

Did I properly verify income under the Truth-in-Lending Act's Ability to Repay Rule?

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Ability to Re-pay Rule

Elliott v. First Fed. Community Bank of Bucyrus, 6th Cir. No. 19-3690, 2020 U.S. App. LEXIS 21470 (July 8, 2020)

In this appeal, the Sixth Circuit Court of Appeals reversed in part the district court's decision to grant a lender summary judgment, holding that the bank's failure to verify and document the borrower's listed income violated TILA's ability-to-repay requirements.

The Bullet Point: Pursuant to the Truth in Lending Act's ("TILA") ability-to-repay requirements, "no creditor may make a residential mortgage loan unless the creditor makes a reasonable and good faith determination based on verified and documented information that, at the time the loan is consummated, the consumer has a reasonable ability to repay the loan, according to its terms, and all applicable taxes, insurance (including mortgage guarantee insurance), and assessments. . . ." 15 U.S.C. § 1639c(a)(1). In making a reasonable and good-faith determination that the consumer has a reasonable ability to repay the loan, the creditor must verify the consumer's income or assets "using reasonably reliable third-party records" and reviewing "required documentation." 12 C.F.R. § 1026.43(c)(2), (3) & (4); 12 C.F.R. Pt. 1026, App. Q § II(A). As explained by this court, a creditor cannot rely on verbal statements made by the consumer or the consumer's spouse to verify income under TILA. The court further explained that a creditor must review "third-party records that provide reasonably reliable evidence of the consumer's income or assets" to verify a consumer's rental income, including current rental agreements and previous tax returns. Simply stated, a creditor violates 15 U.S.C.S. § 1639c and 12 C.F.R. § 1026.43 by considering spousal support and rental income that are not properly verified and documented in making its reasonable ability-to-repay determination.

Class Action Opt-Outs

McAdams v. Mercedes-Benz USA, L.L.C., 2020-Ohio-3702

In this appeal, the Supreme Court of Ohio reversed the lower court's decision, finding that it was an error for the state appellate court to conduct an analysis related to whether certain members of a class opted-out of it, as the issue was barred by res judicata.

The Bullet Point: Class members are bound by a final judgment in a class action, and res judicata bars further litigation by those class members regarding that same cause of action. Res judicata also serves to bar subsequent litigation by absent class members because although they are passive parties, absent class members may intervene in order to protect their individual interests in the action. In addition, members may “opt-out” of the class action by following the opt-out procedure set by the court maintaining the class action. That being said, class members must follow the specific opt-out procedure set by the court in order to opt out and be excluded from the class action. Full faith and credit prevents another court from later determining that a class member “adequately” opted out, and the class member’s claims will be barred by res judicata.

Bad Faith

Hillier v. Fifth Third Bank, 2d Dist. Miami No. 2019-CA-21, 2020-Ohio-3679

In this appeal, the Second Appellate District affirmed in part the trial court’s decision, holding that there was no evidence the bank acted in bad faith or that the bank owed the executor a duty separate from the obligations of the contract.

The Bullet Point: As noted by the court, “bad faith” is a legal term of art which is not specifically defined, but is logically the inverse of “good faith.” Bad faith suggests intentional dishonesty, fraud, or misrepresentation. Therefore, without evidence that a bank’s actions were dishonest, willful, or malicious, a bad faith claim cannot exist. The court further noted that under Ohio law, the existence of a contract action generally excludes a tort action. An exception to this general rule occurs “if a party breaches a duty which he owes to another independently of the contract, that is, a duty which would exist even if no contract existed.” Accordingly, without evidence of an independent tort separate from a breach of contract, a negligence claim cannot survive.

Unjust enrichment

Longmire v. Danaci, 10th Dist. Franklin No. 19AP-770, 2020-Ohio-3704

In this appeal, the Tenth Appellate District affirmed the trial court’s decision, agreeing that Ohio law does not bar the equitable remedy of unjust enrichment if the breach of contract claim is deemed unenforceable under the statute of frauds.

The Bullet Point: Under the statute of frauds, an oral contract that cannot be performed within one year of its making is unenforceable. However, “where one party fully performs and the other party, to his unjust enrichment, receives and refuses to pay over money which, under the unenforceable contract, he agreed to pay to the party who has fully performed, a quasi-contract arises, upon which the performing party may maintain an action against the defaulting party for money owed.” Stated differently, even when the statute of frauds precludes a breach of contract claim, unjust enrichment may be available as an equitable remedy. To succeed on a claim for unjust enrichment, the trial court must find: “(1) a benefit conferred by the plaintiff on the defendant, (2) knowledge of the benefit by the defendant, and (3) retention of the benefit by the defendant in

circumstances where it would be unjust to do so. To demonstrate a claim of unjust enrichment, it is not sufficient for the plaintiffs to show that they have conferred a benefit upon the defendants. Plaintiffs must go further and show that under the circumstances they have a superior equity so that as against them it would be unconscionable for the defendant to retain the benefit.”

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