraising is continuing to gain momentum as it has now become more mainstream, and entrepreneurs are attracted to its benefits now more than ever before. Advances and innovation in fintech will only continue to make the entire financial system operate more efficiently and effectively, and new applications will continue to emerge.

On the regulatory front, many banks and financial institutions have been pressuring governmental agencies to change outdated and inefficient laws and processes.[12] If this pressure produces changes, traditional lending may become a more desirable option.

Conversely, digital technology has been developing at a faster rate than our regulatory agencies can handle. As online fundraising increases in popularity, additional regulations for this type of financing may be introduced.

## CONSIDERATIONS

Both traditional bank borrowing and online fundraising methods offer unique benefits and drawbacks. In addition to understanding these factors, there are a few other things to consider before deciding which funding source is right for you.

> Despite the benefits of online equity fundraising, there is no guarantee that the capital will be raised.

While raising money online can seem like a desirable route, many campaigns do not achieve their goal simply because they lack the appeal and marketability that an online audience usually seeks.

It is also imperative to weigh the benefits and drawbacks to your own tolerance and determine the financial arrangement you are best equipped to deal with in the long run. Discuss the options with your company's co-founders, and take a walk around the block to consider the alternatives before choosing the one that is best for you. It's not a decision to be made lightly. WJ

## NOTES

[1] Kimberly Amadeo, *US Economic Outlook for 2018 and Beyond*, THE BALANCE (July 4, 2018), https://bit.ly/2fLgY1A.

[2] *Id.*

[3] Rohit Arora, *Three Reasons Why Bank Lending to Small Businesses Has Reached Post-Recession Highs*, FORBES (Aug. 10, 2017, 12:24 PM), https://bit.ly/2LbCIn5.

[4] *Id.*

[5] Rohit Arora, *As 2018 Begins, Lots of Small Business Loan Options Are Open to Entrepreneurs*, FORBES (Jan. 9, 2018, 7:55 AM), https://bit.ly/2KMaUJX.

[6] Arora, *supra* note 3.

[7] Regulation A+ and Regulation D equity raises make it possible for private companies to raise capital from investors in exchange for shares. An offering under Regulation A+ can raise up to $50 million and is available to accredited and nonaccredited investors. A Regulation D offering is generally available only to accredited investors and can raise much more money.

[8] *Jumpstart Our Business Startups (JOBS) Act*, U.S. SEC. & EXCH. COMM'N, https://bit.ly/1IxjAH0.

[9] Catherine Clifford, *Less Than a Third of Crowdfunding Campaigns Reach Their Goals*, ENTREPRENEUR (Jan. 18, 2016), https://bit.ly/2dbf0XC.

[10] *Id.*

[11] Kirsten Knipp, *Benefits and Drawbacks of Crowdfunding*, BIG COMMERCE, https://bit.ly/2JnEBM7.

[12] Trevor Dryer, *2018 Small Business Lending Outlook*, PAYMENT WEEK (Dec. 12, 2017), https://bit.ly/2NFGOWx.

# Appeals in a foreclosure case, an empty right in Ohio?

**By Vincent E. Mauer, Esq.**
***Frost Brown Todd LLC***

Foreclosure cases often proceed without participation or significant defense by the obligor/mortgagor because that party is without both any defense and any funds to pay counsel. That happened in *Green Tree Servicing v. Asterino-Starcher, et al.,* 2018-Ohio-977 (Franklin Cty. App., March 15, 2018).

In *Green Tree Servicing,* as sometimes occurs, a junior lienor had the motivation and resources to contest the foreclosure.[1]

After losing at the trial court, the junior lienor appealed and sought to stay the foreclosure sale. A stay was granted, if the junior lienor posted a bond. No bond was posted.

So, the property was sold and the sale proceeds were distributed to the plaintiff/mortgagee; presumably the plaintiff won the property using a credit bid. The junior lienor appealed.

Rejecting the plaintiff/mortgagee's argument, the *Green Tree Servicing* court determined that the judicial sale and proceeds distribution did not moot the junior lienor's appeal.[2]

Specifically, the appellate court held that Ohio Revised Code Section 2329.45 permitted the fashioning of a remedy despite the finality of judicial sales. Relevant portions of that statute read:

> Former R.C. 2329.45 provided as follows:
>
> If a judgment in satisfaction of which lands, or tenements are sold, is reversed, such reversal shall not defeat or affect the title of the purchaser. In such case restitution must be made by the judgment creditor of the money for which such lands or tenements were sold, with interest from the day of sale.
>
> Effective September 28, 2016, R.C. 2329.45 reads:
>
> If a judgment in satisfaction of which lands or tenements are sold is reversed on appeal, such reversal shall not defeat or affect the title of the purchaser. In such case restitution in an amount equal to the money for which such lands or tenements were sold, with interest from the day of sale, must be made by the judgment creditor. In ordering restitution, the court shall take into consideration all persons who lost an interest in the property by reason of the judgment and sale and the order of the priority of those interests.

> The *Green Tree Servicing* court determined that the judicial sale and proceeds distribution did not moot the junior lienor's appeal.

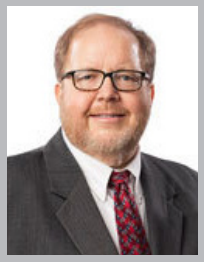
According to the *Green Tree Servicing* court: "[t]he new language further clarifies that a mortgagor, junior lienholder, or other person with an interest in property retains a remedy after sale of the subject property, despite the irrevocable nature of a judicial sale."

On its face, Section 2329.45 could require a successful credit bidding judgment creditor to pay "restitution" of money that it never received from the sale proceeds.[3] Cases hold, however, that a credit bidder may meet its obligation under Section 2329.45 by transferring the property back to the mortgagor. *See, Fannie Mae v. Hicks,* 77 N.E.3d 380 (Cuyahoga Cty. App. 2016) wherein the reversal winning mortgagor sought money from a previously successful credit bidding creditor.

Denying that request, the *Hicks* court followed prior decisions stating that:

> First, that the former R.C. 2329.45 operates to protect the title of a third-party purchaser, not a party purchaser, where the judicial sale occurs prior to the reversal of a foreclosure order. Second, that the former R.C. 2329.45 does not operate to provide restitution to the defendant-debtor when the purchaser is not a third party. And finally, that reversal of a foreclosure order in such instances operates, as a matter of law, to set aside, vacate, and nullify the sale of the property.

While the *Green Tree Servicing* court permitted the junior lienor's appeal to continue despite the fact that the sale was not stayed and proceeds were distributed, the *Green Tree Servicing* court did limit the junior creditor's appeal to issues that were not personal to the mortgagee saying "[a] foreclosure proceeding is a two-step process involving, first, the enforcement of a debt obligation, and, second, the creditor's right to collect against the security given by the borrower for that debt. ... There is reason to distinguish the action on the note from the ensuing action against the associated collateral. The first claim involves only the maker of the note and the person entitled to enforce it. The second joins all those with an interest in the mortgaged property. Thus, the junior lienholders are truly strangers to the action on a note, which could proceed without them. They have no standing to



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This expert analysis was first published May 30, 2018, on the firm's website. Republished with permission.

challenge the plaintiff creditor's standing and, here, cannot assert a defense to the note obligation that the obligor herself has failed to raise."

The *Green Tree Servicing* court admits that other Ohio appellate courts do not permit an appeal to proceed if the foreclosure sale has not been stayed, usually with an accompanying appellate bond. See, 69 O. Jur.3d Section 404 titled "Effect of Reversal of Judgment" which states:

> Some Ohio courts have held that R.C. 2329.45 does not preserve a remedy for a mortgagor appealing from a foreclosure judgment, for purposes of determining whether the appeal is moot after the mortgaged property is sold at the sheriff's sale and the proceeds distributed, unless the mortgagor seeks a stay of the distribution of the sale proceeds. However, there seems to be a split of authority on the issue as several appellate districts in Ohio have construed R.C. 2329.45 as preserving a remedy for mortgagors in foreclosure actions even after the property has been sold and the proceeds of the sale have been distributed.

The *Green Tree Servicing* case is from Franklin County and in disagreement with cases from Ohio's two other largest counties: *Art's Rental Equipment v. Bear Creek Construction,* 2012-Ohio-5371 (Hamilton Cty. App. Nov. 21, 2012)[4] (appeal by non-mortgagee lienors who failed to get a stay to prevent foreclosure sale and distribution of proceeds was moot); and *Blisswood Village Home Owners Ass'n v. Genesis Real Estate Holdings Group, LLC,* 2018-Ohio-1517 (Cuyahoga Cty. App. April 19, 2018) (the remedy provided in section 2329.45, quoted above, is only available "when the appealing party sought and obtained a stay of the distribution of the [foreclosure sale] proceeds." Citing cases prior to the statute's amendment discussed above).

> A mortgagor, junior lienholder or other person with an interest in property retains a remedy after sale of the subject property, despite the irrevocable nature of a judicial sale.

The *Green Tree Servicing* case has not been cited or discussed in a reported decision as of this writing. It remains to be seen if the 2016 amendment to Section 2329.45 will result in appeals being permitted to proceed as suggested therein.

Unless that happens: a mortgagor really has no appeal rights because if she had funds to post a bond, there probably would be no foreclosure case; and lienors whose often modest-sized liens might be junior to plaintiff's mortgage face an untenable choice because they must post a bond that is often much greater than the debt they are trying to collect. WJ

## NOTES

[1] As often happens, the trial court granted the requested foreclosure and ordered the mortgaged property sold with the sale proceeds held pending further order of the court. Lien priority is often determined in that later "distribution" order. This is common in the author's experience because competing lienors delay any fight regarding priority on the hope that the sale proceeds will be adequate to pay all claims. Clients appreciate efforts to save time and money.

[2] As it happens, the junior lienor in *Green Tree Servicing* was not contesting its lien priority, but issues related to the mortgagor's debt to the plaintiff.

[3] Credit bidding permits a lien creditor to "pay" its foreclosure sale auction bid obligation with its judgment lien and buy at a foreclosure sale by only transferring the cash required to satisfy liens with priority over the successful credit bidder's lien.

[4] Followed in *MSCI 2007-IQ16 Granville Retail, LLC v. UHA Corp.,* 660 Fed. Appx. 459 (2016).

TELEPHONE CONSUMER PROTECTION ACT

# Quicken Loans seeks speedy end to do-not-call suit

**By Susan Swann**

Quicken Loans Inc. is urging a federal court to dismiss a lawsuit alleging that its calls to a Florida resident after his entry into a home giveaway sweepstakes violated the Telephone Consumer Protection Act.

***Mahoney v. Quicken Loans Inc., No. 18-cv-324, motion to dismiss filed, 2018 WL 3015189 (M.D. Fla. June 14, 2018).***

The motion, filed June 14 in the U.S. District Court for the Middle District of Florida, also alleges that the wholesale mortgage lender's calls to Tom Mahoney were informational, rather than "telephone solicitations" prohibited by the TCPA.

## TCPA PROTECTIONS

The Telephone Consumer Protection Act, 47 U.S.C.A. § 227, prohibits, among other things, telephone solicitations to numbers registered with the national do-not-call registry established by the TCPA, without the prior consent of the phone's owner.

Mahoney's proposed class action filed May 9 claims that Quicken Loans called him 11 times over a three-day period; the company left voicemail messages on four of the calls.

He alleges that although he entered a sweepstakes that offered contestants the chance to speak with a Quicken Loans representative about mortgage loan opportunities, Mahoney did not check the box on an entry form that would have given the lender permission to contact him.

Mahoney also says his phone number is registered on the TCPA's do-not-call list.

## QUICKEN DISPUTES CLAIMS

Quicken Loans argues in its motion to dismiss that Mahoney's claims, even if true, cannot form the basis of a claim under the TCPA.

The motion says that Mahoney's complaint references prior calls from Quicken Loans, but does not claim they violated the TCPA.

Quicken Loans says that Mahoney either consented to those calls — possibly with one of his previous numerous sweepstakes entries — or he had not added his number to the do-not-call list.

The complaint must be dismissed, the lender argues, because it fails to establish the date of any prior consent, the date of any withdrawal of consent or the date he added his phone number to the do-not-call list.

Quicken Loans also asserts that its calls to Mahoney — or at least the four he allowed to roll over to voicemail, preserving evidence of their content — were not "telephone solicitations" prohibited by the TCPA.

The calls offered Mahoney a "complimentary mortgage review" and did not urge him to purchase rent, or invest in anything, the motion says. Therefore, the calls did not violate the TCPA, the lender says.

Quicken Loans also argues that Mahoney's cause of action seeking only injunctive relief "to bar future TCPA violations" is a remedy and not a cause of action entitling him to relief. WJ

**Attorneys:**
*Plaintiff:* Brandon J. Hill, Wenzel Fenton Cabassa PA, Tampa, FL; Chris R. Miltenberger, Law Office of Chris R. Miltenberger, Southlake, TX

*Defendant:* James K. McDonough, Quarles & Brady, Tampa, FL

**Related Filings:**
Motion to dismiss: 2018 WL 3015189
Complaint: 2018 WL 3015182

***See Document Section B (P. 23) for the complaint.***

# Bank manager, customer charged in $100,000 identity theft, loan scam

The manager of a Massachusetts bank and a customer are facing charges in federal court that they used a stolen identity to obtain $100,000 in commercial loan proceeds.

***United States v. Moiseev et al., No. 18-cr-10206, defendants arrested (D. Mass. June 28, 2018).***

Authorities arrested Alexander Grinis, 47, and Igor Moiseev, 59, on June 28, according to a statement by U.S. Attorney Andrew E. Lelling of the District of Massachusetts.

Grinis, branch manager of Eastern Bank in Auburndale, Massachusetts, is accused of helping Moiseev use a stolen identity to open bank accounts, obtain two business loans and transfer some of the money overseas.

In a June 27 indictment, prosecutors charged Grinis, of Jamaica Plain, Massachusetts, with one count of making false statements on loan applications. Moiseev, of Newton, Massachusetts, faces one count of aggravated identity theft and two counts of bank fraud.

## BUSINESS ACCOUNT

Grinis' duties as a branch manager included helping customers open and close accounts and apply for loans and credit lines. In February 2015 he opened a business checking account in the name of Dedham, Massachusetts-based TFC Enterprises LLC, the charges say.

> The defendants' fraudulent business loans went into default and the bank lost more than $90,000, according to prosecutors.

Moiseev, using a stolen identity, opened a checking account at Eastern Bank in September 2015 with Grinis' assistance, according to the indictment. The following month the men added this identity theft victim's name as a signatory on the TFC account, prosecutors alleged.

## LOANS SOUGHT

In November 2015 Moiseev used the identity theft victim's driver's license and Social Security number to apply to Eastern Bank for a $50,000 business line of credit for TFC, the indictment says. Grinis helped him with the loan paperwork and falsely represented he followed the proper procedures, according to the charges.

After the bank put the money into the TFC account, Moiseev forged the identity theft victim's signature on checks so he could access the funds for his personal expenses, the U.S. attorney said.

REUTERS/Kacper Pempel

## ANOTHER LOAN

Moiseev and Grinis worked together to seek a second $50,000 loan in May 2016 using the same victim's name and personal information, according to the charges. The bank funded the loan after Grinis certified that he complied with all lending protocols, the indictment says.

The two men also schemed between March 2016 and February 2017 to wire some of the loan proceeds to unidentified people in Russia, Canada and other countries, the charges say.

Both loans went into default and Eastern Bank lost more than $90,000, according to prosecutors.

If convicted, Grinis and Moiseev face significant prison sentences and fines.

The charges of bank fraud and false statements carry a maximum penalty of 30 years in prison followed by five years of supervised release, plus a $1 million fine. The aggravated identity theft charge carries a mandatory sentence of two years in prison, up to three years of supervised release and a $250,000 fine.

Prosecutors are seeking an order directing the defendants to forfeit the scheme's proceeds. WJ

**Related Filings:**
Indictment: 2018 WL 3342469

***See Document Section C (P. 29) for the indictment.***

# Judge tosses lawsuit over Caliber Home Loans data breach

(Reuters) – A federal judge in San Diego has dismissed a proposed class action alleging that security failures by Texas-based Caliber Home Loans allowed hackers to steal sensitive information from consumers nationwide who applied for loans from the company.

***Razuki v. Caliber Home Loans, No. 17-cv-1718, 2018 WL 2761818 (S.D. Cal. June 8, 2018).***

In a decision June 8, U.S. District Judge Larry Burns said the complaint was too vague about the harms suffered by named plaintiff Salam Razuki of California to support claims for negligence and various violations of California consumer protection laws. Judge Burns gave Razuki permission to amend his complaint.

Caliber spokesman Jack Kelleher declined to comment. Alex Tomasevic, a lawyer for the plaintiffs, said they plan to amend the complaint.

Filed last year, the lawsuit accused Caliber of using second-rate security measures and waiting over five months to notify consumers after its computers were breached in January 2017.

The lawsuit alleged that Caliber's negligence allowed cybercriminals to steal a trove of information needed to access consumers' financial accounts, including the account numbers, Social Security numbers and dates of birth.

One cybercriminal attempted to make "numerous fraudulent transactions" in Razuki's name, his lawsuit said.

The lawsuit was asking for damages for negligence, violations of consumers' right to privacy under the California Constitution, and violations of California laws governing customer records and business practices. The size of the class was not stated.

In a bid in January to have the lawsuit dismissed, Caliber said Razuki lacked standing because he failed to allege any injury the home lender caused. Razuki's vague allegations of attempted fraudulent transactions did not tie those attempts to the Caliber data breach, the company said.

Even if he had standing, the lack of a clear injury would undermine his negligence claims and claims under the state Customer Records Act and unfair-competition law, Caliber said.

Invasion-of-privacy claims fail because they require intentional conduct, not just the negligent conduct Razuki alleged, Caliber said.

In response, Razuki said he was injured because he had to spend his own time and money trying to protect his assets after learning his personal data was compromised.

Caliber intentionally provided less-than-adequate security to boost its profits, without regard to who would suffer from that decision, which is enough to support an invasion-of-privacy claim, he said.

In the June 8 opinion, Judge Burns sided with Razuki on standing. The 9th U.S. Circuit Court of Appeals in *Krottner v. Starbucks Corp.,* 628 F.3d 1139 (9th Cir. 2010), held that a substantial risk that hackers will commit identity fraud is a sufficient injury for standing, and Razuki's assertion that someone attempted fraudulent transactions in his name meets the 9th Circuit's standing requirements, Judge Burns said.

But Razuki's allegations are too vague to support a negligence claim, which requires actual damages and not just a risk of harm, Judge Burns said. Razuki did not say what type of fraudulent transactions were attempted or exactly what measures he had to take to protect his assets, Judge Burns said.

Allegations that Caliber used low-cost security measures also are not the type of intentional, egregious acts needed to support invasion-of-privacy claims, Judge Burns said. WJ

*(Reporting by Dena Aubin)*

**Related Filings:**
Order: 2018 WL 2761818
Second amended complaint: 2017 WL 9517618
Motion to dismiss: 2018 WL 2772466

***See Document Section D (P. 33) for the order.***

# Debtor's bankruptcy triggered obligation to repay loan he guaranteed

**By Lisa Uhlman**

A debtor cannot confirm a Chapter 13 plan that does not provide for payment of his taxi company's $1.6 million debt to a bank, a New York bankruptcy judge has ruled, saying the bankruptcy filing triggered the debtor's obligation as guarantor.

***In re Singh, No. 17-75330, 2018 WL 3135990 (Bankr. E.D.N.Y. June 22, 2018).***

Citing a default provision in the guaranty, U.S. Bankruptcy Judge Robert E. Grossman of the Eastern District of New York rejected the debtor's argument that the claim was contingent, and thus did not need to be paid under his plan, because his company was current on its payments.

## OBJECTION TO CONFIRMATION

According to Judge Grossman's opinion, Baldev Singh and his wife own Wheel Trans Corp., which owns two New York City Taxi and Limousine Commission taxi medallions valued at about $850,000.

Wheel Trans borrowed $1.6 million from Aspire Federal Credit Union in 2013, and the medallions secure that debt, which the company must repay by July 1, 2018. In addition, the Singhs guaranteed the loan pursuant to an agreement pledging their shares of Wheel Trans as collateral, the opinion said.

The guaranty the Singhs signed provides that the death or insolvency of either guarantor would constitute an "event of default" triggering the obligation to repay the debt in full.

Singh filed a Chapter 13 petition in August 2017, listing in his bankruptcy schedules the debt to Aspire as an unsecured, contingent claim. He submitted a plan proposing to pay 100 percent of allowed unsecured claims.

However, the plan did not provide for payments to Aspire because, according to Singh, Wheel Trans was current on its loan payments and would continue paying the lender outside of bankruptcy. Aspire objected to confirmation, citing the plan's failure to pay it along with other unsecured creditors.

## NOT CONTINGENT

Denying confirmation, Judge Grossman said Aspire's claim was not contingent because the parties' guaranty stated that a bankruptcy filing by Wheel Trans or the guarantors constituted an "event of default" triggering the lender's right to full repayment from the debtor.

Because Singh's bankruptcy filing triggered his liability as guarantor, Aspire's claim is no longer contingent on a future event, the judge said. He rejected the debtor's assertion that the fact that Wheel Trans is current on its loan payments meant the loan was contingent.

"Because an event of default under the guaranty was triggered in this case, the entire amount outstanding under the note is no longer a contingent debt and is now a fixed obligation of the debtor," the judge said.

Because the plan does not propose to pay Aspire's unsecured claim in full along with other unsecured claims, it violates Section 1322(a)(3) of the Bankruptcy Code, 11 U.S.C.A. § 1322(a)(3), which requires like treatment of claims in the same class, Judge Grossman said.

The plan therefore cannot be confirmed, he concluded. WJ

**Attorneys:**
*Debtor:* Richard S. Feinsilver, Richard S. Feinsilver, Esq., Carle Place, NY

*Aspire Federal Credit Union:* Leslie S. Barr, Windels Marx Lane & Mittendorf, New York, NY

**Related Filings:**
Opinion: 2018 WL 3135990

***See Document Section E (P. 36) for the opinion.***

# Student loan discharged after lender failed to prove debt existed

**By Donna Higgins**

An elderly Chapter 7 debtor can discharge a $30,000 student loan debt because the lender failed to produce any evidence that the man ever borrowed the money, a Wisconsin bankruptcy judge has ruled.

***In re Rowe, No. 17-11147-7; Rowe v. Educational Credit Management Corp., Adv. No. 17-33, 2018 WL 3218853 (Bankr. W.D. Wis. June 28, 2018).***

The lender, Educational Credit Management Corp., had the burden of proving the debt existed but did not provide any documentation of the loan, U.S. Bankruptcy Judge Catherine J. Furay of the Western District of Wisconsin said.

ECMC claimed that debtor Thomas E. Rowe took out loans to pay for his daughter's college expenses, but Rowe denied having done so, saying that whoever took out the loans must have forged his signature.

Judge Furay ordered the parties to brief the question of which side had the burden of proof in this situation.

## SOCIAL SECURITY PAYMENTS GARNISHED

Rowe, who is 73, filed his Chapter 7 petition in April 2017. In his bankruptcy schedules, he listed the student loan but disputed the existence of the debt, claiming he never signed for a loan.

The following month, he filed an adversary action against ECMC, seeking a ruling that the alleged student loan debt was dischargeable as an "undue hardship" under Section 523(a)(8) of the Bankruptcy Code, 11 U.S.C.A. § 523(a)(8).

In a pretrial brief, ECMC said its predecessor made three loans to Rowe to finance his daughter's education and that the loans were consolidated into a single note in 2003. At the time the adversary action was filed, the balance on that note stood at more than $29,000, ECMC said.

In court papers, Rowe said an unknown individual took out the loans and that he discovered the alleged debt when ECMC began withholding $219 per month from his Social Security income of $4,200 per month.

## NO EVIDENCE OF A DEBT

"Case law squarely places the burden of proof on the party denying the validity of a signature purported to be his," ECMC argued in its brief on the burden of proof.

If Rowe is contending that his signature is forged, then Rowe must produce the document bearing the allegedly forged signature, the lender argued.

ECMC cited Wisconsin state law governing negotiable instruments, which says that a person's signature is "presumed to be authentic and authorized." Wis. Stat. Ann. § 403.308(1).

Judge Furay said ECMC failed to establish that a debt existed at all.

"It is irrelevant that the signature is 'presumed to be authentic and authorized' because the court does not have evidence that a loan or signature ever existed," she said, noting that neither Rowe nor ECMC produced a copy of the loan document.

A defendant has the initial burden of proving that a debt exists and that it is "of the type excepted from discharge" under Section 523(a)(8), she said.

"It is only after this burden is satisfied that the burden shifts to the debtor to prove undue hardship," the judge concluded. WJ

**Attorneys:**
*Plaintiff-debtor:* Janet M. McDonough, Janet M. McDonough, Esq., Chippewa Falls, WI

*Defendant:* Jeffrey W. Guettinger, Richie, Guettinger & Manydeeds, Eau Claire, WI; Kari Barber, Educational Credit Management Corp., Minneapolis, MN

**Related Filings:**
Opinion: 2018 WL 3218853

# New York top court limits insurer's remedy in MBS trial

**By Peter H. Hamner, Esq.**

Ambac Assurance Corp.'s lawsuit to recover nearly $2.2 billion in the wake of subprime mortgage lender Countrywide Financial Corp.'s near collapse in 2008 could come up short as New York's highest court has ruled the bond insurer must identify specific loans that caused its alleged losses.

***Ambac Assurance Corp. et al. v. Countrywide Home Loans Inc. et al., No. 79, 2018 WL 3129387 (N.Y. June 27, 2018).***

In a June 27 opinion, a majority of the New York Court of Appeals held that Ambac cannot recover all the money at once, but instead must follow the repurchase and cure protocol terms in the related securities' agreements.

Ambac's suit alleges Countrywide fraudulently induced the insurer to guarantee 17 offerings of mortgage-backed securities worth about $25 billion between 2004 and 2006. The insurer added Bank of America as a defendant to hold it jointly liable as Countrywide's successor-in-interest following the financial institutions' merger in 2008.

Judge Michael Garcia wrote for the majority, joined by Judges Eugene M. Fahey, Paul G. Feinman, Leslie E. Stein and Rowan D. Wilson. Judge Jenny Rivera dissented in part and Chief Judge Janet DiFiore did not participate in the decision.

## AMBAC INSURES COUNTRYWIDE SECURITIES

According to court filings, Countrywide pooled about 375,000 mortgage loans into the 17 mortgage-backed securities it first offered to investors in 2004.

Countrywide asked Ambac to insure the securities to enhance their credit value, the suit says.

The insurer agreed, relying on Countrywide's promise that the underlying loans met certain characteristics and underwriting guidelines, the complaint alleges.

The mortgage loans defaulted en masse during the financial crisis, forcing Ambac to make payments on investor claims.

Ambac alleges Countrywide misrepresented the underlying loans, its financial condition and details about its mortgage loan operations, in breach of the governing insurance policies, and fraudulently induced the insurer to guarantee the securities.

## SUMMARY JUDGMENT

Both sides filed motions for summary judgment, which New York Supreme Court Justice Eileen Bransten granted in part and denied in part. *Ambac Assurance Corp. v. Countrywide Home Loans Inc.,* No. 651612/2010, 2015 WL 6471943 (N.Y. Sup. Ct., N.Y. Cty. Oct. 22, 2015).

In the ruling the judge determined that Ambac does not need to show it justifiably relied on Countrywide's alleged misrepresentations for the insurer's fraudulent inducement claim.

She also held that repurchase or cure of each loan is not the sole remedy for Ambac because the repurchase provision only applies to loan-level breaches, not transaction-level breaches such as the financial operations and condition misrepresentations.

Regarding damage calculations, Justice Bransten said Ambac can use statistical sampling of the loans pools to demonstrate liability and damages because it is not limited by a contractual "sole remedy" provision.

The parties appealed and a panel of the New York Appellate Division, 1st Department, affirmed her ruling but with some modifications. *Ambac Assurance Corp. v. Countrywide Home Loans Inc.,* No. 3146A and 3146, 56 N.Y.S.3d 21 (N.Y. App. Div., 1st Dep't 2017).

The panel declined to dismiss Ambac's claims but held that the insurer must show justifiable reliance and loss causation to prove its fraudulent inducement claim and that the repurchase protocol in the related securities' agreement is the insurer's sole remedy.

"Ambac cannot avoid the consequences of the sole remedy provision by relying on what it terms 'transaction-level' representations about Countrywide's operations and financial condition, because the heart of Ambac's lawsuit is that it was injured due to a large number of defective loans," the panel said.

The panel also agreed with Justice Bransten that the insurer cannot seek reimbursement of attorneys' fees.

## IS REPURCHASE THE SOLE REMEDY?

On appeal the state's top court agreed with the Appellate Division.

Despite the insurer's argument that its claim relates to Section 3105 of the New York Insurance Law, N.Y. Ins. Law § 3105, the high court said Ambac must show justifiable reliance and loss causation in connection with the fraudulent inducement claim.

The court noted that Ambac is not seeking recovery under the insurance law and that it does not absolve the insurer of proving the required elements of common law fraud.

"Section 3105 does not provide an affirmative, freestanding, fraud-based cause of action through which an insurer may seek to recover money damages," the court's majority opinion said.

The court also determined Ambac's damages are limited by the repurchase and cure protocol and that it cannot seek attorneys' fees.

Proving the factual allegations for the insurer's transaction-level breaches would first require proof of the specific loan-level

breaches for misrepresentations about the underlying mortgage loans, the majority opinion said.

"In addition to encompassing any breaches of the representations and warranties, the repurchase protocol is the sole recourse as to any defective loan — regardless of whether that defect is a breach of 'loan-level' representations made to investors," the opinion said.

Judge Rivera dissented from the majority's holding that the repurchase protocol is the insurer's sole remedy. She said that the transaction-level misrepresentations concern the loan pools and are therefore not duplicative of the individual loan claims. WJ

**Related Filings:**
Opinion: 2018 WL 3129387

***See Document Section F (P. 39) for the opinion.***

REGULATORY ACTION

# SEC fines Morgan Stanley $3.6 million over stolen client funds

**By Cory Hester**

Morgan Stanley's investment advisory business has agreed to pay a $3.6 million penalty to settle Securities and Exchange Commission allegations that it failed to prevent an employee from stealing customers' money.

***Morgan Stanley Smith Barney LLC, Exchange Act Release No. 4953, 2018 WL 3207304 (June 29, 2018).***

Morgan Stanley Smith Barney LLC's inadequate policies and procedures allowed one of its adviser representatives to misuse or misappropriate $7 million in client funds over the course of 11 months in 2016, according to a June 29 SEC order.

The former adviser, Barry F. Connell, has been charged with fraud in parallel actions by the SEC and U.S. Justice Department. *United States v. Connell,* No. 17-cr-116, *indictment filed* (S.D.N.Y. Feb. 17, 2017); *SEC v. Connell,* No. 17-cv-831, *complaint filed,* 2018 WL 464475 (S.D.N.Y. Feb. 3, 2017).

New York-based MSSB, an indirect wholly owned subsidiary of Morgan Stanley, is dually registered as a broker-dealer and investment adviser with the SEC.

Without admitting or denying the charges, MSSB agreed to a censure and cease-and-desist order. The firm will pay the $3.6 million penalty and change its internal policies and procedures, according to the SEC order.

## INADEQUATE POLICIES

The SEC alleged that since at least 2009, MSSB allowed its adviser representatives to initiate third-party disbursements from client accounts of up to $100,000 per day.

The policy required that the adviser provide an attestation on an internal electronic form that they received a client request by phone or in person, with details of the client's request, the order said.

Although this policy was not illegal, the SEC said it created a "higher risk of fraud" because financial advisers could initiate transfers to third parties and misappropriate funds from client accounts by making false attestations.

The agency said Rule 206(4)-7 of the Investments Advisers Act of 1940, 15 U.S.C.A. § 80b-6, requires investment advisers to implement appropriate internal procedures "reasonably designed" to prevent such misconduct and safeguard client assets.

Once MSSB representatives initiated such a plan, an internal business unit responsible for overseeing movements of client funds reviewed the attestations, the SEC said. This review focused on whether the form was complete, however, and included limited mechanisms to detect or prevent fraudulent attestations, according to the order.

## STOLEN FUNDS

From December 2015 to November 2016, these inadequate policies allowed Connell to initiate $7 million in unauthorized third-party transfers of client funds, the order said.

Specifically, Connell made transfers across four client accounts by providing false attestations on 90 internal electronic forms, and he misused 20 client account checks, according to the SEC.

WESTLAW JOURNAL Meghan McNally

Connell misappropriated $5 million in funds from these transfers for his personal use and to fund a "lavish lifestyle," the order said.

The insufficient policies that allowed Connell to steal the funds violated the Investment Advisers Act, and MSSB also failed to reasonably supervise its personnel, the agency said.

The SEC noted that the firm has since significantly enhanced its policies, including increasing anti-fraud program expenditures and hiring more anti-fraud personnel. WJ

**Related Filings:**
Order: 2018 WL 3207304

## Robocalls

CONTINUED FROM PAGE 1

Consumer Protection Act, 47 U.S.C.A. § 227, which prohibits the use of robocalls or automatic dialing systems, as well as artificial or prerecorded messages, without the recipient's prior consent.

In his complaint filed in the U.S. District Court for the Middle District of Florida, Hall also says the companies violated the Florida Consumer Collection Practices Act, Fla. Stat. § 559.72, which prohibits anyone who is collecting a debt from harassing debtors.

### SUIT: 400 CALLS

In 2014 the defendants began calling Hall's cellphone to collect a debt owed by an unidentified person, the suit says. Hall claims he has never had a business relationship with Capital One and does not owe the bank any money.

Hall says he could tell Capital One used an automated dialing system to make the calls because he could hear an extended pause before an employee came on the line. In some instances, the calls were just prerecorded messages, the complaint says.

Hall answered one of the calls in fall 2014 and told the representative that he was not a Capital One customer, that he did not have an outstanding debt and to stop calling, the suit claims.

> The plaintiff says he spoke to representatives of the defendants on at least 10 separate occasions and asked that the calls stop.

Portfolio Recovery Associates also made calls to the plaintiff using an automated system and some of these calls involved a prerecorded message, the suit alleges.

Hall says he spoke to representatives of Capital One and Portfolio on at least 10 separate occasions and asked that the calls stop. He says the defendants ignored his requests each time.

Since fall 2014 the defendants have collectively called Hall at least 400 times, including multiple times a day, on back-to-back days and "with such frequency as can reasonably be expected to harass," according to the complaint.

Hall claims Capital One and Portfolio have corporate policies for using autodialers and prerecorded voice messages with no way for consumers to remove their phone numbers.

### DAMAGES ALLEGED

Each call made Hall's phone unavailable for legitimate incoming and outgoing calls, reduced his phone's battery, and wasted his time, the suit claims.

Hall also says the calls caused stress, anxiety and aggravation.

He says the defendants willfully violated the TCPA and the FCCPA by calling him after he asked them to stop.

The suit seeks unspecified damages, punitive damages, costs and attorney fees. WJ

**Attorneys:**
*Plaintiff:* Shaughn C. Hill, Morgan & Morgan, Tampa, FL

**Related Filings:**
Complaint: 2018 WL 3358536

***See Document Section A (P. 17) for the complaint.***

## CASE AND DOCUMENT INDEX

# HALL

2018 WL 3358536 (M.D.Fla.) (Trial Pleading)
United States District Court, M.D. Florida.
Tampa Division

Sammie HALL, Plaintiff,
v.
CAPITAL ONE BANK (USA) N.A. and Portfolio Recovery Associates, LLC, Defendants.

No. 8:18-cv-01586-JSM-TGW.
July 2, 2018.

**Complaint**

Shaughn C. Hill, Esquire, Florida Bar No.: 105998, Morgan & Morgan, Tampa, P.A., 201 N. Franklin Street, 7th Floor, Tampa, FL 33602, Tele: (813) 223-5505, SHill@ForThePeople.com, SLauredan@ForThePeople.com, for plaintiff.

1. Plaintiff alleges violation of the Telephone Consumer Protection Act, 47 U.S.C. § 227 *et seq.* ("TCPA") and the Florida Consumer Collection Practices Act, Fla. Stat. § 559.55 *et seq.* ("FCCPA") and the Fair Debt Collection Practices Act, 15 U.S.C. § 1692 *et. seq.* ("FDCPA").

***INTRODUCTION***

2. The TCPA was enacted to prevent companies like CAPITAL ONE BANK (USA) N.A. ("Capital One") and PORTFOLIO RECOVERY ASSOCIATES, LLC ("Portfolio") (referred to collectively hereinafter as "Defendants"), from invading American citizens' privacy and prevent abusive "robo-calls."

3. "The TCPA is designed to protect individual consumers from receiving intrusive and unwanted telephone calls." *Mims v. Arrow Fin. Servs., LLC*, --US--, 132 S.Ct. 740, 745, 181 L.Ed.2d 881 (2012).

4. "No one can deny the legitimacy of the state's goal: Preventing the phone (at home or in one's pocket) from frequently ringing with unwanted calls. Every call uses some of the phone owner's time and mental energy, both of which are precious. Most members of the public want to limit calls, especially cellphone calls, to family and acquaintances, and to get their political information (not to mention their advertisements) [*6] in other ways." *Patriotic Veterans v. Zoeller*, No. 16-2059, 2017 U.S. App. LEXIS 47, at *5-6 (7th Cir. Jan 3, 2017).

5. "Senator Hollings, the TCPA's sponsor, described these calls as 'the ***1256** scourge of modern civilization, they wake us up in the morning; they interrupt our dinner at night; they force the sick and elderly out of bed; they hound us until we want to rip the telephone out of the wall.' 137 Cong. Rec. 30, 821 (1991) Senator Hollings presumably intended to give telephone subscribers another option: telling the autodialers to simply stop calling." *Osorio v. State Farm Bank, F.S.B.,* 746 F. 3d 1242 (11th Cir. 2014).

6. According to the Federal Communications Commission (FCC), "Unwanted calls and texts are the number one complaint to the FCC. There are thousands of complaints to the FCC every month on both telemarketing and robocalls. The FCC received more than 215,000 TCPA complaints in 2014." https://www.fcc.gov/document/fact-sheet-consumer-protection-proposal.

***JURISDICTION AND VENUE***

7. Jurisdiction and venue for purposes of this action are appropriate and conferred by 28 U.S.C. § 1331, Federal Question Jurisdiction, as this action involves violations of the TCPA.

8. Subject matter jurisdiction, federal question jurisdiction, for purposes of this action is appropriate and conferred by 28 U.S.C. § 1331, which provides that the district courts shall have original jurisdiction of all civil actions arising under the Constitution, laws, or

treaties of the United States; and this action involves violations of 47 U.S.C. § 227(b)(1)(A)(iii). See *Mims v. Arrow Fin. Servs., LLC*, S.Ct. 740, 748 (2012) and *Osorio v. State Farm Bank, F.S.B.*, 746 F.3d 1242, 1249 (11th Cir. 2014).

9. The alleged violations described herein occurred in Pasco County, Florida. Accordingly, venue is appropriate with this Court under 28 U.S.C. § 1391(b)(2), as it is the judicial district in which a substantial part of the events or omissions giving rise to this action occurred.

***FACTUAL ALLEGATIONS***

10. Plaintiff is a natural person, and citizen of the State of Florida, residing in Land O' Lakes, Pasco County, Florida.

11. Plaintiff is the "called party." See *Breslow v. Wells Fargo Bank, N.A.*, 755 F. 3d 1265 (11th Cir. 2014) and *Osorio v. State Farm Bank, F.S.B.*, 746 F.3d 1242 (11th Cir. 2014).

12. Plaintiff is a "consumer" as defined in Florida Statute § 559.55(8).

13. Defendant, CAPITAL ONE, is a Corporation and National Association with a principal place of business at 8000 Tower Crescent Drive, 16th Floor, Tysons Corner, Virginia 22182, and which conducts business in the State of Florida.

14. Defendant, PORTFOLIO, is a foreign limited liability company with a principal place of business at 120 Corporate Boulevard, Suite 100, Norfolk, Virginia 23502, and which conducts business in the State of Florida through its registered agent, Corporation Service Company, located at 1201 Hays Street, Tallahassee, Florida 32301.

15. Defendant, CAPITAL ONE, is a "creditor" as defined in Florida Statute § 559.55(5).

16. Defendant, PORTFOLIO, is a "debt collector" as defined by Florida Statute § 559.55(6) and 15 U.S.C. § 1692(a)(6).

17. The alleged debt that is the subject matter of this complaint is a "consumer debt" as defined by Florida Statute § 559.55(6).

18. Plaintiff is the regular user and carrier of the cellular telephone number at issue, (813) *** - 1464, and was the called party and recipient of Defendants' hereinafter described calls.

19. Defendants placed an exorbitant number of automated calls to Plaintiff's cellular telephone (813) *** - 1464 in an attempt to collect on a consumer debt that did not belong to him.

20. Plaintiff does not now, nor has he ever, entered into a business relationship with Defendants.

21. On several occasions since 2014, Plaintiff instructed Defendants' agents to stop calling his cellular telephone.

22. Upon receipt of the calls from Defendant, CAPITAL ONE, Plaintiff's caller ID identified the calls were being initiated from, but not limited to, the following phone number: (800) 955-6600, and when that numbers is called, a pre-recorded message answers "Thanks for calling Capital One. Please say or enter your 16-digit card number."

23. Upon information and belief, some or all of the calls the Defendant, CAPITAL ONE, made to Plaintiff's cellular telephone number were made using an "automatic telephone dialing system" which has the capacity to store or produce telephone numbers to be called, without human intervention, using a random or sequential number generator (including but not limited to a predictive dialer) or an artificial or prerecorded voice; and to dial such numbers as specified by 47 U.S.C § 227(a)(1) (hereinafter "autodialer calls"). Plaintiff will testify that he knew it was an autodialer because of the vast number of calls he received, and because when he answered a call from the Defendants, he would hear either an extended pause before a representative would come on the line or a pre-recorded message instructing him to hold line the for the next available agent/representative.

24. Furthermore, some or all of the calls at issue were placed by the Defendant, CAPITAL ONE, using a "prerecorded voice," as specified by the TCPA, 47 U.S.C. § 227(b)(1)(A).

 

25. Upon receipt of the calls from Defendant, PORTFOLIO, Plaintiff's caller ID identified the calls were being initiated from, but not limited to, the following phone number(s): (973) 854-0915, and when that number is called, a pre-recorded message answers "Thank you for calling Portfolio Recovery Associates."

26. Upon information and belief, some or all of the calls the Defendant, PORTFOLIO, made to Plaintiff's cellular telephone number were made using an "automatic telephone dialing system" which has the capacity to store or produce telephone numbers to be called, without human intervention, using a random or sequential number generator (including but not limited to a predictive dialer) or an artificial or prerecorded voice; and to dial such numbers as specified by 47 U.S.C § 227(a)(1) (hereinafter "autodialer calls"). Plaintiff will testify that he knew it was an autodialer because of the vast number of calls he received, and because when he answered a call from the Defendant, he would hear an extended pause before a representative would come on the line.

27. Furthermore, some or all of the calls at issue were placed by the Defendant, PORTFOLIO, using a "prerecorded voice," as specified by the TCPA, 47 U.S.C. § 227(b)(1)(A).

28. None of Defendants' telephone calls placed to Plaintiff were for "emergency purposes" as specified in 47 U.S.C. § 227(b)(1)(A).

29. Defendants attempted to collect an alleged debt from the Plaintiff by this campaign of telephone calls.

30. In or about Fall of 2014, Plaintiff received a call from the Defendant, CAPITAL ONE, met with an extended pause, eventually was connected to a live agent/representative of CAPITAL ONE, explained to the agent/representative he never opened a credit card with them, that he did not owe them any money, and demanded that CAPITAL ONE stop calling his cell phone.

31. During the aforementioned phone conversation in or about Fall of 2014 with CAPITAL ONE's agent/representative, Plaintiff unequivocally revoked any express consent Defendants may have otherwise believed they had for placement of telephone calls to Plaintiff's aforementioned cellular telephone number by the use of an automatic telephone dialing system or a pre-recorded or artificial voice.

32. Each call the Defendants made to the Plaintiff's aforementioned cellular telephone number was done so without the "express consent" of the Plaintiff.

33. Each subsequent call the Defendants made to the Plaintiff's aforementioned cellular telephone number was knowing and willful.

34. Most recently, on or about April 25, 2018, due to continued automated calls to his aforementioned cellular telephone number from PORTFOLIO, Plaintiff again answered a call from PORTFOLIO, met with an extended pause, was eventually connected to a live agent/representative of PORTFOLIO, and informed the agent/representative of that he never opened an account with Capital One, that he did not owe them any money that he had previously informed them not to call his cellular phone, and again demanded that PORTFOLIO cease placing calls to his aforementioned cellular telephone number.

35. Despite actual knowledge of their wrongdoing, Defendants continued the campaign of abuse, calling the Plaintiff despite the Plaintiff revoking any express consent Defendants may have had to call his aforementioned cellular telephone number.

36. Further, Defendant, PORTFOLIO, continued the campaign of abuse, calling the Plaintiff in an effort to collect an alleged debt on behalf of CAPITAL ONE, despite not having his express consent to call his aforementioned cellular telephone number.

37. On at least ten (10) separate occasions, Plaintiff has either answered a call from Defendants or returned a call to Defendants regarding his alleged account, held the line to be connected to a live representative, and demanded that Defendants cease placing calls to his aforementioned cellular telephone number.

38. Each of the Plaintiff's requests for the harassment to end was ignored.

39. From Fall of 2014 through the filing of this Complaint, Defendant, CAPITAL ONE, along with Defendant, PORTFOLIO, has placed approximately four hundred (400) actionable calls to Plaintiff's aforementioned cellular telephone number.

40. Defendants intentionally harassed and abused Plaintiff on numerous occasions by calling multiple times during one day, and on back to back days, with such frequency as can reasonably be expected to harass.

41. From each and every call placed without express consent by Defendants to Plaintiff's cell phone, Plaintiff suffered the injury of invasion of privacy and the intrusion upon his right of seclusion.

42. From each and every call without express consent placed by Defendants to Plaintiff's cell phone, Plaintiff suffered the injury of the occupation of his cellular telephone line and cellular phone by unwelcome calls, making the phone unavailable for legitimate callers or outgoing calls while the phone was ringing from Defendants' calls.

43. From each and every call placed without express consent by Defendants to Plaintiff's cell phone, Plaintiff suffered the injury of unnecessary expenditure of his time. Plaintiff had to waste time to deal with missed call notifications and call logs that reflect the unwanted calls. This also impaired the usefulness of these features of Plaintiff's cellular phone, which are designed to inform the user of important missed communications.

44. Each and every call placed without express consent by Defendants to Plaintiff's cell phone was an injury in the form of a nuisance and annoyance to the Plaintiff. For calls that were answered, Plaintiff had to go to the unnecessary trouble of answering them. Even for unanswered calls, Plaintiff had to deal with missed call notifications and call logs that reflected the unwanted calls. This also impaired the usefulness of these features of Plaintiff's cellular phone, which are designed to inform the user of important missed communications.

45. Each and every call placed without express consent by Defendants to Plaintiff's cell phone resulted in the injury of unnecessary expenditure of Plaintiff's cell phone's battery power.

46. Each and every call placed without express consent by Defendants to Plaintiff's cell phone resulted in the injury of a trespass to Plaintiff's chattel, namely his cellular phone and his cellular phone services.

47. As a result of the calls described above, Plaintiff suffered an invasion of privacy. Plaintiff was also affected in a personal and individualized way by stress, anxiety, nervousness, and aggravation.

48. Defendants' corporate policy is structured so as to continue to call individuals like Plaintiff, despite these individuals explaining to Defendants they do not wish to be called.

49. Defendants' corporate policy provided no means for Plaintiff to have Plaintiff's number removed from Defendant's call list.

50. Defendants have numerous other federal lawsuits pending against them alleging similar violations as stated in this Complaint.

51. Defendants have numerous complaints against them across the country asserting that their automatic telephone dialing systems continue to call despite being requested to stop.

52. Defendants have had numerous complaints against them from consumers across the country asking to not be called; however, Defendants continue to call these individuals.

53. Defendants violated the TCPA with respect to the Plaintiff.

54. Defendants willfully and/or knowingly violated the TCPA with respect to the Plaintiff.

**_COUNT I:_ CAPITAL ONE**
**(Violation of the TCPA)**

55. Plaintiff incorporates paragraphs one (1) through fifty-four (54) above as if fully set forth herein.

56. Defendant, CAPITAL ONE, willfully violated the TCPA with respect to Plaintiff, specifically for each of the auto-dialer calls made to Plaintiff's cellular telephone after Plaintiff notified Defendant that Plaintiff did not wish to receive any telephone communication from Defendant, and demanded for the calls to stop.

57. Defendant, CAPITAL ONE, repeatedly placed non-emergency telephone calls to Plaintiff's cellular telephone using an automatic telephone dialing system or prerecorded or artificial voice without Plaintiff's prior express consent in violation of federal law, including 47 U.S.C § 227(b)(1)(A)(iii).

 

**WHEREFORE**, Plaintiff respectfully demands a trial by jury on all issues so triable and judgment against CAPITAL ONE for statutory damages, treble damages, punitive damages, actual damages and any other such relief the court may deem just and proper.

***COUNT II:* CAPITAL ONE**
**(Violation of the FCCPA)**

58. Plaintiff incorporates paragraphs one (1) through fifty-four (54) above as if fully set forth herein.

59. At all times relevant to this action Defendant, CAPITAL ONE, is subject to and must abide by the law of Florida, including Florida Statute § 559.72.

60. Defendant, CAPITAL ONE, has violated Florida Statute § 559.72(7) by willfully communicating with the debtor or any member of her or his family with such frequency as can reasonably be expected to harass the debtor or her or his family.

61. Defendant, CAPITAL ONE, has violated Florida Statute § 559.72(7) by willfully engaging in conduct which can reasonably be expected to abuse or harass the debtor or any member of her or his family.

62. Defendant's, CAPITAL ONE's, actions have directly and proximately resulted in Plaintiff's prior and continuous sustaining of damages as described by Florida Statute § 559.77.

**WHEREFORE,** Plaintiff respectfully demands a trial by jury on all issues so triable and judgment against CAPITAL ONE for statutory damages, punitive damages, actual damages, costs, interest, attorney fees, enjoinder from further violations of these parts and any other such relief the court may deem just and proper.

***COUNT III:* PORTFOLIO RECOVERY ASSOCIATES, LLC**
**(Violation of the TCPA)**

63. Plaintiff incorporates paragraphs one (1) through fifty-four (54) above as if fully set forth herein.

64. Defendant, PORTFOLIO, willfully violated the TCPA with respect to Plaintiff, specifically for each of the auto-dialer calls made to Plaintiff's cellular telephone after Plaintiff notified Defendant that Plaintiff did not wish to receive any telephone communication from Defendant, and demanded for the calls to stop.

65. Defendant, PORTFOLIO, repeatedly placed non-emergency telephone calls to Plaintiff's cellular telephone using an automatic telephone dialing system or prerecorded or artificial voice without Plaintiff's prior express consent in violation of federal law, including 47 U.S.C § 227(b)(1)(A)(iii).

**WHEREFORE**, Plaintiff respectfully demands a trial by jury on all issues so triable and judgment against PORTFOLIO for statutory damages, treble damages, punitive damages, actual damages and any other such relief the court may deem just and proper.

***COUNT IV:* PORTFOLIO RECOVERY ASSOCIATES, LLC**
**(Violation of the FCCPA)**

66. Plaintiff incorporates paragraphs one (1) through fifty-four (54) above as if fully set forth herein.

67. At all times relevant to this action Defendant, PORTFOLIO, is subject to and must abide by the law of Florida, including Florida Statute § 559.72.

68. Defendant, PORTFOLIO, has violated Florida Statute § 559.72(7) by willfully communicating with the debtor or any member of her or his family with such frequency as can reasonably be expected to harass the debtor or her or his family.

69. Defendant, PORTFOLIO, has violated Florida Statute § 559.72(7) by willfully engaging in conduct which can reasonably be expected to abuse or harass the debtor or any member of her or his family.

70. Defendant's, PORTFOLIO's, actions have directly and proximately resulted in Plaintiff's prior and continuous sustaining of damages as described by Florida Statute § 559.77.

**WHEREFORE,** Plaintiff respectfully demands a trial by jury on all issues so triable and judgment against PORTFOLIO for statutory damages, punitive damages, actual damages, costs, interest, attorney fees, enjoinder from further violations of these parts and any other such relief the court may deem just and proper.

**_COUNT V:_ PORTFOLIO RECOVERY ASSOCIATES, LLC**
**(Violation of the FDCPA)**

71. Plaintiff incorporates paragraphs one (1) through fifty-four (54) above as if fully set forth herein.

72. Defendant, PORTFOLIO, has violated 15 U.S.C. § 1692(d)(5) by willfully engaging in conduct the natural consequence of which is to harass, oppress, or abuse any person in connection with the collection of a debt.

73. Defendant, PORTFOLIO, has violated 15 U.S.C. § 1692(d)(5) by causing a telephone to ring or engaging any person in telephone conversation repeatedly or continuously with intent to annoy, abuse, or harass any person at the called number.

74. Defendant, PORTFOLIO, has violated 15 U.S.C. § 1692(f) by using unfair and unconscionable means to collect or attempt to collect any debt.

75. Defendant, PORTFOLIO, has violated 15 U.S.C. § 1692(f) by using unfair and unconscionable means to collect or attempt to collect any debt.

76. Defendant, PORTFOLIO, has violated 15 U.S.C. § 1692(g)(b) by failing to cease collection activity until debt collector obtains verification of the debt and such verification is mailed to the consumer by the debt collector.

**WHEREFORE,** Plaintiff respectfully demands a trial by jury on all issues so triable and judgment against Defendant PORTFOLIO for statutory damages, punitive damages, actual damages, costs, interest, attorney fees, enjoinder from further violations of these parts and any other such relief the court may deem just and proper.

Respectfully Submitted,

s/*Shaughn C. Hill*

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# QUICKEN LOANS

2018 WL 3015189 (M.D.Fla.) (Trial Motion, Memorandum and Affidavit)
United States District Court, M.D. Florida.
Fort Myers Division

Tom MAHONEY, on behalf of himself and on behalf of others similarly situated, Plaintiff,
v.
QUICKEN LOANS INC., Defendant.

No. 2:18-cv-00324-UA-MRM.
June 14, 2018.

**Quicken Loans Inc.'s Motion to Dismiss**

J. Kirby McDonough, Fla. Bar No. 79031, Quarles & Brady LLP, 101 E. Kennedy Blvd., Ste. 3400, Tampa, Fla. 33602, Tel.: (813) 387-0300, Fax: (813) 387-1800, kirby.mcdonough@quarles.com, for Quicken Loans Inc.

Pursuant to Federal Rule of Civil Procedure 12(b)(6), Quicken Loans Inc. hereby moves to dismiss the Complaint (ECF No. 1) of Plaintiff Tom Mahoney ("Mahoney" or "Plaintiff") in its entirety because it fails to state a claim for violation of the Telephone Consumer Protection Act ("TCPA"), 47 U.S.C. § 227 *et seq*., upon which relief can be granted.

***INTRODUCTION***

Mahoney—a repeat TCPA plaintiff[1]—alleges that, on multiple occasions over the last year (he does not plead how many times or when), he entered HGTV's (a third-party with no corporate relationship to Quicken Loans) "home giveaway sweepstakes." Compl. ¶ 34. He further alleges that, in connection with his online entries, he was given the option to "check a box" to request and consent to calls from Quicken Loans—a multiple J.D. Power Award winner for customer satisfaction—about mortgage loan opportunities. *Id.* ¶ 32. According to Mahoney, in connection with one of his entries sometime in the last year (again, Plaintiff does not plead when), he did not check the box but nonetheless received calls from Quicken Loans, even though his number was purportedly on the federal do-not-call list. *Id.* ¶¶ 22, 26-32.[2] He claims that these calls—none of which Plaintiff answered and only four of which resulted in voicemails—violated the TCPA's federal do-not-call list provision (47 C.F.R. § 64.1200(c)). *Id.* ¶¶ 27-30, 49-58.

Plaintiff also admits that he has taken part in "previous H[G]TV sweepstakes giveaways" and references that he had other calls with Quicken Loans "in connection" with these sweepstakes, during which he spoke with a team member (employee) and purportedly requested that Quicken Loans stop calling him. *Id.* ¶ 34. Plaintiff does not, however, challenge these other unidentified calls in this lawsuit. *See id.* ¶¶ 28–30. This raises the reasonable and plausible inference that, as part of other HGTV entries, Plaintiff "checked the box" requesting that Quicken Loans call him and later attempted to revoke that consent. Indeed, if Plaintiff had not consented to these calls, then Plaintiff presumably would be challenging those other calls with Quicken Loans team members as part of this lawsuit. Importantly (and, perhaps, conveniently), however, Mahoney omits any factual allegations about his other HGTV entries, including whether he checked the box for Quicken Loans to call in connection with any of those entries, when he made those other entries, the dates of his other calls with Quicken Loans, and the date(s) and content of his purported attempt to revoke his prior consent. These omissions are significant because, as discussed below, they demonstrate that Plaintiff has failed to state cognizable federal do-not-call list claim against Quicken Loans here.

Against this background, Plaintiff's TCPA claim (and derivative "claim" for injunctive relief) must be dismissed for at least four independent and adequate reasons.

First, Plaintiff pleads no factual basis from which this Court can conclude that it has personal jurisdiction over Quicken Loans with respect to his claims. He does not—because he cannot—allege that Quicken Loans, a Michigan corporation, is "at home" in Florida, nor does he allege that any of the challenged calls were received in or placed from Florida. He only alleges that he received the challenged calls on a phone number used for "residential purposes," conspicuously stopping short of pleading that the number was

tied to a residential landline or that he was in Florida when receiving the challenged calls. *Id.* ¶ 21. His complaint thus falls well short of pleading that Quicken Loans is somehow subject to this Court's jurisdiction here.

Second, Plaintiff's federal do-not-call list claim fails as matter of law because, according to his own allegations, the calls were informational in nature and not "telephone solicitations." To trigger the federal do-not-call list provision, the challenged call must be a "telephone solicitation." 47 C.F.R. § 64.1200(c). That term is defined in the relevant regulations as an unsolicited call whose purpose is to "encourage[] the purchase or rental of, or investment in, property, goods, or services." *Id.* § 64.1200(f)(14). Here, however, Plaintiff's allegations about the content of the challenged calls reveal no such purpose. Compl. ¶ 31. Nowhere, for example, does Plaintiff plead the content of any call from Quicken Loans where it encouraged him to purchase, rent, or invest in anything. *See id.* Instead, the most that Plaintiff alleges is that Quicken Loans sought to provide him with "mortgage information." *Id.* That is insufficient to state a federal do-not-call list claim. *See, e.g., Norman v. N. Ill. Gas Co.*, No. 13-3465, 2014 WL 184774, at *2 (N.D. Ill. Jan. 16, 2014).

Third, Plaintiff's federal do-not-call list claim is devoid of other factual allegations necessary to sustain it. A federal do-not-call list claim arises where (a) the plaintiff's phone number is on the federal do-not-call list, (b) the plaintiff had neither prior contact nor an established business relationship with the defendant, (c) the plaintiff has not given his or her permission or invitation for the defendant to call, and (d) the defendant makes a telephone solicitation to the plaintiff at the number on the federal do-not-call list. 47 C.F.R. § 64.1200(c), (f)(14). Plaintiff's allegations do not present a typical federal do-not-call list claim; he openly admits to other telephone calls and contact with Quicken Loans and alleges that he attempted to make a do-not-call request as part of at least one of those contacts. Compl. ¶ 34. This, in turn, raises the reasonable and plausible inference (unrefuted by any of Plaintiff's other allegations) that he checked the box requesting that Quicken Loans call him as part of one or more other HGTV sweepstakes entries. Given these circumstances, it is Plaintiff's burden to plead, among other things, factual allegations of the substance and timing of his other interactions with Quicken Loans and the timing and factual circumstances that led to them. Otherwise there is no plausible basis for this Court to infer that the challenged calls arose in a factual context where Plaintiff had not taken some prior action to invite them. *See* 47 C.F.R. § 64.1200(c), (f)(14). And, to the extent Plaintiff now contends that the challenged calls are actionable because they occurred after he purportedly asked Quicken Loans to stop calling, then he must also allege the timing of the challenged calls in relation to his purported do-not-call request. This is because the TCPA contains a thirty-day safe harbor for a defendant to stop calls after a do-not-call request. 47 C.F.R. § 64.1200(d)(3). Mahoney pleads none of these basic factual allegations, leaving this Court with no basis (let alone the requisite plausible one) to conclude either that the challenged calls occurred (a) before Plaintiff ever (at any time) invited Quicken Loans to call through his HGTV submissions or (b) more than thirty days after Plaintiff revoked any prior invitations for Quicken Loans to call. Mahoney has thus failed to state a cognizable do-not-call list claim against Quicken Loans.

Finally, Plaintiff's purported "claim" for injunctive relief is not a claim at all. It is well-established that injunctive relief is a remedy, not a substantive cause of action. *Brevard Cty. v. Priceline.com, Inc.*, No. 08-1695, 2010 WL 680771, at *5 (M.D. Fla. Feb. 24, 2010). As such, Count 2 fails to state a viable cause of action and must be dismissed.

***BACKGROUND***[3]

As Plaintiff himself tells the story, at some point in time (presumably in 2018, although the Complaint does not say) he submitted an online entry form, including his telephone number, as part of an "H[G]TV" home giveaway sweepstakes.[4] Compl. ¶¶ 32-34, 36. The sweepstakes website contained an option for participants to request to "speak to a Quicken Loans Home Loan Expert about [his or her] mortgage opportunities." *Id.* ¶ 32. By checking the box to select that option, participants "agree that Quicken Loans may contact [them] ... via phone ... even if [their] number is on any state, federal, or corporate Do Not Call list." *Id*. Plaintiff claims that he "did not check the box" next to the Quicken Loans-specific language as part of one unidentified entry, presumably in 2018, but nonetheless received voicemails from Quicken Loans team members "calling about [his] entry to the [HGTV] home giveaway sweepstakes." *Id.* ¶¶ 31-32. Specifically, Plaintiff alleges that he received eleven phone calls from Quicken Loans over the course of three days (April 27, April 29, and May 1, 2018), resulting in four voicemail messages and seven unanswered calls. *Id.* ¶¶ 27-30. Plaintiff asserts that the subject telephone number—which phone number was allegedly used for "residential purposes"—was "listed on the National Do Not Call Registry for more than 31 days prior to" the challenged calls. *Id.* ¶¶ 21, 26.

As noted, Plaintiff also alleges that, on multiple (but unspecified) dates "within the last year," he had submitted other entries in HGTV "home sweepstakes giveaways," and received other calls from Quicken Loans "in connection" with those entries. *Id.* ¶ 34. He, however, does not allege that these calls violated the TCPA as part of this lawsuit, presumably because Plaintiff consented to receive these calls. Plaintiff fails to allege when these other HGTV submissions and Quicken Loans' calls occurred, so neither the Court nor Quicken Loans can assess if they were before or after the eleven challenged calls. He further alleges that, in connection with certain

 

of his calls with Quicken Loans within the last year, he allegedly "told representatives of Quicken Loans not to call him." *Id.* The Complaint, however, is devoid of any factual enhancement as to when these calls with Quicken Loans occurred (before or after the challenged calls here), who was on the calls, and what Plaintiff allegedly said to inform Quicken Loans not to call him. *See id.*

Based on these sparse and implausible allegations, Plaintiff filed this lawsuit, asserting two separate causes of action. *Id.* ¶¶ 49-61. In Count 1, Plaintiff asserts that Quicken Loans violated the federal do-not-call list provision by "initiating ... telephone solicitations to ... Plaintiff" when his number was registered on the federal do-not-call list. *Id.* ¶ 53. And, in Count 2, Plaintiff asserts a second cause of action solely for "[i]njunctive relief to bar future TCPA violations." *Id.* ¶¶ 59-61.

## *LEGAL STANDARD*

A plaintiff seeking to establish personal jurisdiction over a nonresident defendant "bears the initial burden of alleging in the complaint sufficient facts to make out a prima facie case of jurisdiction." *Louis Vuitton Malletier, S.A. v. Mosseri*, 736 F.3d 1339, 1350 (11th Cir. 2013) (quoting *United Techs. Corp. v. Mazer,* 556 F.3d 1260, 1274 (11th Cir. 2009)). "[V]ague and conclusory allegations presented in [the] complaint ... are insufficient to establish a prima facie case of personal jurisdiction ...." *Snow v. DirecTV, Inc.*, 450 F.3d 1314, 1318 (11th Cir. 2006).

To survive a Rule 12(b)(6) motion to dismiss, "a complaint must contain sufficient factual material ... 'to state a claim to relief that is plausible on its face.'" *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007)). "A facially plausible claim must allege facts that are more than merely possible .... The plausibility standard calls for enough fact to raise a reasonable expectation that discovery will reveal evidence of the defendant's liability." *Chaparro v. Carnival Corp.*, 693 F.3d 1333, 1337 (11th Cir. 2012) (internal citations and quotation marks omitted). While this Court must assume the truth of well pleaded factual allegations, "[l]egal conclusions without adequate factual support are entitled to no assumption of truth." *Mamani v. Berzain*, 654 F.3d 1148, 1153 (11th Cir. 2011). Applying these well-known standards to the Complaint demonstrates that Plaintiff's claims should be dismissed.

## *ARGUMENT*

### I. PLAINTIFF FAILS TO PLEAD FACTS SUFFICIENT TO ESTABLISH THIS COURT'S PERSONAL JURISDICTION OVER QUICKEN LOANS.

The Complaint must be dismissed in its entirety for the threshold reason that Plaintiff does not plead facts sufficient to establish that this Court has general or specific personal jurisdiction over Quicken Loans.

Quicken Loans is not subject to general personal jurisdiction in Florida. "With respect to a corporation, the place of incorporation and principal place of business are paradig[m] ... bases for general jurisdiction." *Daimler AG v. Bauman*, 571 U.S. 117, 137 (2014) (internal quotation marks and citation omitted). Plaintiff correctly concedes that Quicken Loans is a Michigan corporation. Compl. ¶ 8. Therefore, to implicate general personal jurisdiction, Plaintiff must plead sufficient factual allegations to establish that Quicken Loans' activities in Florida are "so 'continuous and systematic'" to render it "at home" in this forum. *Daimler AG*, 571 U.S. at 127 (citation omitted). Plaintiff pleads no such factual allegations. Because none exist. Instead, he pleads only that Quicken Loans "made telephone calls into this District." Compl. ¶ 10. This generic allegation suggests, at most, only that Quicken Loans has made some unspecified telephone calls to someone in Florida. This is insufficient to plead a *prima facie* case of general jurisdiction. *Daimler AG*, 571 U.S. at 137-38 (rejecting as "unacceptably grasping" the notion that general jurisdiction could be conferred by merely doing business in a state that was not the place of incorporation or principal place of business); *BNSF Ry. Co. v. Tyrrell*, 137 S. Ct. 1549, 1558-59 (2017) (general jurisdiction over railroad corporation lacking even though it had "over 2,000 miles of railroad track and more than 2,000 employees" in the forum, because it was incorporated and principally located elsewhere); *Carmouche v. Tamborlee Mgmt., Inc.*, 789 F.3d 1201, 1204 (11th Cir. 2015); *Pinnacle Ins. & Fin. Servs., LLC v. Sehnoutka*, No. 16-0546, 2017 WL 3193641, at *9 (M.D. Fla. July 27, 2017) ("sales and marketing efforts" are not sufficient to confer general jurisdiction over defendant).

Nor does Plaintiff plead factual allegations sufficient to implicate specific personal jurisdiction over Quicken Loans. "Specific jurisdiction arises out of a party's activities in the forum that are related to the cause of action alleged in the complaint." *Consolidated Dev. Corp. v. Sherritt, Inc.*, 216 F.3d 1286, 1291 (11th Cir. 2000). The Complaint makes no attempt to meet this standard. At most, Plaintiff pleads that the subject phone number upon which he allegedly received the challenged calls is a number "used for residential purposes." Compl. ¶ 21. But he suspiciously fails to plead that the subject phone number was a landline tied to a Florida residence (rather than a cellular phone used for "residential purposes"), or that the subject calls were otherwise received or placed in Florida. In short, he fails to allege that Quicken Loans conducted any specific activities in Florida that gave rise to his claim. This failure means that this Court has no jurisdiction over Quicken Loans under controlling Supreme Court precedent. *Goodyear Dunlop Tires Operations, S.A. v. Brown*,

564 U.S. 915, 919 (2011) ("Because the episode-in-suit, the bus accident, occurred in France, and the tire alleged to have caused the accident was manufactured and sold abroad, North Carolina courts lacked specific jurisdiction to adjudicate the controversy.").

Plaintiff's failure to plead any factual allegations supporting this Court's exercise of personal jurisdiction over Quicken Loans warrants dismissal of his claims.

**II. COUNT 1 MUST BE DISMISSED BECAUSE PLAINTIFF FAILS TO PLEAD THE TELEPHONE SOLICITATION ELEMENT.**

As noted, in Count 1, Plaintiff alleges that Quicken Loans violated the federal do-not-call list provision of the TCPA by "initiating ... telephone solicitations" to him at a number allegedly "registered" on the do-not-call list. Compl. ¶ 53 (citing 47 C.F.R. § 64.1200(c)). But Plaintiff's own allegations confirm that the challenged calls did not contain the requisite "telephone solicitation" element necessary to sustain the claim.

As defined in the Federal Communication Commission's TCPA regulations, a telephone solicitation is "a telephone call or message for the purpose of encouraging the purchase or rental of, or investment in, property, goods, or services." 47 C.F.R. § 64.1200(f)(14). Here, Plaintiff pleads no factual allegations of such a purpose to any of the eleven challenged calls. For seven of the eleven calls, Plaintiff alleges that he did not answer and no voicemail was left. Compl. ¶¶ 27-30. There is thus no call content or other factual basis from which this Court can infer (plausibly) that the calls were "telephone solicitations." And, as to the remaining four calls, Plaintiff admits he never spoke with a Quicken Loans team member and that each resulted only in a voicemail, where the Quicken Loans team member stated that he or she was calling to provide "a complementary mortgage review" or "mortgage information" in response to Plaintiff's inquiry. *Id.* ¶¶ 27-31. At best, Plaintiff alleges only four informational calls made in response to his inquiry—not any calls during which Quicken Loans encouraged him to purchase, rent or invest in anything. There is thus no telephone solicitation sufficient to sustain Count 1. *Murphy v. DCI Biologicals Orlando, LLC*, No. 12-1459, 2013 WL 6865772, at *10 (M.D. Fla. Dec. 31, 2013) (dismissing Section 227(c)(5) claims because Plaintiff failed to allege that the challenged calls were made to "encourage[] [Plaintiff] to purchase, rent, or invest in anything"), *aff'd*, 797 F.3d 1302 (11th Cir. 2015); *Norman*, 2014 WL 184774, at *2 (same); *Friedman v. Torchmark Corp.*, No. 12-2837, 2013 WL 4102201, at *6 (S.D. Cal. Aug. 13, 2013) (same); *see also Freyja v. Dun & Bradstreet, Inc.*, No. 14-7831, 2015 WL 6163590, at *2 (C.D. Cal. Oct. 14, 2015); *Morris v. Unitedhealthcare Ins. Co.*, No. 15-0638, 2016 WL 7115973, at *8-9 (E.D. Tex. Nov. 9, 2016).

In response, Quicken Loans anticipates that Plaintiff will point to his assertion that the calls were "marketing solicitations" that were meant to "encourage[] the purchase or rental of, or investment in, property goods, or services to Plaintiff's phone." Compl. ¶¶ 2, 23. But such parroting of the "telephone solicitation" definition (47 C.F.R. § 64.1200(f)(14)) without any supporting factual enhancement is exactly the kind of allegation the Supreme Court has repeatedly held is insufficient to sustain a plaintiff's Rule 8 pleadings burden. *Iqbal*, 556 U.S. at 678-79. It thus cannot save Plaintiff's claim in Count 1 here. Moreover, Plaintiff's bald assertion that the calls constituted "marketing solicitations" is belied by his factual allegations about the content of the voicemail messages confirming that the calls were informational in nature. Compl. ¶ 31.

**III. COUNT 1 MUST BE DISMISSED BECAUSE PLAINTIFF DOES NOT PLEAD THE TIMING OF HIS CONTACTS WITH QUICKEN LOANS IN RELATION TO THE CHALLENGED CALLS.**

Count 1 must be dismissed for the additional reason that Plaintiff fails to plead other factual allegations sufficient to sustain it.

This Court (Merryday, J.) recently provided a common sense explanation of how the typical do-not-call list claim can arise in *Nece v. Quicken Loans Inc.*, 292 F. Supp. 3d 1274 (M.D. Fla. 2018):

> In plainer English, the do-not-call regulations establish this sensible scheme: A company generally may not call a person on the national do-not-call registry. If a person on the national do-not-call registry inquires about the company's services and provides a phone number, the company may call the person for three months after the inquiry. To accommodate a request that the company stop calling, the company must implement a policy mechanism to add the number to the company's do-not-call registry at the time of the request and to honor the request within a reasonable time [not to exceed thirty days].

*Id.* at 1281 (citing 47 C.F.R. § 64.1200(c), (d), (f)(14)).

Applying the regulation and Judge Merryday's explanation of it here, Plaintiff must plead plausible factual allegations that (a) his phone number was on the federal do-not-call list at the time of the challenged calls, (b) he had no prior contact and no established

 

business relationship with the Quicken Loans at the time of the calls (*i.e.*, he had not inquired with Quicken Loans about its services within ninety days of the challenged calls), (c) he had not given his permission or invitation for Quicken Loans to call him prior to the challenged calls, and (d) the challenged calls included "telephone solicitations." 47 C.F.R. § 64.1200(c), (f)(5), (f)(14). If Plaintiff *did* have an established business relationship with Quicken Loans or had previously given Quicken Loans his invitation or permission to receive calls from it (b or c, above), then he must separately allege that he made a "[Quicken Loans]-specific do-not-call request" more than thirty days prior to the challenged calls. *Id.* § 64.1200(c), (d)(3), (f)(14). The Complaint here is devoid of these requisite factual allegations.

First, Plaintiff pleads no factual allegations from which this Court can infer (plausibly or otherwise) that the challenged calls occurred in the absence of (a) prior invitation or permission from Plaintiff, or (b) a prior "inquiry" that established a business relationship with Quicken Loans. To the contrary, the only plausible inference to draw from Plaintiff's allegations—about other HGTV submissions, other calls from Quicken Loans in connection with those submissions (unchallenged here) and the purported do-not-call request—is that Plaintiff invited those other, unchallenged calls from Quicken Loans and established a business relationship with it *before* the challenged calls here. *See* Compl. ¶ 34. Indeed, if this were not the case, there would be no reason for Plaintiff to include his allegation about asking Quicken Loans to stop calling.

Plaintiff pleads nothing to rebut this inference. Nonetheless, the Complaint is devoid of allegations about the timing of the challenged calls in relation to his other unidentified HGTV submissions and the resulting (and unchallenged) Quicken Loans' calls. In the absence of such allegations, there is no plausible basis for this Court to infer that the challenged calls were placed without prior permission or invitation, or an established business relationship. *See* 47 C.F.R. § 64.1200(c), (f)(5), (f)(14)(ii); *Nece*, 292 F. Supp. 3d at 1278-80.

The conspicuous absence of these details makes it more likely than not that the challenged calls were made after securing Plaintiff's invitation from these other submission entries and while there remained an existing business relationship between Plaintiff and Quicken Loans. In light of his own allegations that he habitually entered HGTV sweepstakes and allegedly did not check the box for Quicken Loans to call in connection with only one of his entries, there is no basis (let alone a plausible one) for this Court to conclude that the challenged calls could constitute a federal do-not-call list provision violation. *See Phillips v. Mozes, Inc.*, No. 12-4033, 2015 WL 12806594, at *1 (N.D. Ala. Jan. 26, 2015) (dismissing federal do-not-call list claim as to certain text messages where Plaintiff had formed an EBR with defendant); *see also Hovila v. Tween Brands, Inc.*, No. 09-0491, 2010 WL 1433417, at *5 (W.D. Wash. Apr. 7, 2010) (granting summary judgment for Defendant on federal do-not-call list claim because Plaintiff formed EBR by purchasing merchandise from Defendant's retail store).

Second, and consistent with the reasonable and plausible inference that Plaintiff had previously invited calls from Quicken Loans and established a business relationship with it before the challenged calls, Plaintiff pleads that he asked Quicken Loans to stop calling him at some unidentified time. Compl. ¶ 34. The problem, however, is that Plaintiff fails to plead the date or content of his alleged request. Instead, he pleads only that, at some undefined point "within the last year," he "had told [unidentified] representatives of Quicken Loans not to call him in connection with previous [HGTV] sweepstakes giveaways." *Id.* But without the date of this purported do-not-call request, there is no plausible basis for this Court to infer that it was made at a time such that any of the challenged calls occurred later and are actionable. This is because there is no factual basis to conclude that Quicken Loans contacted Plaintiff more than thirty days after any purported do-not-call request or outside the ninety-day established business relationship period recognized by Judge Merryday in *Nece. Iqbal*, 556 U.S. 578 (there must be "more than a sheer possibility that a defendant has acted unlawfully"); *Nece*, 292 F. Supp. 3d at 1278-80. Count 1 thus must be dismissed for this additional reason.

## IV. COUNT 2 DOES NOT PLEAD A CAUSE OF ACTION.

Count 2 must be dismissed because it fails to state any actionable claim against Quicken Loans. Plaintiff purports to bring a second count for "[i]njunctive relief to bar future TCPA violations." Compl. ¶¶ 59-61. Count 2 does not allege that Quicken Loans violated any substantive provision of the TCPA—or any other statute—and seeks only an injunction (precisely the same relief Plaintiff requests in Count 1). *Id.* ¶¶ 58, 61. Count 2 thus fails because an injunction is fundamentally not a '"claim showing that the pleader is entitled to relief."' *Brevard Cty.*, 2010 WL 680771, at *5 (quoting Fed. R. Civ. P. 8(a)(2)). Rather, "[a]n injunction is a remedy." *Id.* (dismissing "free-standing 'claim' for injunctive relief" with prejudice); *see also, e.g.*, *Pierson v. Orlando Reg'l Healthcare Sys., Inc.*, 619 F.Supp.2d 1260, 1288 (M.D. Fla. 2009), *aff'd*, 451 F. App'x 862 (11th Cir. 2012) (same; collecting cases).

## *CONCLUSION*

For the foregoing reasons, Quicken Loans respectfully requests that the Court grant its Motion and dismiss the Complaint.

Dated: June 14, 2018

Respectfully submitted,

*/s/ J. Kirby McDonough*

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Footnotes

1 *See, e.g., Mahoney v. TT of Pine Ridge, Inc.*, No. 17-80029 (S.D. Fla.).

2 If this matter proceeds beyond the pleadings stage (and it should not), Quicken Loans intends to present evidence demonstrating that Plaintiff "checked the box" to request and consent to calls from Quicken Loans as part of each of his 21 different sweepstakes entries to HGTV in 2017 and 2018.

3 Quicken Loans, as it must for purposes of a Rule 12(b)(6) motion, assumes the truth of the factual allegations in the complaint. *Franklin v. Curry*, 738 F.3d 1246, 1248 (11th Cir. 2013). Quicken Loans will contest those allegations and raise various defenses in the event this Motion is not granted.

4 Plaintiff repeatedly refers to the sweepstakes as an "HDTV" sweepstakes in his Complaint. Quicken Loans understands him to be referring to a sweepstakes offered by "HGTV," and so uses that term in the Motion.

**End of Document**

# MOISEEV

2018 WL 3342469 (D.Mass.) (Trial Pleading)
United States District Court, D. Massachusetts.

UNITED STATES OF AMERICA, Plaintiff,
v.
Igor MOISEEV and Alexander Grinis, Defendants.

No. 1:18CR10206.
June 28, 2018.

**Indictment**

Laura J. Kaplan, Assistant U.S. Attorney.

**VIOLATIONS:**

18 U.S.C. § 1344 (Bank Fraud) [Cts. 1 & 2]
18 U.S.C. § 1014 (False Statement) [Ct. 3]
18 U.S.C. § 1028A (Agg. Identity Theft) [Ct. 4]
18 U.S.C. § 2 (Aiding & Abetting)

**FORFEITURE ALLEGATION**

18 U.S.C. § 982(a)(2)
THE GRAND JURY CHARGES THAT:

***General Allegations***

At all times relevant to this Indictment:

1. Eastern Bank was a bank insured by the Federal Deposit Insurance Corporation ("FDIC") with offices located throughout the United States, including in the District of Massachusetts.

2. Defendant Igor Moiseev ("MOISEEV") was an individual who resided in Newton, Massachusetts.

3. Defendant Alexander Grinis ("GRINIS") was employed at Eastern Bank in Auburndale, MA, and served as its branch manager. Among GRINIS's duties and responsibilities as branch manager was to assist customers with opening and closing accounts, and applying for loans and lines of credit.

4. TFC Enterprises, LLC ("TFC") was a company incorporated in Massachusetts in or around July 2009 with its principal place of business located in Dedham, Massachusetts. The Massachusetts Secretary of State lists Victim #1 and individuals John Doe #1 and Jane Doe #2 as TFC's only managers and signatories.

5. Victim #1 was a real person known to the Grand Jury who resided in Massachusetts. Victim #1 was not a customer of Eastern Bank.

6. John Doe #1 was a real person known to the Grand Jury who resided in Belarus.

7. Jane Doe #2 was a real person known to the Grand Jury who resided in Massachusetts.

8. On February 15, 2015, at Eastern Bank in Auburndale, MA, GRINIS opened a business checking account ending in *1232 in the name of TFC Enterprises, LLC/John Doe #1 ("the TFC account"), and completed a Business Customer Profile Form for TFC wherein

he certified that he had read and complied with the bank's policies with respect to New Account Opening, Customer Identification Program, Know Your Customer & Anti-Money Laundering.

9. On or about September 22, 2015, MOISEEV forged Victim #1's name to a signature card and opened a checking account in Victim #1's name. GRINIS assisted MOISEEV with opening these accounts. MOISEEV was not authorized by Victim #1 to open these accounts or sign Victim #1's name on any signature cards, loan documents, wire transfers or checks.

10. On or about October 9, 2015, MOISEEV added Victim #1's name as a signer on the TFC account.

11. On or about November 4, 2015, MOISEEV used Victim #1's driver's license and social security number to apply for a business-preferred line of credit in the amount of $50,000 for TFC with Victim #1 as the guarantor. MOISEEV forged Victim #1's signature to several documents connected with this line of credit. GRINIS assisted MOISEEV with the application and certified that he had read and complied with all of the bank's policies in connection with new account opening and customer identification procedures. The application was approved and the proceeds from the line of credit were transferred into the TFC account. The line of credit application was false and fraudulent in that it was not submitted by Victim #1.

12. On or about May 3, 2016, MOISEEV used Victim #1's driver's license and social security number to apply for a business-preferred loan in the amount of $50,000 for TFC with Victim #1 as the guarantor. MOISEEV forged Victim #1's signature to several documents connected with this loan. GRINIS assisted MOISEEV with the application and certified that he had read and complied with new account opening and customer identification procedures. The application was approved and the proceeds from the loan were transferred into the TFC account. The loan application was false and fraudulent in that it was not submitted by Victim #1.

13. From as early as November 2015 through July 2017, MOISEEV withdrew money from the TFC account and forged Victim #1's name to approximately twenty-one checks drawn on the TFC account, which MOISEEV then used for his own personal expenses.

14. On approximately ten occasions, between March 2016 and February 2017, with assistance from GRINIS, MOISEEV caused Eastern Bank to wire transfer money from the TFC account, in Victim #1's name, to Russia, Canada, and elsewhere overseas.

15. Neither loan was repaid and between October and December 2017, Eastern Bank charged off approximately $91,418.86 as a loss to Eastern Bank.

***The Scheme to Defraud***

16. From at least as early as February 2015, and continuing through in or around December 2017, MOISEEV engaged in a scheme and artifice to defraud Eastern Bank and to obtain money, funds, and property of Eastern Bank by means of materially false and fraudulent pretenses and representations.

17. From at least as early as February 2015, and continuing through in or around December 2017, MOISEEV presented GRINIS with Victim #1's license and social security card, without the knowledge or consent of Victim #1, in order to open a checking and savings account in Victim 1's name, and thereafter added Victim #1 to the TFC account. Thereafter, MOISEEV forged Victim #1's name to applications for two purported business loans for TFC. On each loan application, GRINIS falsely certified that he had complied with all bank procedures and, as a result, the loans were approved. The proceeds of the two loans were subsequently distributed to the TFC account and MOISEEV forged Victim #1's name on checks, and withdrew money from the TFC account to pay for his own personal expenses. In addition, MOISEEV, with GRINIS's assistance, caused proceeds from the TFC account to be wire transferred to Russia, Canada, and elsewhere overseas using Victim #1's name.

***COUNT ONE* (Bank Fraud - 18 U.S.C. § 1344)**

18. Paragraphs 1 through 17 are re-alleged in this count in their entirety and incorporated herein by reference.

19. In or about November 2015, in the District of Massachusetts and elsewhere,
**IGOR MOISEEV,**

defendant herein, did knowingly execute a scheme and artifice to defraud Eastern Bank, a financial institution, and to obtain moneys, funds, and credits owned by and under the custody and control of a financial institution, by means of materially false and fraudulent

 

pretenses, representations, and promises, to wit, by obtaining a false and fraudulent business line of credit in the amount of $50,000 from a financial institution, using the name and other identifying information of Victim #1, without the knowledge or permission of Victim #1.

All in violation of Title 18, United States Code, Sections 1344 and 2.

***COUNT TWO* (Bank Fraud - 18 U.S.C. § 1344)**

20. Paragraphs 1 through 17 are re-alleged in this count in their entirety and incorporated herein by reference.

21. In or about May 2016, in the District of Massachusetts and elsewhere,
**IGOR MOISEEV,**

defendant herein, did knowingly execute a scheme and artifice to defraud Eastern Bank, a financial institution, and to obtain moneys, funds, and credits owned by and under the custody and control of a financial institution, by means of materially false and fraudulent pretenses, representations, and promises, to wit, by obtaining a false and fraudulent business loan in the amount of $50,000 from a financial institution, using the name and other identifying information of Victim #1, without the knowledge or permission of Victim #1.

All in violation of Title 18, United States Code, Sections 1344 and 2.

***COUNT THREE* (False Statements on Loan Application - 18 U.S.C. § 1014)**

22. Paragraphs 1 through 17 are re-alleged in this count in their entirety and incorporated herein by reference.

23. In or about February 2015, in the District of Massachusetts and elsewhere,
**ALEXANDER GRINIS,**

defendant herein, knowingly made a false statement for the purpose of influencing the action of Eastern Bank, a financial institution, the accounts of which are insured by the Federal Deposit Insurance Corporation, in order to procure a false and fraudulent business line of credit, in that the defendant falsely stated, among other things, defendant had complied with Eastern Bank's customer identification policies, when in truth and in fact, as the defendant well knew, defendant had not complied with said bank policies.

All in violation of Title 18, United States Code, Sections 1014 and 2.

***COUNT FOUR* (Aggravated Identity Theft - 18 U.S.C. § 1028A)**

24. Paragraphs 1 through 17 are re-alleged in this count in their entirety and incorporated herein by reference.

25. In or about November 2015, in the District of Massachusetts and elsewhere,
**IGOR MOISEEV,**

defendant herein, did, during and in relation to the felony violation of bank fraud, in violation of Title 18, United States Code, Section 1344, as alleged in Count One, knowingly use, without lawful authority, a means of identification of another person, to wit, the name of Victim #1.

All in violation of Title 18, United States Code, Section 1028A and 2.

***FORFEITURE ALLEGATION* (18 U.S.C. § 982(a)(2))**

26. Upon conviction of one or more of the offenses charged in Counts One through Four of the Indictment,

**IGOR MOISEEV and ALEXANDER GRINIS,**

defendants herein, shall forfeit to the United States, pursuant to 18 U.S.C. § 982(a)(2), any property constituting, or derived from, proceeds obtained directly or indirectly, as the result of such violation.

27. If any of the property described in paragraph 26 above, as a result of any act or omission of the defendants --

a. cannot be located upon the exercise of due diligence;

b. has been transferred or sold to, or deposited with, a third party;

c. has been placed beyond the jurisdiction of the Court;

d. has been substantially diminished in value; or

e. has been commingled with other property which cannot be divided without difficulty;

it is the intention of the United States, pursuant to 18 U.S.C. § 982(b)(1), incorporating 21 U.S.C. § 853(p), to seek forfeiture of all other property of the defendants up to the value of the property in paragraph 26 above.

All pursuant to Title 18, United States Code, Section 982(a)(2).

A TRUE BILL,

<<signature>>

FOREPERSON OF THE GRAND JURY

<<signature>>

LAURA J. KAPLAN
Assistant U.S. Attorney
DISTRICT OF MASSACHUSETTS, June 27, 2018
Returned into the District Court by the Grand Jurors and filed.

<<signature>>

Deputy Clerk

**End of Document**

# RAZUKI

2018 WL 2761818
Only the Westlaw citation is currently available.
United States District Court, S.D. California.

Salam RAZUKI, individually and on behalf of others similarly situated, Plaintiff,
v.
CALIBER HOME LOANS, INC., et al., Defendants.

CASE NO. 17cv1718-LAB (WVG)

Signed 06/07/2018

Filed 06/08/2018

**Attorneys and Law Firms**

Alex M. Tomasevic, David Gerald Greco, Craig McKenzie Nicholas, Nicholas and Tomasevic LLP, San Diego, CA, for Plaintiff.

Benjamin Kleine, Laura Marie Elliott, Maurice Werter Trevor, Cooley Godward Kronish LLP, San Francisco, CA, Matthew D. Spohn, Norton Rose Fulbright US LLP, Denver, CO, Spencer Persson, Norton Rose Fulbright US LLP, Los Angeles, CA, for Defendants.

**ORDER OF DISMISSAL**

Honorable Larry Alan Burns, United States District Judge

***1** Salam Razuki sued Caliber Home Loans after hackers breached Caliber's security and stole sensitive customer information like social security numbers. Razuki alleges a cybercriminal attempted to open credit cards in his name after the hack, and he's spent money and suffered emotional distress as a result. He blames Caliber for deploying second-rate security and waiting too long to notify customers like him. Caliber removed under the Class Action Fairness Act, and now asks the Court to dismiss for lack of standing and failure to state a claim. Razuki has standing, but he's failed to state a claim. Fed. R. Civ. P. 12(b)(6).

**A. Standing**

Caliber argues Razuki's increased risk of identity theft isn't an injury in fact. But the Ninth Circuit recently held that data-breach-victims pled "an injury in fact based on a substantial risk that hackers will commit identity fraud." *In re Zappos.com, Inc.*, 888 F.3d 1020, 1029 (9th Cir. 2018). If pleading a substantial risk of identity fraud is enough to satisfy the injury requirement, then Razuki's allegation that his identity was "stolen and exploited" by "an unknown party [who] attempted to make numerous fraudulent transactions in his name, including the opening of new credit accounts" is sufficient. *See also Krottner v. Starbucks Corp.*, 628 F.3d 1139 (9th Cir. 2010).

Caliber also maintains Razuki can't show causation. It's true the criminal who used Razuki's information might have obtained it through open Wi-Fi on a train, a discarded bank statement, or some other data breach. But the Ninth Circuit rejected that argument in *Zappos* as well: "That hackers might have stolen Plaintiffs' [data] in unrelated breaches, and that Plaintiffs might suffer identity theft or fraud caused by the data stolen in those other breaches ... is less about standing and more about the merits of causation and damages." 888 F.3d at 1029. The Court must draw all reasonable inferences in Razuki's favor at this stage. He alleges he gave Caliber his private data, a breach happened, and someone tried to open credit accounts in his name. In sum, his identity was "stolen and exploited." That's enough to reasonably infer causation for Article III standing.

Caliber's reply brief argued Razuki failed to allege the company still possessed his data during the breach, or that it was actually stolen. But Caliber admits it sent out "notice to those individuals whose information could potentially be affected." Razuki alleges he "received such a letter." That's sufficient. Caliber's opening brief also seems to acknowledge the point. And the argument is waived anyway—new counsel raised it for the first time in the reply. Caliber's motion to dismiss the complaint for lack of standing is denied.

**B. Failure to State a Claim**

**1. Negligence**

In *Krottner v. Starbucks*, the Ninth Circuit found risk of identity theft following a data breach sufficient to supply an injury-in-fact for standing, but insufficient to support actual damages for a negligence claim because the injuries "stem from the danger of future harm." *Krottner v. Starbucks Corp.*, 406 Fed.Appx. 129, 131 (9th Cir. 2010); *but see Ruiz v. Gap, Inc.*, 540 F. Supp. 2d 1121, 1126 (N.D. Cal. 2008), *aff'd*, 380 Fed.Appx. 689 (9th Cir. 2010). In *Starbucks*, one plaintiff alleged personal information was misused, but the court couldn't find any "loss related to the attempt to open a bank account in his name." Razuki makes the same allegations: his personal information was misused when someone attempted to open accounts in his name. Razuki hasn't distinguished his case from *Starbucks*.[1]

***2** What's more, his allegations are too vague for the Court or Caliber to evaluate. He says he "was informed that an unknown party attempted to make numerous fraudulent transactions in his name"; he "spent time, money, energy, and effort managing the fallout"; and he "took remedial measures." Who "informed him" and what "fraudulent transactions" were made? How did he "manage the fallout"? What "remedial measures" did he spend money on? Also, he sums up his damages in paragraph 22 by alleging, "Plaintiff and/or members of the Class" suffered harm. That's not good enough. This conjunctive-disjunctive formulation suggests class members may have suffered injuries Razuki didn't. As the class representative, he needs to allege his damages—not possible damages that happened to other, absent class members. Finally, his opposition alludes to purchasing some type of identity protection service. He didn't clearly allege that in his complaint. Plus, Caliber's offered free, two-year identity protection to affected customers.[2]

Under Rule 8's "short and plain statement" standard, Razuki need not allege his allegations of harm in great specificity. *See e.g., Dieffenbach v. Barnes & Noble, Inc.*, 887 F.3d 826 (7th Cir. 2018) (reversing trial court for dismissing data breach claim) (Easterbrook, J). And the Court must accept all allegations as true and draw inferences in Razuki's favor. But he needs to allege more than the cagey and indefinite allegations in his complaint. This claim is dismissed with leave to amend.

**2. California Constitution (Art. I, § I)**

Razuki argues Caliber violated his constitutional right to privacy by failing to protect his data. What matters here is whether Caliber committed "a serious invasion of privacy"; that is, "an egregious breach of the social norms underlying the privacy right." *Hill v. Nat'l Collegiate Athletic Assn.*, 7 Cal. 4th 1, 37, 40 (1994). Losing personal data through insufficient security doesn't rise to the level of an egregious breach of social norms underlying the protection of sensitive data like social security numbers. "Even negligent conduct that leads to theft of highly personal information, including social security numbers, does not approach the standard of actionable conduct under the California Constitution and thus does not constitute a violation of Plaintiffs' right to privacy." *In re iPhone Application Litig.*, 844 F. Supp. 2d 1040, 1063 (N.D. Cal. 2012) (alterations omitted).

Razuki counters that he's alleged Caliber intentionally violated his privacy by choosing to implement low-budget security measures with an "absolute disregard of its consequences." *Cope v. Davidson*, 30 Cal. 2d 193, 201 (1947). The privacy damage here is serious. But Razuki's allegations don't suggest the type of intentional, egregious privacy invasion contemplated in *Hill.* 7 Cal. 4th at 93 (drug-test monitors watched college athletes provide urine sample). Other courts to consider the issue have reached similar results. *See, e.g.*, *Ruiz*, 540 F. Supp. 2d at 1128. Razuki didn't distinguish these cases, nor did he point to any authority besides *Cope v. Davidson*—a case interpreting "willful misconduct within the meaning of section 403 of the Vehicle Code." 30 Cal. 2d at 195. This claim is dismissed with leave to amend.

**3. Customer Records Act (Civ. Code § 1798.80)**

The Customer Records Act requires businesses to protect customers' personal information by maintaining "reasonable security procedures," and if a data breach occurs, to notify affected customer's "without unreasonable delay" §§ 1798.81.5, 82. Razuki argues Caliber failed to address this claim, so it waived argument. The opposite is true. Caliber moved to dismiss this claim for failing to allege injury, and for conclusory allegations about security, data disposal, and notification. Razuki failed to address these arguments. The claim is deemed abandoned. *See, e.g.*, *Shull v. Ocwen Loan Servicing, LLC*, 2014 WL 1404877, at *2 (S.D. Cal. Apr. 10, 2014). This claim is dismissed with leave to amend.

***3** If Razuki amends, he needs to provide more facts to support his various theories for a CRA violation. The Court acknowledges Razuki probably can't make specific and definitive allegations about how Caliber's security was insufficient before discovery. But

 

he needs to hum a few more bars about some of these allegations, like why mitigation was "inadequate" or disposal of customer information was "improper." The Court must accept his factual allegations as true, but he needs more than "[t]hreadbare recitals of the elements of a cause of action, supported by mere conclusory statements." *Iqbal*, 556 U.S. at 678. This claim is dismissed with leave to amend.

**4. Consumers Legal Remedies Act (Cal. Civ. Code § 1750)**

Razuki argues Caliber violated various provisions of § 1770(a)'s ban on unfair business practices that result "in the sale or lease of goods or services to any consumer." The CLRA unhelpfully defines "services" as "work, labor, and services for other than a commercial or business use, including services furnished in connection with the sale or repair of goods." § 1761. Caliber argues selling home loans doesn't count as the sale of a service under the Act. The Court agrees.

The California Supreme Court has held that "ancillary services that insurers provide to actual and prospective purchasers of life insurance" doesn't count as a "service" under the Act because the activity centers on a "contractual obligation to pay money." *Fairbanks v. Superior Court*, 46 Cal. 4th 56, 61, 65 (2009). If selling life insurance isn't a service, then neither is selling home loans—both center on contractual obligations to pay money.

Razuki says the Court should read the statute more broadly. But that reading would "defeat the apparent legislative intent" of the Act, since "ancillary services are provided by the sellers of virtually all intangible goods," like those who provide "loans." *Id.* at 65. Other courts agree. *See, e.g.*, *Alborzian v. JPMorgan Chase Bank, N.A.*, 235 Cal. App. 4th 29, 40 (2015) (mortgage loan not a service). This claim is dismissed without leave to amend.

**5. Unfair Competition Law (Cal. Bus. & Prof. Code § 17200)**

Razuki argues Caliber engaged in unfair business practices by failing to provide sufficient security for his data. The unfair competition law bans unlawful, unfair, and fraudulent business practices. Cal. Bus. & Prof. Code § 17200. Razuki's complaint doesn't explain which theory he's advancing. His opposition suggests he's relying on the CLRA and CRA violations above as predicates for an unlawful theory. Since those claims are out, this one is too. Plus, he hasn't sufficiently alleged "lost money or property." Cal. Bus. & Prof. Code § 17204. The motion to dismiss this claim is granted with leave to amend.

* * *

Given the Ninth Circuit's extremely liberal stance on amendment, the Court dismisses all of Razuki's claims with leave to amend, except his CLRA claim—amendment would be futile since home loans aren't covered under the statute. If Razuki doesn't file an amended complaint by July 6, 2018, this case will be dismissed.

**IT IS SO ORDERED**.

**All Citations**

Slip Copy, 2018 WL 2761818

Footnotes

1 In the published opinion, the plaintiffs made additional allegations that track Razuki's claims; for example, spending time monitoring accounts. *Krottner*, 628 F.3d at 1141.

2 Dkt. 16 ¶ 24; https://oag.ca.gov/system/files/Sample%20Notice_11.pdf.

**End of Document**

# SINGH

2018 WL 3135990
Only the Westlaw citation is currently available.
United States Bankruptcy Court, E.D. New York.

In re: BALDEV SINGH, Debtor.
Case No. 8-17-75330-reg

Dated: Central Islip, New York June 22, 2018
Chapter 13

**SUPPLEMENTAL FINDINGS OF FACT AND CONCLUSIONS OF LAW**

Robert E. Grossman United States Bankruptcy Judge

**Introduction**

***1** This matter is before the Court pursuant to Aspire Federal Credit Union's ("Aspire's") objection to confirmation of the Chapter 13 plan proposed by Baldev Singh (the "Debtor"). Aspire filed a proof of claim based on the Debtor's guaranty of payment on Aspire's loan to Wheel Trans Corporation. Wheel Trans Corporation, a corporation owned by the Debtor and his spouse, own two taxi medallions. Aspire, as part of the loan agreement, was granted a security interest in the medallions. As additional collateral, the Debtor executed a guaranty of payment in favor of Aspire. Several issues were raised in connection with confirmation of the Debtor's plan. The first issue is whether the Debtor qualifies as a Chapter 13 debtor under § 109(e) of the Bankruptcy Code, which requires an individual to have noncontingent, liquidated, unsecured debts of less than $394,725.00 and secured debts of less than $1,184,200.00 on the date of the filing. Because the event giving rise to Debtor's liability under the guaranty did not occur prior to the bankruptcy filing, Aspire's claim is a contingent claim for the purposes of § 109(e). Thus, the Debtor is eligible as a Chapter 13 debtor.

The second issue is whether the Debtor's proposed plan is confirmable. The Debtor proposed to pay the unsecured creditors 100%, but because Wheel Trans Corporation, according to the parties, is current on its obligations to Aspire, there is no claim against the Debtor by Aspire and, therefore, the Plan need not and does not include payments on account of the Debtor's guaranty. However, despite Wheel Trans Corporation being current on its obligation under the Note, the Debtor's insolvency, as evidenced by the commencement of this bankruptcy proceeding, triggered an event of default under the Guaranty, thus rendering the entire amount due and payable to Aspire. It is a fixed obligation of the Debtor and is therefore a current unsecured claim. Because the claim of Aspire is not given the same treatment as the other unsecured claims, the Debtor's plan cannot be confirmed as proposed. The third issue raised by Aspire is whether the Debtor's plan was proposed in good faith. Aspire alleged that the Debtor was using the plan process to retain his home, which had substantial equity, while precluding Aspire from receiving payment in full on the obligation incurred by Wheel Trans Corporation and guaranteed by the Debtor. Because the plan as proposed is not capable of confirmation, the Court need not address this issue.

**Facts**

According to the Debtor's schedules, the Debtor has a 50% ownership interest in Wheel Trans Corporation, and his non-filing spouse owns the remaining 50%. On December 12, 2013, Aspire loaned $1.6 million to Wheel Trans Corporation pursuant to a promissory note ("Note"), which matures and is due and payable on July 1, 2018. The obligations of Wheel Trans Corporation under the Note are secured by two New York City Taxi and Limousine Commission taxi medallions owned by Wheel Trans Corporation, which are valued at approximately $852,284.70 as of September 30, 2017 (30 days post-petition). On December 12, 2013, the Debtor and his non-filing spouse executed a guaranty ("Guaranty"), whereby they guaranteed, as primary obligors, to pay to Aspire "any and all liabilities of" Wheel Trans Corporation. The Guaranty was secured by a Pledge Agreement dated December 12, 2013, pursuant to which the Debtor and his spouse pledged their shares of Wheel Trans Corporation to Aspire as collateral.

***2** The Guaranty provides, on page 2 under subsection (c), that "the death or insolvency (however evidenced) of [Wheel Trans Corporation] or any person (including the undersigned)" constitutes an "Event of Default" under the Guaranty. The Guaranty further provides, under subsection (g), that any proceeding "commenced by or against [Wheel Trans Corporation] or [the Debtor or the Debtor's spouse] under any bankruptcy, reorganization, arrangement of debt, insolvency, readjustment of debt, receivership, liquidation or dissolution law or statute" constitutes an event of default. Upon the occurrence of any event of default, Aspire may "make the liabilities of [Wheel Trans Corporation] to [Aspire], whether or not then due, immediately due from and payable" by the Debtor or the Debtor's spouse, and Aspire "shall be entitled to enforce the obligations of [the Debtor and the Debtor's spouse]."

On August 31, 2017 (the "Petition Date"), the Debtor filed a petition for relief under Chapter 13 of the Bankruptcy Code. According to Debtor's schedules, the Debtor owns real property that has equity of $400,000.00 in excess of the mortgage debt. Debtor also listed three creditors in his Schedules: Nassau County Treasurer as a secured creditor with a $0 claim; Bank of America as an unsecured creditor with a claim of $728.00; and Aspire as an unsecured creditor with a contingent claim of $1,463,000.00.

According to the Debtor's Chapter 13 Plan, the Debtor intends to make 36 consecutive monthly payments to the Trustee in the amount of $1,000.00 per month. The Plan also provides a 10% commission to the Trustee, in addition to a $3,500.00 fee for the Debtor's attorney's fees. The Plan further acknowledges the Debtor's personal liability to Aspire and provides that Wheel Trans Corporation will "remain current and remit payments to [Aspire] outside of bankruptcy." It further provides that the "[i]ndividual Debtor shall not remit any post-petition payments to this creditor." Finally, the plan provides that unsecured creditors will receive a 100% distribution of their allowed claims. On December 20, 2017, Aspire filed its proof of claim in the amount of $1,465,230.09, with a secured portion of $852,284.70 and an unsecured portion of $612,945.39.

On January 11, 2018, the Debtor's case was dismissed pursuant to the Trustee's Motion to Dismiss for failure to provide the Trustee with several documents. The case was subsequently closed on February 6, 2018. On April 9, 2018, the Debtor filed a motion to reinstate his Chapter 13 case because he cured the prior deficiencies, and the case was reopened by Court order on May 1, 2018. Aspire subsequently filed an objection to confirmation of the Debtor's plan on May 9, 2018, arguing that the Debtor's plan was unconfirmable because it was not proposed in good faith. According to Aspire, the Debtor could not use the Chapter 13 process to evade his impending liability under the Guaranty by obtaining a discharge before the debt to Wheel Trans Corporation was paid in full.

At the confirmation hearing held on May 24, 2018, the Court questioned both parties about the nature of the debt owed by the Debtor, including whether the Guaranty was secured by a pledge of stock in Wheel Trans Corporation. The parties agreed that the Debtor and his spouse pledged their stock interests, but disagreed as to whether the stock pledge was perfected by Aspire. The Court also questioned both parties about the nature of the Guaranty and its terms and conditions. Both the Debtor and Aspire claimed that the Guaranty did not include any provision that the filing for bankruptcy by either guarantor constituted an event of default thereunder.

At the conclusion of the hearing, the Court directed the parties to file briefs addressing whether Aspire's claim was a contingent or actual debt, and whether the Debtor's pledge of his shares of Wheel Trans Corporation was perfected by Aspire. The Court indicated that the remainder of the issues raised at the hearing could be addressed by the Court's review of the various agreements between Aspire, Wheel Trans Corporation, and the Debtor.

***3** The parties filed their respective papers on May 16 and 17, 2018. The Debtor confirmed that Aspire's security interest in the Debtor's stock in Wheel Trans Corporation was not perfected because Aspire did not have physical possession of the stock certificate, as required pursuant to UCC § 9-313(a). Aspire, in turn, argued that the Debtor's pledge in stock was irrelevant to the case because the Debtor's guaranty of payment was a contingent debt that was subject to an estimation proceeding pursuant to § 502(c)(1) of the Bankruptcy Code. Aspire further argued that the Debtor's case could not be confirmed because the Debtor's assertion that Wheel Trans Corporation would remain current on the payments was untrue, and thus constituted a lack of good faith pursuant to § 1325(a)(3) of the Bankruptcy Code. On June 7, 2018, the Court read its decision into the record, which is fully set forth below.

**Discussion**

In assessing the first issue of the Debtor's eligibility as a Chapter 13 debtor, his or her eligibility is based on the nature and amount of the debtor's obligations to its creditors as of the date the petition is filed. *In re Piovanetti*, 496 B.R. 57, 61 (Bankr. D.P.R. 2013). Only "[n]on-contingent and liquidated debts [are counted] toward the debt limitations for Chapter 13 eligibility." *In re Barcal*, 213 B.R. 1008, 1012 (B.A.P. 8th Cir. 1997). "It is generally agreed that a debt is contingent if it does not become an obligation until the occurrence of a future event, but is noncontingent when all of the events giving rise to liability for the debt occurred prior to the debtor's filing for bankruptcy." *In re Mazzeo*, 131 F.3d 295, 303 (2d Cir. 1997). In this case, it appears that the parties have agreed that as of the Petition Date, Aspire's claim was contingent and should not be included in the calculation of the unsecured debt. However, regardless of the parties' agreement on this issue, Chapter 13 eligibility is a statutory criteria that should be determined by the Court. *See In re Piovanetti*, 496 B.R. at 62 ("The court cannot allow a debtor to self-determine his/her own bankruptcy eligibility."). Since the event giving rise to Debtor's liability under the guaranty did not occur prior to the bankruptcy filing, Aspire's claim is contingent. Thus, without including Aspire's claim, the Debtor's unsecured debt totals $728.00, which falls within the statutory limit for eligibility. Therefore, the Debtor meets the eligibility requirements under § 109(e) of the Bankruptcy Code.

It also appears that the issue briefed by the parties regarding the Debtor's pledge of his shares of Wheel Trans Corporation does not change the analysis of Debtor's eligibility or the status of Aspire's claim in the case. The Court inquired into this issue to determine whether the pledge of stock itself would make Aspire a secured creditor with a current, noncontingent claim. At the confirmation hearing, Aspire could not determine whether it had a lien on the stock because it was unaware whether it had possession of the stock certificate. The parties later confirmed that Aspire did not have possession of the stock itself, and thus it did not have a perfected

security interest in the stock owned by the Debtor. This issue ultimately was not dispositive of the issues relevant to the case, since the unperfected security interest in the stock would not change Aspire's claim or status as a creditor in the case.

The final issue concerns the confirmability of the plan. Debtor's plan currently treats Aspire's claim as contingent and, therefore, not currently due on the basis that Wheel Trans Corporation is current on its monthly payments under the Note. The Debtor's plan specifically states that no post-petition payments will be made under the Guaranty because Wheel Trans Corporation is current under the Note. However, a review of the Guaranty reveals that an event of default occurred thereunder on the Petition Date. Despite the parties' reassurances to the Court that the filing of a petition by the guarantors was not an event of default under the Guaranty, the parties are incorrect.

***4** Typically, "a claim based on a guaranty is contingent unless the loan is in default" or is dependent on the occurrence of a future event. *In re Benanti*, 2018 WL 1801194, at *6 (Bankr. C.D. Ill. April 13, 2018); *In re Mazzeo*, 131 F.3d at 300. In instances where there has been a default on an underlying debt, the "liability on a guaranty becomes fixed and is no longer contingent because all predicates to enforcement have occurred." *In re LightSquared Inc.*, 2014 WL 5488413, at *3 (Bankr. S.D.N.Y. Oct. 30, 2014).

In this case, the Debtor's insolvency, as evidenced by the commencement of this bankruptcy proceeding, constitutes an "Event of Default" pursuant to subsections (c) and (g) of the Guaranty, which entitled the Lender to enforce the obligations of the Debtor under the Guaranty. This triggered the Debtor's obligation to pay the debt owed to Aspire in full since the Debtor's obligation is no longer contingent upon the occurrence of a future event. As Courts have explained, but for the automatic stay, the lender could demand full payment from the guarantor today. *In re Lightsquared*, 2014 WL 5488413, at *4; *In re Rhead*, 179 B.R. 169, 172 (Bankr. D. Ariz. 1995) ("[B]ut for the bankruptcy, [Lender] could seek a judgment against the [Debtors] for the full amount guaranteed, without the occurrence of any further event.").

In addition, the fact that the Borrower—Wheel Trans Corporation—is current on the Note and is able to continue making payments does not render the claim contingent, as the Debtor has argued. Courts have noted that when estimating a contingent guaranty claim, it may be appropriate to factor in the ability of an obligor to satisfy the obligations, but in each of those cases, the guarantees had not been triggered, like it has in this case. *In re Lightsquared*, 2014 WL 5488413, at *4. Further, while Aspire seeks to have an estimation of the claim under § 502(c)(1) of the Code, estimation is not necessary. The entire amount of the Note has come due despite the fact that the corporation is current with the payments.

Therefore, because an event of default under the Guaranty was triggered in this case, the entire amount outstanding under the Note is no longer a contingent debt and is now a fixed obligation of the Debtor. The proposed plan does not meet the requirements of § 1322(a)(3) because the plan does not provide for payment of Aspire's unsecured claim in full along with the other unsecured creditors. This Court acknowledges that there has been a dramatic increase in the number of cases involving taxi medallions as there has been a precipitous drop in their value. Whether a case should be deemed to have been filed in bad faith is a question of the particular facts presented to the court. In the matter presently before this Court, it is not necessary to undertake this analysis pursuant to § 1325(a)(3) because the plan as currently presented is not capable of being confirmed.

**Conclusion**

For the reasons stated herein, the Court finds that the entire amount due under the Note is no longer a contingent claim, but rather is a fixed obligation of the Debtor. Thus, the Debtor's plan does not meet the requirements of § 1322(a)(3) because Aspire's unsecured claim is not being given the same treatment as the other unsecured creditors. Therefore, confirmation of the Debtor's plan is denied. The Court shall enter an order consistent with the Supplemental Findings of Fact and Conclusions of Law.

**Notice Recipients**

***5** District/Off: 0207–8
Case: 8–17–75330–reg
User: atennerie
Form ID: pdf000
Date Created: 6/22/2018
Total: 5

**Recipients of Notice of Electronic Filing:**
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tr Michael J. Macco ecf@maccosternlaw.com
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# AMBAC

2018 WL 3129387

THIS DECISION IS UNCORRECTED AND SUBJECT TO REVISION BEFORE PUBLICATION IN THE NEW YORK REPORTS.
Court of Appeals of New York.

AMBAC ASSURANCE CORPORATION, et al., Appellants,
v.
COUNTRYWIDE HOME LOANS, INC., et al., Respondents,
Bank of America Corp., Defendant.

No. 79

Decided June 27, 2018

**Synopsis**
**Background:** Financial guaranty insurer commenced action against insured lender, alleging breach of contract and fraud with regard to residential mortgage-backed securitizations. The Supreme Court, New York County, Eileen Bransten, J., 2015 WL 6471943, granted summary judgment in part for both parties. The Supreme Court, Appellate Division, Richter, J.P., modified the Supreme Court's opinion in part and affirmed. Financial guaranty insurer appealed.

**Holdings:** The Court of Appeals, Garcia, J., held that:
[1] statute that permitted insurer, in event of material misrepresentation, to avoid contract of insurance or defeat recovery under insurance contract, did not relieve financial guaranty insurer of common-law requirement of proving justifiable reliance and loss causation on fraud claim;
[2] financial guaranty insurer was not entitled to compensatory damages in form of all claims payments made to investors;
[3] financial guaranty insurer was limited to repurchase protocol as potential remedy for all alleged loan-level breaches and transaction-level breaches; and
[4] financial guaranty insurer was not entitled to attorney fees.

Affirmed.

Rivera, J., filed separate opinion dissenting in part.

West Headnotes (17)

[1] **Fraud** Elements of Actual Fraud

The required elements of a common law fraud claim are misrepresentation or a material omission of fact which was false and known to be false by the defendant, made for the purpose of inducing the other party to rely upon it, justifiable reliance of the other party on the misrepresentation or material omission, and injury.

Cases that cite this headnote

[2] **Fraud** Reliance on Representations and Inducement to Act
**Fraud** Injury and causation

Justifiable reliance is a fundamental precept of a fraud cause of action, as is resulting injury.

Cases that cite this headnote

[3] **Insurance**Of insureds

Statute that permitted insurer, in event of material misrepresentation, to either avoid contract of insurance or defeat recovery under insurance contract did not relieve financial guaranty insurer of common-law requirement of proving justifiable reliance and loss causation on claim against insured lender alleging fraud with regard to residential mortgage-backed securitizations, since insurer did not seek rescission of an insurance contract. N.Y. Insurance Law § 3105.

Cases that cite this headnote

[4] **Insurance**Of insureds

Statute that permitted insurer, in event of material misrepresentation, to either avoid contract of insurance or defeat recovery under insurance contract, does not provide an affirmative, freestanding, fraud-based cause of action through which an insurer may seek to recover money damages, and does not inform a court's assessment of the longstanding common law elements of fraudulent inducement. N.Y. Insurance Law § 3105.

Cases that cite this headnote

[5] **Insurance**Materiality

A purpose of statute that permits an insurer, in event of material misrepresentation, to either avoid contract of insurance or defeat recovery under insurance contract, is to overrule prior case law which did not require a showing of materiality for an insurer to avoid its obligations under a policy based on the insured's misrepresentations. N.Y. Insurance Law § 3105.

Cases that cite this headnote

[6] **Fraud**Reliance on Representations and Inducement to Act

Where a sophisticated business person or entity claims to have been taken in, the justifiable reliance requirement for fraud cause of action serves to rid the court of cases in which the claim of reliance is likely to be hypocritical.

Cases that cite this headnote

[7] **Fraud**Injury and causation

If an alleged fraud causes no loss, then the plaintiff has suffered no damages.

Cases that cite this headnote

[8] **Insurance**Of insureds

Financial guaranty insurer was not entitled to compensatory damages from insured lender in form of all claims payments made to investors on claim against insured lender alleging fraud with regard to residential mortgage-backed securitizations; insurer had no right to rescission or rescissory damages on the unconditional, irrevocable insurance policies it issued, and the compensatory damages that insurer sought were equivalent of rescissory damages.

Cases that cite this headnote

[9] **Damages**Effect of provisions of contract

Courts must honor contractual provisions that limit liability or damages because those provisions represent the parties' agreement on the allocation of the risk of economic loss in certain eventualities.

Cases that cite this headnote

[10] **Contracts** Nature and Form of Remedy

Contract terms providing for a sole remedy are sufficiently clear to establish that no other remedy was contemplated by the parties at the time the contract was formed, for purposes of that part of the transaction, especially when entered into at arm's length by sophisticated contracting parties.

Cases that cite this headnote

[11] **Insurance** Of insureds

Financial guaranty insurer was limited to repurchase protocol as potential remedy for all alleged loan-level breaches and transaction-level breaches of contract under which insurer agreed to insure payments of principal and interest owed to the holders of residential mortgage-backed securities sponsored by the insured lender; contract's sole remedy provision stated that repurchase protocol was sole remedy for any breach of a representation and warranty incorporated into the insurance agreements and the remedy with respect to any defective mortgage loan or any mortgage loan as to which there had been a breach of representation or warranty.

Cases that cite this headnote

[12] **Contracts** Nature and Form of Remedy

A plaintiff cannot subvert an exclusive remedies provision in a contract by simply re-characterizing its claims.

Cases that cite this headnote

[13] **Contracts** General and specific words and clauses

A specific provision in a contract will not be set aside in favor of a catchall clause.

Cases that cite this headnote

[14] **Costs** American rule; necessity of contractual or statutory authorization or grounds in equity

The prevailing litigant ordinarily cannot collect attorneys' fees from its unsuccessful opponents; the exception is when an award is authorized by agreement between the parties or by statute or court rule.

Cases that cite this headnote

[15] **Costs** American rule; necessity of contractual or statutory authorization or grounds in equity
**Damages** Elements of damages in general

Attorneys' fees are treated as incidents of litigation, rather than damages.

Cases that cite this headnote

[16] **Costs** American rule; necessity of contractual or statutory authorization or grounds in equity

A court should not infer a party's intention to waive the benefit of the rule that prevailing litigant ordinarily cannot collect attorneys' fees from its unsuccessful opponents unless the intention to do so is unmistakably clear from the language of the promise.

Cases that cite this headnote

[17] **Insurance** Costs and Attorney Fees

Financial guaranty insurer was not entitled to attorney fees from insured lender in action alleging breach of contract and fraud with regard to residential mortgage-backed securitizations, since attorney fee provision in contract did not contain language evincing an unmistakably clear intent to permit a party to seek reimbursement for attorneys' fees incurred in litigation against other party to the contract.

Cases that cite this headnote

**Attorneys and Law Firms**

Philippe Z. Selendy, for appellants.

Joseph M. McLaughlin, New York, for respondents.

Securities Industry and Financial Markets Association; Mark J. Browne; Association of Financial Guaranty Insurers; New York Insurance Association, Inc., amici curiae.

**Opinion**

GARCIA, J.:

***1** Plaintiff Ambac Assurance Corporation, a monoline financial guaranty insurer, agreed to insure payments of principal and interest owed to the holders of residential mortgage-backed securities sponsored by defendant Countrywide.[1] Following a market downturn, many of the loans backing those securities went into default, causing substantial losses. Ambac filed suit against Countrywide, alleging, among other things, that Countrywide fraudulently induced Ambac to enter into the insurance agreements and that Countrywide breached a number of contractual representations and warranties. Both parties brought motions for partial summary judgment. As relevant here, Ambac argued that, with respect to its fraudulent inducement claim, it did not need to prove justifiable reliance or loss causation, and that the proper measure of damages would be recovery of all claims paid out under the policies. Ambac also asserted that the repurchase protocol provided for as a sole damages remedy in the contract between the parties should not govern certain of its contractual claims. Lastly, Ambac sought attorneys' fees from Countrywide. We agree with the Appellate Division that these arguments lack merit and therefore affirm.

**I.**

The residential mortgage-backed securities ("RMBS") market was a booming industry in the mid–2000s. These "intricately structured financial instruments [are] backed by hundreds or thousands of individual [ ] mortgages, each obtained by individual borrowers for individual houses" (*Federal Housing Finance Agency v. Nomura Holding America, Inc.,* 104 F.Supp.3d 441, 458 [S.D. N.Y.2015], affd 873 F.3d 85 [2d Cir.2017] ). The investor in this type of security is entitled to "a stream of income from pools of residential mortgage loans held by a trust" (*id.*). Between 2004 and 2006, Ambac insured 17 RMBS securitizations issued by Countrywide. These securitizations were backed by more than 300,000 individual mortgage loans, which Countrywide had originated or acquired and then sold into securitization trusts. In exchange for substantial premiums, Ambac issued unconditional, irrevocable insurance policies, agreeing to insure certain payments to the investors. Securities with a guaranty of payment from a monoline insurer typically receive the credit rating of that insurer. In this case, the guaranty by Ambac, itself rated AAA, significantly enhanced the credit ratings of the RMBS securitizations.

***2** For each securitization, Ambac executed an Insurance and Indemnity Agreement ("Insurance Agreement")—the only contract between the parties here—setting out Ambac's insurance obligations. Section 2.01(l) of the Insurance Agreement incorporates

 

more than 60 representations and warranties from the agreements executed by Countrywide to effect each of the securitization transactions.[2] These representations and warranties address a range of issues, including each mortgage loan's compliance with underwriting guidelines, the accuracy of the information in the Mortgage Loan Schedule, appraisal and foreclosure issues, and compliance with federal regulations.

Section 2.01(l) also provides that the remedy for breach of any of these imported representations and warranties and the remedy "with respect to any defective Mortgage Loan or any Mortgage Loan as to which there has been a breach of representation or warranty" under the Securitization Documents "shall be limited to the remedies specified" in the applicable Securitization Documents. In turn, the limited remedy provided in the Securitization Documents requires Countrywide to either repurchase, cure, or substitute nonconforming loans. Other subdivisions of Section 2.01 contain additional representations and warranties, including that there are no material untrue statements in the Insurance Agreement, Securitization Documents, or other material written or electronic information provided to Ambac relating to the mortgage loans or Countrywide's operations or financial condition (Section 2.01(j) ), and that the transactions' offering documents did not contain any material misrepresentation or omission and otherwise complied with applicable securities laws (Section 2.01(k) ).

Section 3.03 (c) of the Insurance Agreements provides that Countrywide agrees to reimburse Ambac for "charges, fees, costs, and expenses ... including reasonable attorneys' ... fees and expenses, in connection with ... the enforcement, defense or preservation of any rights in respect of any of the Operative Documents, including defending, monitoring, or participating in any litigation or proceeding relating to any of the Operative Documents." Section 5.02(b) of the Insurance Agreements provides that, "unless otherwise expressly provided, no remedy herein conferred or reserved is intended to be exclusive of any other available remedy, but each remedy shall be cumulative and shall be in addition to other remedies given under this Insurance Agreement ... or existing at law or in equity."

By 2007, with the housing market in decline, mortgage default and delinquency rates increased (*see Federal Housing Finance Agency,* 873 F.3d at 106–107). As a result, Ambac had to pay out far more claims than anticipated. At this point, the complaint alleges, Ambac began to review the origination files of defaulting loans and found that approximately 7,900 out of 8,800 that were reviewed contained material breaches of the Insurance Agreements' representations and warranties. Ambac then initiated the repurchase protocol by submitting notices of breach to Countrywide.

In September 2010, Ambac commenced the instant action, alleging that Countrywide "fraudulently induced Ambac to provide credit enhancement to improve the marketability of the notes and certificates issued in connection with each of the RMBS securitizations." In addition, Ambac alleged material breach of each Insurance Agreement; breach of the representations and warranties between the parties; breach of the repurchase protocol; and indemnification and reimbursement of attorneys' fees and expenses. Ambac also included a claim of successor and vicarious liability against Bank of America.

***3** Both parties moved for partial summary judgment. As relevant to this appeal, Supreme Court determined, relying on Insurance Law § 3105, that Ambac did not need to demonstrate justifiable reliance and loss causation in order to succeed on its fraudulent inducement claim. With respect to Ambac's claims alleging breaches of the various contractual representations and warranties, the court found that the sole remedy provision did not apply "beyond Section 2.01(l)," so "to the extent that Ambac can prove breaches of other sections of the I[nsurance] Agreements, it is not limited to the sole remedy of repurchase." However, the court determined that, "to the extent that Ambac is entitled to receive an award of damages unrelated to the repurchase protocol," Ambac was not entitled to recover all payments made to investors pursuant to the Insurance Agreements as compensatory damages because that would be "effectively equivalent to rescissory damages," and that any damages calculation "must be calculated in reference to claims payments made due to loans breaching" representations and warranties. Finally, the court found that Ambac was not entitled to recover attorneys' fees.

On appeal, the Appellate Division modified Supreme Court's opinion in part and affirmed (*Ambac Assurance Corp. v. Countrywide Home Loans,* 151 A.D.3d 83, 56 N.Y.S.3d 21 [1st Dept. 2017] ). The Appellate Division held that justifiable reliance and loss causation are required elements of a fraudulent inducement claim, and that Insurance Law § 3105 is not applicable to a common law fraud claim for money damages. The Appellate Division rejected Supreme Court's holding that the repurchase protocol was not the sole remedy for Ambac's claims for breach of representations and warranties, holding instead that "Ambac cannot avoid the consequences of the sole remedy provision by relying on what it terms 'transaction-level' representations, because the heart of Ambac's lawsuit is that it was injured due to a large number of defective loans." The Appellate Division affirmed Supreme Court's method of damages calculation for any claims not subject to the repurchase protocol, holding that Ambac was not entitled to compensatory damages "amounting to all claims payments it made or will make under the policies, regardless of whether they arise from a breach or misrepresentation." Finally, the Appellate Division affirmed Supreme Court's holding that Ambac was not entitled to attorneys' fees. The Appellate Division granted Ambac leave to appeal.

**II.**

[1] [2]The required elements of a common law fraud claim are "a misrepresentation or a material omission of fact which was false and known to be false by the defendant, made for the purpose of inducing the other party to rely upon it, justifiable reliance of the other party on the misrepresentation or material omission, and injury" (*Pasternack v. Laboratory Corp. of Am. Holdings,* 27 N.Y.3d 817, 827, 37 N.Y.S.3d 750, 59 N.E.3d 485 [2016] [internal citations and quotation marks omitted] ). Justifiable reliance is a "fundamental precept" of a fraud cause of action (*Danann Realty Corp. v. Harris,* 5 N.Y.2d 317, 322, 184 N.Y.S.2d 599, 157 N.E.2d 597 [1959] ), as is "resulting injury" (*Centro Empresarial Cempresa S.A. v. América Móvil, S.A.B. de C.V.,* 17 N.Y.3d 269, 276, 929 N.Y.S.2d 3, 952 N.E.2d 995 [2011] ). This Court has previously held, in the context of a monoline insurer suing for fraudulent inducement of a financial guaranty on a transaction involving asset-backed securities, that "to plead a claim for fraud in the inducement or fraudulent concealment, plaintiff must allege facts to support the claim that it justifiably relied on the alleged misrepresentations" (*ACA Fin. Guar. Corp. v. Goldman, Sachs & Co.,* 25 N.Y.3d 1043, 1044, 10 N.Y.S.3d 486, 32 N.E.3d 921 [2015]; *see also id.* at 1051, 10 N.Y.S.3d 486, 32 N.E.3d 921 [Read, J dissenting on other grounds] [describing the justifiable reliance requirement as "our venerable rule"] ). In apparent recognition of the fact that justifiable reliance and loss causation are required elements of its fraudulent inducement claim, Ambac's operative complaint pled these well-established elements, alleging that Ambac "reasonably relied on Countrywide's statements and omissions when it entered into the ... Agreements and issued its Policies," and that "as a result of Countrywide's false and misleading statements and omissions, [Ambac] suffered, and will continue to suffer, damages including claims payments under the Policies." Nevertheless, Ambac argues it need not make the showing required to substantiate these allegations.

***4** Supreme Court relied on Insurance Law § 3105 in addressing Ambac's claim that it need not show justifiable reliance or loss causation. Distinguishing this Court's holding in *ACA Financial* because "the parties [in that case] did not raise the issue of New York Insurance Law § 3105, under which Ambac seeks recovery here," Supreme Court held that "the only 'pertinent question under Section 3105 is whether the information allegedly misrepresented by Countrywide induced [Ambac] to take action that it might otherwise not have taken,' or, [in other words,] whether the misrepresentation was 'material.' " This was error.

[3] [4]Insurance Law § 3105 plays no role here. Ambac did not, and could not, seek recovery under this section, nor does section 3105 function to relieve Ambac of the burden of showing justifiable reliance. Section 3105(b)(1) provides that "[n]o misrepresentation shall avoid any contract of insurance or defeat recovery thereunder unless such misrepresentation was material," and "no misrepresentation shall be deemed material unless knowledge by the insurer of the facts misrepresented would have led to a refusal by the insurer to make such contract." Section 3105 does not provide an affirmative, freestanding, fraud-based cause of action through which an insurer may seek to recover money damages. Nor does it "inform" a court's assessment of the longstanding common law elements of fraudulent inducement. By its terms, section 3105 is only relevant when an insurer seeks rescission of an insurance contract or is defending against claims for payment under an insurance contract, relief that Ambac cannot, and does not, seek.

[5]Moreover, section 3105 was intended to overrule prior case law which did not require a showing of materiality for an insurer to avoid its obligations under a policy based on the insured's misrepresentations (*see Glickman v. N.Y. Life. Ins.,* 291 N.Y. 45, 51, 50 N.E.2d 538 [1943] [noting with respect to section 3105's predecessor statute, "[a]pparently ... the Legislature was seeing to it that a policy of insurance will not be avoided by proof of an immaterial breach of warranty"] ). Section 3105, intended to benefit the insured party, does not remove required elements for a showing of common law fraudulent inducement under any "insurer-only" exception.

[6]Public policy reasons support the justifiable reliance requirement. Where a "sophisticated business person or entity ... claims to have been taken in," the justifiable reliance rule "serves to rid the court of cases in which the claim of reliance is likely to be hypocritical" (*DDJ Mgmt. LLC v. Rhone Grp. LLC,* 15 N.Y.3d 147, 154, 905 N.Y.S.2d 118, 931 N.E.2d 87 [2010] ). Excusing a sophisticated party such as a monoline financial guaranty insurer from demonstrating justifiable reliance would not further the policy underlying this "venerable rule."

[7]Likewise, there is no merit to Ambac's argument that it need not show loss causation. Loss causation is a well-established requirement of a common law fraudulent inducement claim for damages. This Court long ago noted that "[t]o give rise, under any circumstances, to a cause of action, either in law or in equity, reliance on the false representation must result in injury" (*Sager v. Friedman,* 270 N.Y. 472, 479–481, 1 N.E.2d 971 [1936] ). This Court recently affirmed this requirement, as well as the principle that, " 'if the fraud causes no loss, then the plaintiff has suffered no damages' " (*Connaughton v. Chipotle Mexican Grill, Inc.,* 29 N.Y.3d 137, 142, 53 N.Y.S.3d 598, 75 N.E.3d 1159 [2017], citing *Sager,* 270 N.Y. at 479–481, 1 N.E.2d 971). It applies with equal force to Ambac's claim.

***5** [8]With respect to the method of damages calculation for any claims not subject to the repurchase protocol, Ambac's request for compensatory damages in the form of all claims payments made to investors must be rejected.[3] Ambac has, admittedly, no right to rescission or rescissory damages on the unconditional, irrevocable insurance policies it issued. Yet Ambac seeks to recover claims

 

payments on all policies, even those that do not arise from a breach or misrepresentation. Payment of that measure of damages would place Ambac in the same position it would be in if it had not insured any of the securities—the equivalent of rescissory damages. Instead, any compensatory damages should be measured only by reference to claims payments made based on nonconforming loans.

**III.**

Once again, as in our recent decision in *Nomura Home Equity Loan, Inc., Series 2006–FM2 v. Nomura Credit & Capital, Inc.,* we are confronted with an argument that a sole remedy provision executed by sophisticated parties as part of a complex securitization process can be avoided by alleging "broader" or numerous violations of representations and warranties contained in the governing contract (30 N.Y.3d 572, 585–86, 69 N.Y.S.3d 520, 92 N.E.3d 743 [2017] ). Specifically, Ambac asserts that, while recovery for "loan-level" breaches may be limited to the repurchase protocol in Section 2.01(l), "transaction-level" breaches instead fall under Sections 2.01(j) and (k). For the same reasons we rejected that argument in *Nomura,* Ambac's argument must fail.

[9] [10]It is well settled that "courts must honor contractual provisions that limit liability or damages because those provisions represent the parties' agreement on the allocation of the risk of economic loss in certain eventualities" (*id.* at 581, 69 N.Y.S.3d 520, 92 N.E.3d 743). "Contract terms providing for a sole remedy are sufficiently clear to establish that no other remedy was contemplated by the parties at the time the contract was formed, for purposes of that part of the transaction ... especially when entered into at arm's length by sophisticated contracting parties" (*id.* at 582, 69 N.Y.S.3d 520, 92 N.E.3d 743 [internal citations and quotation marks omitted] ).

In *Nomura,* plaintiff, an RMBS trustee, sought to avoid a sole remedy repurchase protocol by alleging that, although loan-level representations and warranties were breached, and were subject to a similar sole remedy provision, certain transaction-level breaches violated a separate section of the agreement that were not subject to any limitation on remedy. This Court rejected that argument, stating that "there is no support in the governing agreements for the position of [plaintiff] that the Sole Remedy Provision applies only to occasional mortgage loan-specific breaches, whereas pervasive (or 'aggregate') breaches are addressed under" a separate provision not limited by the sole remedy provision (*id.* at 585, 69 N.Y.S.3d 520, 92 N.E.3d 743). The Court noted that all the claims asserted as transaction-level breaches not subject to the sole remedy provision were in fact "grounded in alleged breaches of the mortgage loan-specific representations and warranties to which the limited remedy fashioned by the sophisticated parties applies" (*id.* at 577, 69 N.Y.S.3d 520, 92 N.E.3d 743). Accordingly, the Court held that the sole remedy provision could not be "nullif[ied by allegations of] multiple, systemic breaches" (*id.* at 585–586, 69 N.Y.S.3d 520, 92 N.E.3d 743).

[11] [12]In the same way, the factual allegations underpinning Ambac's transaction-level breaches are the same as those for the loan-level breaches. For example, Ambac alleges as a transaction-level breach that the loans in the securitizations failed Countrywide's origination guidelines. Yet one of the loan-level representations and warranties incorporated into the Insurance Agreements provides that "each Mortgage Loan was originated in accordance with [Countrywide's] underwriting guidelines." This allegation, if proven, would violate the loan-level representations and warranties under Section 2.01(l) and so any damages would be limited to the sole remedy repurchase protocol. This is true as to all of Ambac's transaction-level allegations, despite the attempt to label the claims otherwise. As in *Nomura,* plaintiff here "cannot subvert [an] exclusive remedies [provision] by simply re-characterizing its claims" (*id.* at 584, 69 N.Y.S.3d 520, 92 N.E.3d 743 [internal citation and quotation marks omitted] ).

***6** In fact, the sole remedy provision contracted for by the parties is arguably broader than the one at issue in *Nomura,* which provided that the repurchase protocol was the sole remedy for the "Purchaser against [defendant] respecting a missing document or a breach of the representations and warranties" contained in the governing contract (*id.* at 579, 69 N.Y.S.3d 520, 92 N.E.3d 743). The contract here provides that the repurchase protocol is the sole remedy "for any breach of a representation and warranty [incorporated into the Insurance Agreements] and the remedy with respect to *any defective Mortgage Loan* or any Mortgage Loan as to which there has been a breach of representation or warranty under" the relevant section of the Securitization Documents. In addition to encompassing any breaches of the representations and warranties, the repurchase protocol is the sole recourse as to any defective loan—regardless of whether that defect is a breach of "loan-level" representations made to investors.[4]

[13]Ambac's assertion that section 5.02(b) somehow overrides Section 2.01(l)'s limitation on remedies is unavailing for the same reasons we rejected a similar argument in *Nomura.* Section 5.02(b) provides that contractual remedies are cumulative "unless otherwise expressly provided;" Section 2.01(l) expressly provides otherwise for breaches of that section, making the repurchase remedy exclusive for recovery on Ambac's breach of contract claims. The Court in *Nomura* held that a cumulative remedy provision, even without "unless otherwise expressly provided" language, did not override the sole remedy provision. We noted that plaintiff's argument to the contrary in that case would render the sole remedy provision meaningless even for disputes that would have fallen squarely under the representations section of the relevant purchase agreement (*id.* at 586, 69 N.Y.S.3d 520, 92 N.E.3d 743). And, in general, " '[a] specific provision will not be set aside in favor of a catchall clause' " (*id.,* quoting *William Higgins & Sons v. State of*

*N.Y.,* 20 N.Y.2d 425, 428, 284 N.Y.S.2d 697, 231 N.E.2d 285 [1967] ). Here, the broader language in the cumulative remedy provision explicitly referencing any limitations in other provisions makes it even clearer that the cumulative remedy provision is not controlling.

Ambac's complaint fails to include breach of contract allegations beyond those that fall under the sole remedy provision of Section 2.01(l), and accordingly Ambac is limited to the repurchase protocol as the potential remedy for those claims.[5]

**IV.**

Ambac argues that the Appellate Division erred in ruling that the parties' contract "does not evince an 'unmistakably clear' intent to permit Ambac to seek reimbursement for attorneys' fees incurred in its litigation against Countrywide" (151 A.D.3d at 89, 56 N.Y.S.3d 21). We disagree.

**[14] [15] [16] [17]**In New York, "the prevailing litigant ordinarily cannot collect ... attorneys' fees from its unsuccessful opponents.... Attorneys' fees are treated as incidents of litigation, rather than damages.... The exception is when an award is authorized by agreement between the parties or by statute or court rule" (*Congel v. Malfitano,* –––N.Y.3d ––––, ––––, ––– N.Y.S.3d ––––, ––– N.E.3d ––––, 2018 N.Y. Slip Op. 02119, at *4, 2018 WL 1473551 [2018] [internal citations and quotation marks omitted] ). In *Hooper Assocs. Ltd. v. AGS Computers,* this Court held that a court "should not infer a party's intention to waive the benefit of the rule unless the intention to do so is unmistakably clear from the language of the promise" (74 N.Y.2d 487, 492, 549 N.Y.S.2d 365, 548 N.E.2d 903 [1989] ). Here, as in *Hooper,* the attorneys' fees provision "does not contain language clearly permitting plaintiff to recover from defendant attorney[s'] fees incurred in a suit against defendant" (*id.* at 492, 549 N.Y.S.2d 365, 548 N.E.2d 903). Similarly, the subjects set forth in this provision are all "susceptible to third-party claims," and "[n]one are exclusively or unequivocally referable to claims between the parties themselves" (*id.* at 492, 549 N.Y.S.2d 365, 548 N.E.2d 903). Accordingly, there is no unmistakable promise to reimburse attorneys' fees in a case brought by Ambac against Countrywide.

**V.**

***7** The Appellate Division correctly determined that justifiable reliance and loss causation are required elements of a fraudulent inducement claim; that Ambac may only recover damages on its fraudulent inducement claim that flow from nonconforming loans; that the remedy for Ambac's contract claims is limited to the repurchase protocol provided for in the contract's sole remedy provision, and that Ambac is not entitled to attorneys' fees.

The order, insofar as appealed from, should be affirmed, with costs, and the certified question answered in the affirmative.

RIVERA, J. (dissenting in part):

I join the majority's opinion with respect to Parts I, II, and IV. For the reasons set forth in my dissent in *Nomura Home Equity Loans, Inc., Series 2006–FM2 v. Nomura Credit & Capital, Inc.,* 30 N.Y.3d 572, 69 N.Y.S.3d 520, 92 N.E.3d 743 (2017), I disagree that Ambac's remedies are limited to the Repurchase Protocol, and therefore do not join Part III of the majority opinion. As in *Nomura,* it is here "undisputed" that "where there is a breach of the representations and warranties [R & Ws] ... concerning an individual mortgage loan, [Ambac] is limited to the sole remedy" of the repurchase protocol (*id.* at 600, 69 N.Y.S.3d 520, 92 N.E.3d 743 [Rivera, J., dissenting] ). "Yet," here just as in *Nomura,* "that remedy is not exclusive of other available remedies for different breaches of the ... agreement" (*id.*). In particular, in this case,

> "[p]laintiff's allegations of transaction-wide misrepresentations concerning the respective loan pools are not mere duplicative recitations of breaches of [the R & Ws]. Instead, [some of] plaintiff's ... claims concern [*inter alia* ] defendant's characterizations, through its statements and documentation, of the securitizations as suitable investment opportunities, the reliability of defendant's business practices, and the nature and quality overall of the loan pools" (*id.* at 602, 69 N.Y.S.3d 520, 92 N.E.3d 743).

The alleged mischaracterizations are beyond the realm of mere R & W violations controlled by the sole remedy provision. I would therefore hold that Ambac is not limited to the sole remedy of the repurchase protocol.

Order, insofar as appealed from, affirmed, with costs, and certified question answered in the affirmative.

Judges Stein, Fahey, Wilson and Feinman concur. Judge Rivera dissents in part in an opinion. Chief Judge DiFiore took no part.

**All Citations**

--- N.E.3d ----, 2018 WL 3129387, 2018 N.Y. Slip Op. 04686

Footnotes

1 Plaintiffs in this action are Ambac Assurance Corporation and the Segregated Account of Ambac Assurance Corporation, a segregated account in statutory rehabilitation with the legal capacity and authority to sue in its own right (collectively, Ambac). Defendants in this action include Countrywide Home Loans, Inc., Countrywide Securities Corp., Countrywide Financial Corp. (collectively, Countrywide). Countrywide is now a subsidiary of defendant Bank of America Corp.

2 The underlying agreements vary by type of transaction. The principal governing documents for certain transactions are the Mortgage Loan Purchase Agreement ("Purchase Agreement") and the Sale and Servicing Agreement ("Sales Agreement"), while other types of transactions are governed by the Pooling and Service Agreement ("PSA"). The representations in these documents (collectively, the "Securitization Documents"), as relevant here, are identical.

3 As discussed in Section III below, Ambac's remedy for any successful breach of contract claims based on the representations and warranties in the Insurance Agreement is limited to the repurchase protocol.

4 Prior to filing this lawsuit, Ambac attempted to avail itself of this remedy by submitting nearly 8,000 loans to Countrywide pursuant to the protocol. Unsatisfied with that process, Ambac included a cause of action in this lawsuit for breach of Countrywide's "repurchase, cure, or substitution obligation."

5 Countrywide acknowledges that Ambac would not be limited to the repurchase remedy for breach of contract claims unrelated to representations pertaining to specific loan characteristics. For example, Ambac could bring claims alleging misstatements in the transactions' offering documents concerning overcollateralization provisions, or descriptions of RMBS certificates, which would fall under Section 2.01(k) (*see Nomura,* 30 N.Y.3d at 586, 69 N.Y.S.3d 520, 92 N.E.3d 743).

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