

Consumer Law Section Cosponsors May ICLE Program

The Consumer Law Section is once again cosponsoring the upcoming ICLE consumer law seminar. Titled “Consumer Law and Practice: What You Need to Know”, this seminar is the broadest overview of consumer law and practice that the Section has put on to date. The program is scheduled for May 3 in Troy, and will be repeated on video in Ann Arbor, Grand Rapids, Lansing, and Marquette in succeeding weeks.

As cosponsor, Section members receive a \$20 discount from the general seminar fee.

The seminar will cover some of the biggest sources of consumer law litigation, and many of the questions that clients of all kinds of law practices ask their lawyers. “Dealing with Identity Theft” will be covered by Ian Lyngklip, a past Section council member and lecturer at consumer law programs around the country. Lyngklip will address how to fix the headaches and credit problems created for clients by identity theft, and what causes of action are available if the credit industry doesn’t do its required part.

Automobile sale cases are the biggest part of many consumer law practices. Dani Liblang, current chair of the Consumer Law Section, will cover “Handling Lemon Law, UCC, and Magnuson-Moss Issues.” Steve Goren will give the short course in handling consumer class actions. Gary Victor, professor at Eastern Michigan and the dean of Consumer Protection Act litigators, will address the Act and other Michigan consumer statutes, while the federal Fair Debt Collection Practices Act will be covered by Fred Miller.

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Consumer Law and Practice:

What You Need to Know

May 3, 2005, Troy

Moderator: Dani K. Liblang

The Michigan Consumer Protection Act and Other Consumer Protection Statutes

- History and current status of the Michigan Consumer Protection Act
- Recovery of attorney fees
- Other Michigan consumer protection statutes

Gary M. Victor—Eastern Michigan University; Sole Practitioner; Ypsilanti

Dealing with Identity Theft

- Diagnosing the scope of identity theft problems
- Statutory and common law remedies for identity theft
- Prerequisites to recovery
- Maximizing damages awards to victims fee awards
- FCRA resources

Ian B. Lyngklip—Lyngklip & Taub Consumer Law Group PLC; Southfield

Fair Debt Collection

- Fair Debt Collection Practices Act
- Michigan Collection Practices Act
- Remedies for violation

Frederick L. Miller—UAW-GM Legal Services Plan; Detroit

Handling Lemon Law, UCC, and Magnuson-Moss Issues

- Combining lemon law, UCC, and Magnuson-Moss claims to maximize recovery
- Exploding evidentiary myths and the burden of proof in “lemon law” cases
- Using discovery - formal and informal - to your advantage
- Trial and fee hearing strategies

Dani K. Liblang—Liblang & Associates PC; Birmingham

Consumer Class Actions

- Class action basics
- Recognizing a good class action and choosing the appropriate plaintiffs
- The class action complaint: jurisdiction and venue, class definition, and other issues
- Motions for class certification
- Class notice
- Settlement: ethics, attorney fees, hearings, and other considerations

Steven E. Goren—Goren, Goren & Harris PC; Bingham Farms

Sign Up through ICLE: www.icle.org - Note your Section membership for \$20 discount

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From the Chair

One of the most difficult and important challenges we face this year is working to fix the Supreme Court's misinterpretation of the exemption provisions of the Michigan Consumer Protection Act in *Smith v Globe Life Insurance Co.* Gary Victor has drafted a Resolution for the Council and we are in the process of obtaining the State Bar's approval to go forward with efforts through the Council's legislative committee. In the meantime, several Council and Section members are working on an individual basis, approaching and educating legislators and allies in our efforts to restore Michigan consumers' and businesses' most potent weapon in the fight against unfair and deceptive practices.

The Council has also been active in promoting consumer education. We have teamed up with ICLE and are presenting a half-day seminar on May 3, 2005, *Consumer Law and Practice: What You Need to Know*. The seminar will take place at the MSU Center in Troy, from 9:00 a.m. to 12:30 p.m. The seminar is *free* to ICLE Partners and *discounted* for Section members. Speakers will include Gary Victor on the MCPA and other statutes, Ian Lyngklip on dealing with identity theft, Fred Miller on Fair Debt Collection Practices, Steve Goren on Consumer Class Actions, and myself on handling Lemon Law, Magnuson-Moss and UCC cases (from case selection through fee petition). I encourage everyone to attend and to spread the word to colleagues who might be interested.

Other projects in the works include a Section-member consumer law trial techniques seminar, followed by a luncheon, slated for late fall of 2005. Council members Lorray Brown and Laurin' Roberts Thomas are working on this project and would welcome your input for topics you would like to see covered.

Adam Taub and I are working on a Judicial Benchbook on Consumer Law. This will undoubtedly be a long-term and ongoing project. We welcome your input and volunteers from both the plaintiff and defense bar to assist us in providing concise overviews of key consumer law concepts and sample jury instructions.

Our website is being continually updated and improved. Section members are encouraged to forward briefs and other sample pleadings to be uploaded and made available to Section members. Please contact Fred Miller by e-mail: Fredmi@UAWLSP.com if you are able to contribute.

The State Bar has also announced that a Consumer Law theme issue has been added to the *Bar Journal* schedule for October 2006. Gary Maveal will be the theme editor from the Publications Committee. He can be contacted at mavealgm@udmercy.edu. The Council will be glad to assist with suggestions and editing for anyone willing to submit articles. Please feel free to contact me (nolemons@aol.com) or Fred Miller (see above). There is no such thing as too many articles – even if we receive more than we need for the *Bar Journal*, articles are always welcomed for our Section Newsletter.

It is hard to believe that so much of my term as Chair for 2004-2005 has already flown by. It has been an honor to work with such a dedicated hard-working group. We have accomplished much and still have much more we can do in our efforts to make consumer law a viable avenue for ensuring fairness in the marketplace. I look forward to our continued successes and thank all who have contributed so much to our work.

With thanks and gratitude,
Dani K. Liblang
Chair, Consumer Law Section

The New Judgment Lien Act: A New Tool for Creditors

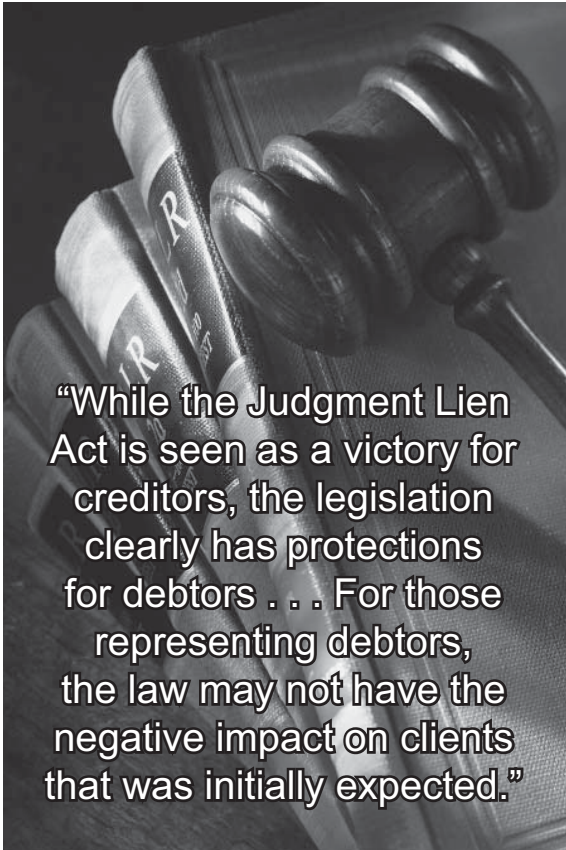
By Peter Bagley

Until September 1, 2004, Michigan was one of only six states without a judgment lien statute. Pursuant to MCL 600.2801--2819, judgment creditors now may perfect and retain for up to 10 years, a valid judgment lien against property by filing a certified Notice of Judgment Lien (MC 94) with the Register of Deeds in the county where the judgment debtor has or may in the future have real property. No legal description is included as the lien is not filed against a specific property but against any and all real property owned in the county by the judgment debtor. MC 94 also requires the last four digits of the judgment debtor's social security number, the date the judgment was entered and the expiration date of the judgment. The judgment lien expires five years after it is recorded or when the underlying judgment expires, whichever is earlier. However the judgment lien may be re-recorded one time.

A copy of the judgment lien must be served on the judgment debtor's last known address unless the judgment is for more than \$25,000, in which case personal service on the debtor is required.

A judgment lien is extinguished when any of the following are recorded with the Register of Deeds: a discharge of judgment lien, a certified copy of a satisfaction of judgment, a certified copy of a court order discharging the lien, or a copy of the judgment debtor's discharge in bankruptcy along with a copy of the bankruptcy schedule listing the judgment debt.

The judgment creditor must record a discharge of lien within twenty-eight days of payment in full of the judgment. A judgment creditor who does not file the discharge within twenty-eight days, must



“While the Judgment Lien Act is seen as a victory for creditors, the legislation clearly has protections for debtors . . . For those representing debtors, the law may not have the negative impact on clients that was initially expected.”

record the discharge within fourteen days after receiving a written request from the judgment debtor. A judgment creditor who fails to do so is liable to the debtor for \$300 plus actual damages costs incurred by the debtor because of the failure.

If the judgment debtor has paid a judgment in full and has sent the written request and is unable to locate the creditor or his attorney, the debtor may record an affidavit with the register of deeds. Recording the affidavit, written request, and receipt discharges the judgment lien.

The Act seeks to protect persons with the same name or similar names in addition to the social security number requirement. A person with the same or similar name as the judgment debtor may

demand in writing that the judgment creditor deliver a recordable document that discharges the lien as to property owned by the mistaken person. The judgment creditor has fourteen days to provide this document. If he fails to do so, he is liable for actual damages and costs, which are presumed to be at least \$300.

There is no right to foreclose the lien and the lien does not attach to entireties property unless the judgment is against both husband and wife. The judgment lien takes lower priority than purchase money mortgages, subsequent refinancing of a purchase money mortgage, a non-purchase money mortgage recorded before attachment of the judgment lien, tax liens, construction liens, and association fees, etc.

The judgment lien holder shall be paid the amount of the equity after all senior liens are paid as well as property taxes, and costs and fees necessary for closing upon the sale, transfer, or refinancing of the property.

While the Judgment Lien Act is seen as a victory for creditors, the legislation clearly has protections for debtors. The lack of a requirement for a legal description, as well as the prohibition on foreclosure, are seen as pro debtor elements of the legislation. Title companies and the real estate industry are very concerned about the existence of the liens as clouds on title. The benefit to the creditor bar and collection industry seems great, but five months after the law became effective very few judgment liens have actually been filed. Is this because of the potential liabilities for the judgment creditor included in the Act? For those representing debtors, the law may not have the negative impact on clients that was initially expected.

Nursing Homes and Consumer Law Issues

By Josh Ard

By and large the consumer law community has paid little attention to nursing home problems. To be sure there are some exceptions, many of which are discussed below, but nursing home matters have often been left to elder law attorneys or general practitioners. Logically, this is somewhat surprising. Nursing home contracts have inherent characteristics that indicate a likelihood of major consumer law problems. I hope this article will begin to facilitate a greater dialogue between elder law and consumer law attorneys.

Nursing homes have the characteristics that tend to mark major risk areas for consumers. First, consumers have more at risk in large monetary transactions. This is one major explanation as to why automobiles and homes compose the bulk of many consumer lawyers' efforts. In fact, nursing homes may be much more expensive than cars. The states have to report an average cost of nursing home bills for Medicaid purposes. Most advocates believe the reported number probably underestimated the actual average cost in a state, but the reported numbers are high enough to give one pause. For 2005 the Michigan figure is \$5,367 a month. That means that a stay for one year is expected to cost over \$64,000. Very few car sales or leases approach that figure.

Private pay rates are often considerably higher than the so-called average rate. Few consumers can pay those rates for long and even those who could often try to avoid them. If a consumer qualifies, the joint federal-state Medicaid program, which is needs based, will step in. The qualification rules are more complicated when the applicant has a spouse living outside a long-term care facility, but, to oversimplify a bit, for a single individual all income except for \$60 per month spending allowance goes to pay the nursing home bill and the Medicaid program pays the remainder. The applicant's income must be less than the nursing home bill,



which isn't difficult to achieve. The more complicated matter is to qualify by having no more than \$2,000 in countable assets. Certain assets do not count, such as one's home or car. Shifting assets or divesting them is the essential technique involved in Medicaid planning.

Second, consumer law is particularly important in situations where consumers have little actual bargaining power. Nursing home contracts are much more adhesion contracts than anything one is likely to see in even the sleaziest automotive dealership. No one wants to go into a nursing home; they are truly places of last resort. Most commonly, there is no ability to shop around or even any time to do so. Mom may have an accident or illness and has to enter a hospital, expecting to return home. She, and possibly the family, is asked to come to a meeting at the discharge planner's office. She is told that it is time to leave the hospital but she cannot return home. The hospital will only re-

lease her to a nursing home. The transfer has to be made very soon. Fortunately, the discharge planner already has an arrangement with a nearby nursing home. All that's required is to fill out some papers.

Mom is possibly too physically frail or exhausted to do much immediately. She may not have the mental ability to read the papers well or to negotiate. If she truly needs to enter a nursing home, she is unlikely to be able to visit several sites and see the one she prefers. The family can't easily put the decision off. Where would she live during the time needed for comparison shopping? Few children would be able to take her into their home or to be able to provide the medical attention she needed. The result is generally acquiescence—both to the nursing home and whatever that contract says.

Based on these factors, we would expect abuses to be rife, as they indeed are. Eric Carlson, a nationally-known expert on nursing home law, spoke at the Elder Law & Advocacy Section Conference at Treetops in Gaylord in October. He brought along many examples of illegal contract provisions.

There is considerable regulation of nursing homes, both by federal and state authorities. A former student of mine, married to a nursing home administrator, said that nursing homes were the second most highly regulated industry, second only to nuclear power. That is quite likely true. What we have learned about regulation of the pharmaceutical industry recently proves the relative paucity of regulation there.

Regulators do not seem particularly interested in contract violations per se, but rather are concerned about poor quality of care or denial of rights. In essence, it doesn't matter so much to the regulators what the contract says about rights as long as they don't learn that the residents really weren't given the rights at the relevant

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time. Of course, if the contract says that a person doesn't have a right, she might be disinclined to try to exercise it.

Some of the problems with nursing home contracts involve failures to comply with complex federal regulations, especially those involving Medicaid. I would not expect many consumer law attorneys to learn these regulations, unless they wish to develop an expertise in Medicaid or nursing home litigation. What is more relevant for consumer law attorneys is that many of the issues found in other consumer realms are frequent in the nursing home arena, also.

One example is compulsory arbitration. Many of the same defenses raised generally to arbitration could also be raised in this context. The best resource is *Consumer Arbitration Agreements* by the National Consumer Law Center. One defense that is often available in nursing home admission contracts is that the person signing the contract is not able to bind the resident to the agreement. Often the resident herself cannot or does not sign and a family member signs for her. Unless there is some specific legal authority such as durable power of attorney, how can the signature of a third party bind the resident to arbitration? If the power of attorney excludes the power to bind the principal to compulsory arbitration, then even a power of attorney would not be a viable theory for such binding. More specific theories, based largely on the intricacies of Medicaid law, are found in David McGuffey's article "Nursing Home Arbitration Agreements." See <http://www.mcguffey.net/nbarb082604.pdf>. This is an opportunity for collaboration between elder law and consumer law attorneys.

Deanne Loonin of the National Consumer Law Center wrote a monograph "When you can't go home again: using consumer law to protect nursing facility residents," available as both a booklet and on-line at http://www.nclc.org/initiatives/seniors_initiative/when_gohome.shtml. The primary remedy she suggests for many of the abuses by nursing homes is the state Unfair Acts and Deceptive Practices statutes, in Michigan our Consumer Protection Act. Unfortunately, that remedy isn't currently available. There is no doubt,

especially post-*Globe*, that the act is inapplicable to nursing homes. If regulated entities are excluded and nursing homes are the second most regulated industry there is, forget about it. This is yet another reason to fix the act. Nursing home residents are about as vulnerable as a person could be and if our laws cannot protect them, what is their use?

The other remedies she suggests are

- Negligence Tort claims, including battery, infliction of emotional distress, and false imprisonment
- Breach of contract (based on the facility admission agreement and/or contract with Medicare or Medicaid)
- Fraudulent Misrepresentation
- Contract Formation Defenses
- Unconscionability

Note that none of these are specific consumer statutes.

There are certain consumer statutes that are relevant for some of the abuses found in nursing homes. A pervasive problem with nursing homes is the abuse of so-called responsible parties. Federal law forbids a nursing home that accepts Medicaid from requiring a guarantor of payment. They are allowed to require the use of a responsible party. The idea is that the bills are sent to the responsible party who arranges payment out of the resident's funds. For example, the responsible party may pay the nursing home the social security payments that are deposited into the resident's banking account. Essentially, the responsible party facilitates payment out of the resident's funds. Nevertheless, many nursing homes have sued responsible parties individually for payments. Even if the responsible party stole the money for himself, there isn't a viable theory that the nursing home could use to demand direct payment from him. If an administrative staff employee stole money that should have been used to pay my bar dues, the Bar cannot sue that staff member directly for the funds. The only viable theory a nursing home can raise against the responsible party works only if the responsible party was individually liable on the contract. The only viable justification for that is that the responsible party was a guarantor or co-signer.

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Often a family member who is sued on the basis that he is a responsible party simply defaults or agrees to pay. Few know that they have any legal rights. If an elder law attorney is consulted, she may know that federal law forbids requiring the responsible party to serve as guarantor, but the arcane nature of federal Medicaid regulation may be difficult to explain to a trial judge. Moreover, some nursing homes have claimed that “we didn't require him to be a guarantor; he voluntarily agreed to serve as one.” It is not clear that federal Medicaid law forbids one from agreeing to co-sign.

What is missing in this analysis is a consumer law perspective. Under both state and federal law, one must give proper notices to co-signers. A state statute, MCL § 445.271 et seq., requires that notice be given to co-signers. There are quite a few details about what has to be disclosed at the time of signing and what has to be done about giving notice of default before taking any action against the co-signer. I doubt that any nursing home follows the statutory requirements. The penalty is actual damages or statutory damages plus reasonable attorney fees. The federal Credit Practices Rule, 16 CFR Part 444, also requires a detailed, specific notice to co-signers. Whether the signing is voluntary or not, if the nursing home treats the responsible party as a co-signer, the law

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Nursing Homes . . .
Continued

says that they have to give proper notice of rights.

Another possible remedy is the federal Fair Debt Collection Practice Act. The act does not apply to nursing homes as a creditor, but is applicable to an attorney who brings a collection action. A court in Illinois ruled that suits against responsible parties were violations of the FDCPA, because it was an attempt to collect a consumer debt that is uncollectible by law.

A major area of concern regarding nursing homes concerns financial matters. As discussed above, Medicaid provides much of the payment to nursing homes. Typically, residents exhaust their own resources if they are residents for an extended stay and Medicaid has to take over. Medicaid planning has much the same characteristics as tax planning. Someone who sees a clever tax planner can significantly reduce her or his taxes without cutting income as dramatically. Likewise, a clever Medicaid planner can craft plans that allow a person to qualify for Medicaid much more quickly than would otherwise happen. Nursing homes hate that. They make a profit on a Medicaid bed, but make much more out of private-pay patients. Therefore, they prefer private-pay patients and hope that private-pay patients remain in that status as long as possible. There is nothing wrong with hoping, but some nursing homes engage in practices that are arguably unlawful to attain that desired status.

There are certain federal requirements that are relevant. For example, if the nursing home accepts Medicaid, it must accept the combined Medicaid + income - \$60 as payment in full for services. This still leaves certain wiggle room for nursing homes. They may:

- Require a guarantee that the resident not engage in any Medicaid planning, but rather spend down resources solely on the nursing home bills.
- Discourage applications from applicants who they fear may apply for Medicaid in the near future.

- Treat applicants they fear may qualify for Medicaid in the near future differentially, either placing them on a long waiting list or rejecting their application outright.

The question is whether any of these activities is unlawful. A promising place to look is the federal Equal Credit Opportunity Act, which forbids certain types of discrimination in granting credit. So far as I am aware, no suit has ever raised this issue against nursing homes. In fact, the appropriateness of the act is controversial.

The ECOA begins as follows:

- (a) It shall be unlawful for any creditor to discriminate against any applicant, with respect to any aspect of a credit transaction—
 - (1) on the basis of race, color, religion, national origin, sex or marital status, or age (provided the applicant has the capacity to contract);
 - (2) because all or part of the applicant's income derives from any public assistance program;
- (b) It shall not constitute discrimination for purposes of this title for a creditor—
 - (2) to make an inquiry of the applicant's age or of whether the applicant's income derives from any public assistance program if such inquiry is for the purpose of determining the amount and probable continuance of income levels, credit history, or other pertinent element of creditworthiness as provided in regulations of the Board. 15 USC § 1691.

The first hurdle is whether the nursing home is a creditor. Nursing homes, like landlords, do not intend to offer rooms on credit. Rather, they require prepayment for each month at the beginning. Neverthe-

less, nursing homes do offer what is called incidental credit. According to Regulation B, the regulation promulgated by the Federal Reserve Board as authorized under the ECOA:

Definition. Incidental credit refers to extensions of consumer credit other than the types described in paragraphs (a) and (b) of this section:

- (i) That are not made pursuant to the terms of a credit card account;
- (ii) That are not subject to a finance charge (as defined in Regulation Z, 12 CFR 226.4); and
- (iii) That are not payable by agreement in more than four installments.

12 CFR 202.3.

The Board, in its Official Staff Commentary, gives some examples: "This type of credit might be extended by a local merchant that does not normally extend credit, for example, to a long-standing customer; or by a doctor or lawyer, as an accommodation to a patient or a client." In other words, any one who allows a patient or client to receive services today and pay later offers incidental credit. Note that this would not apply to creditors who require prepayment. Generally, insurance companies and landlords require payment ahead of time. A nursing home that does not accept Medicaid at all might not necessarily offer incidental credit, but one that does accept Medicaid must have a policy of accepting delayed payments, because Medicaid regulations allow for that: After a person applies for Medicaid, it normally takes the state agency more than a billing cycle to determine eligibility. The goal is 45 days but that is rarely met. By law, the nursing home may take no involuntary dismissal action while the application is pending. That is to say, the nursing home offers credit while the application is pending. If the application is accepted, Medicaid will pay beginning on the month of the application and in certain circumstances will even make retroactive payment for a limited number

of prior months in which the resident was actually eligible. If the application is denied, the resident is liable for the current payment and for all payments that were deferred because of the application.

It would appear that nursing homes do offer incidental credit, which brings us to the next hurdle: whether nursing home residents are applicants for credit.

A Sixth Circuit case addressed the issue of Medicaid and the ECOA. *Barney v. Holzer Clinic, Ltd.*, 110 F3d 1207 (1997). Medicaid recipients sued a clinic in Ohio because they were rejected since they lived outside of the local service area. Private pay persons from outside the area were accepted as patients. The Sixth Circuit did not reject the theory that the clinic offered incidental credit, as the plaintiffs claimed. The suit was dismissed because they were not technically applicants. The court relied on the definition in Regulation B:

Applicant means any person who requests or who has received an extension of credit from a creditor, and includes any person who is or may become contractually liable regarding an extension of credit. 12 CFR § 202.2(e).

The court held that they were not applicants because they were not and could not become contractually liable, because Medicaid would pay for the entire treatment.

Nursing home cases are distinguishable. First, as noted above, a person seeking Medicaid eligibility certainly may become contractually liable if the Medicaid agency denies eligibility. This often happens because applicants and their families are unaware of certain requirements. For example, the value of one's home is not counted in determining resources unless the home is owned by a trust. Several persons apply for Medicaid only to be denied once the agency discovers that the home has been transferred to a trust. This is a particular risk for persons who have fallen victims to trust mills.

Second, even persons who are Medicaid-eligible may lose that eligibility. For example, a single person may have no more than \$2000 in countable assets. It is easy to go over this limit if one is not diligent. A small inheritance could lead to disqualifica-

tion. Even an account in the resident's name to pay incidental expenses could lead to disqualification if bills are not paid on time and the balance exceeds \$2000. Thus, there is always the risk that a Medicaid recipient may become contractually liable.

Third, unlike the situation in the Sixth Circuit case, Medicaid virtually never pays the entire bill for nursing home residents. Instead it makes up the shortfall after the recipients' income (except for \$60) is devoted to the nursing home bill. Residents are always contractually liable for their private pay amounts.

There is a third hurdle in applying the ECOA to nursing homes. Applicants are often not treated differentially because part of their current income derives from public assistance, but rather because it is expected that part of their future income will derive from public assistance. Although I am not aware of any case law on that precise point, this would appear to be covered as discrimination based on the receipt of public assistance.

Under the regulations, creditors offering incidental credit are not required to comply with certain parts of the act and regulations:

- (2) Exceptions. The following provisions of this regulation do not apply to incidental credit:
 - (i) Section 202.5(b) concerning information about the sex of an applicant, but only to the extent necessary for medical records or similar purposes;
 - (ii) Section 202.5(c) concerning information about a spouse or former spouse;
 - (iii) Section 202.5(d)(1) concerning information about marital status;
 - (iv) Section 202.5(d)(2) concerning information about income derived from alimony, child support, or separate maintenance payments;
 - (v) Section 202.7(d) relating to the signature of a spouse or other person;

- (vi) Section 202.9 relating to notifications;
- (vii) Section 202.10 relating to furnishing of credit information; and
- (viii) Section 202.12(b) relating to record retention.

12 CFR § 202.3(c)

Certain of these exceptions are unfortunate, especially those dealing with required signatures of other persons. That would apply to responsible parties who are treated as guarantors. It is also unfortunate that nursing homes are not required to give a notification explaining the rationale behind the adverse actions they may take. Nevertheless, there are some clear causes of action.

"[D]iscrimination against an applicant means to treat an applicant less favorably than other applicants." 12 CFR § 202.2(n). That's even more basic. Denying admission or deferring admission certainly constitutes discrimination if people with more income are admitted immediately. Discrimination on the basis that income derives from any public assistance is clearly banned under the ECOA. 15 USC § 1691.

Even discouraging applications is actionable.

A creditor shall not make any oral or written statement, in advertising or otherwise, to applicants or prospective applicants that would discourage on a prohibited basis a reasonable person from making or pursuing an application. 12 CFR § 202.4(b).

There are both civil and administrative remedies. The latter can apparently be brought only by federal, not state officials.

Civil remedies are nothing to scoff at.

Any creditor, other than a government or governmental subdivision or agency, who fails to comply with any requirement imposed under this title shall be liable to the aggrieved applicant for punitive damages in an amount not greater than \$10,000,

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in addition to any actual damages provided in subsection (a), except that in the case of a class action the total recovery under this subsection shall not exceed the lesser of \$500,000 or 1 per centum of the net worth of the creditor. . . . In the case of any successful action under subsection (a), (b), or (c), the costs of the action, together with a reasonable attorney's fee as determined by the court, shall be added to any damages awarded by the court under such subsection. 15 USC § 1691e.

This line of argumentation is rather complicated and must be presented clearly before it could be successful. Much harm is done to consumers by inadequately prepared attorneys who bring poorly argued cases and establish bad precedents for future claimants. There is also a major matching problem: How will an attorney with expertise in the ECOA, an attorney with expertise in Medicaid and nursing home law, and an appropriate victim meet? Someone already in a nursing home might not want to rock the boat by suing that home. An attorney trying to obtain admissions for her clients into a desirable nursing home might not want to antagonize that home. Finally, litigation is not particularly attractive to frail elderly and they might not profit that much financially. If the recovery from a successful suit must be spent down on nursing home bills, that might not seem like much of a victory. There ought to be clever solutions to these problems that can benefit the consuming public.

In summary, there are many issues on which consumer law attorneys and elder law attorneys can collaborate in regard to nursing home contract. The combined effort can offer great promise to some of the most vulnerable consumers that exist, persons who have to enter nursing homes.

Section Notes

Section Seeks Kelley Award Nominations

The Consumer Law Section seeks nominations for the annual Frank J. Kelley Consumer Advocacy Award, to be presented at the Section annual meeting in September.

The Kelley award recognizes attorneys, advocates, and journalists who have shown long-standing dedication and service to consumer affairs.

Section members are encouraged to submit nominees to Larry Lacey, by e-mail at llacey@juno.com, or by calling 248-584-2170.



Bar Journal to Feature Consumer Law

At the request of the Consumer Law Section, the *Michigan Bar Journal* will publish a Consumer Law theme issue in October 2006. The theme issue editor will be Gary Maveal, with assistance from the Section council. With the substantial lead time needed for publication, prospective authors should be thinking about articles soon. Gary Maveal can be contacted at mavealgm@udmercy.edu.



Section Website Begins Article and Brief Bank

The Consumer Law Section's pages on the Bar website now feature a growing list of articles and briefs on consumer law topics. Articles from Section newsletters that cover substantive law topics are included, along with outlines of the law and briefs submitted by Section members.

If you have materials you think would be helpful to others, please submit them to Fred Miller, by e-mail at Fredmi@uawflsp.com.

The articles and briefs page of the website can be found at www.michbar.org/consumer/articles.cfm. Available articles include the following:

Auto Sales and Service

- June, 1998: *Disputes Over Motor Vehicle Repair Fees and the Consumer's Dilemma: Advising Consumers of Motor Vehicle Repairs*, Ian Lyngklip

- August, 2003: *Yo-Yo Sales: The Predatory Practice of Unscrupulous Car Dealers*, Adam Taub
- August, 2004: *More Autofraud Scams: Prevalent Tricks of the Trade*, Adam Taub

Credit Reporting

- Summer, 2000: *Evaluating Credit Reporting Errors For Litigation*, Fred Miller
- February, 2004: *Furnisher Liability Under the Fair Credit Reporting Act: Statutory Changes and New Caselaw*, Fred Miller

Debt Defense

- June, 1998: *Lender Liability and the FTC Holder Rule*, Fred Miller
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In *Koonz v Nigh* the United States Supreme Court Limits Statutory Damages Under the Truth in Lending Act to \$1,000

By Gary M. Victor

Introduction

The Truth in Lending Act (TILA)¹ is a disclosure statute designed to assist consumers in making informed decisions about credit by allowing them to compare the cost of different credit opportunities.² To that end, the act requires the disclosure of such items as the amount financed, the finance charge, the annual percentage rate of interest, the total of payments as well as other rights of the consumer.³ In individual actions, creditors who violate the act's disclosure requirements can be held liable for actual damages,⁴ statutory damages,⁵ and attorneys fees.⁶ Awards of statutory damages are unrelated to the severity of the act's violations. They are available whether the violations are technical⁷ or egregious.⁸

Prior to 1995, the TILA's statutory damage provision contained language allowing for damages in an amount equal to twice the amount of the finance charge, but limiting those damages to a minimum of \$100 and a maximum of \$1,000.⁹ In 1995, the section was amended with what Justice Ginsburg has described as "[l]ess than meticulous drafting,"¹⁰ which led to a question as to whether the \$100 minimum and maximum still applied to general credit transactions. Subsequent to the amendment, the Seventh Circuit held that they did.¹¹ The Fourth Circuit, however, in *Nigh v Koons Buick*,¹² by a divided panel held they did not and affirmed an award of statutory damages to the consumer in excess of \$24,000.¹³ The Supreme Court granted certiorari in *Koonz* in order to resolve this conflict.¹⁴ This article will examine the changes in the TILA's statutory damage provision, the circuit court cases creating the conflict, and the Supreme Court's resolution of the conflict reversing *Koonz*.¹⁵

The TILA Statutory Damage Language

Over the life of the TILA, its statutory damage provision has gone through a number of changes.¹⁶ As originally enacted in 1968, the civil liability section stated:

(a) Any creditor who fails in connection with any consumer credit transaction to disclose to any person any information required under this chapter to be disclosed to that person is liable to that person in an amount . . . of

(1) twice the amount of the finance charge in connection with the transaction, except that liability under this paragraph shall not be less than \$100 nor greater than \$1,000¹⁷

Under the original wording, it was clear that statutory damages were subject to a \$100 minimum and a \$1,000 maximum. In 1974, Congress amended the statute¹⁸ to allow for actual damages and class actions. The amended statute provided for damages in individual actions as follows:

(a) Any creditor who fails to comply with any requirement imposed under this chapter . . . is liable to such person in an amount equal to the sum of --

(1) any actual damage sustained by such person as a result of the failure;

(2)(A) in the case of an individual action twice the amount of any finance charge in connection with the transaction, except that the liability under this subparagraph shall not be

less than \$100 nor greater than \$1,000¹⁹

Here again, it was plain that minimum and maximum applied in individual actions. A 1976 amendment²⁰ applied truth-in-lending provisions to consumer leases resulting in the following changes:

(2)(A)(i) in the case of an individual action twice the amount of any finance charge in connection with the transaction, or (ii) in the case of an individual action relating to a consumer lease . . . 25 per centum of the total amount of monthly payments under the lease, except that the liability under this subparagraph shall not be less than \$100 nor greater than \$1,000²¹

The 1976 amendment led to litigation regarding the question of whether the minimum and maximum contained in subsection (2)(A)(ii) relating to consumer leases also applied to other financing transactions covered in (2)(A)(i). The circuit courts consistently held that the minimum and maximum applied to both loans and leases.²²

The 1995 amendment²³ created a separate approach to closed-end transactions secured by real property or a dwelling. The current reading of the statute is:

(2)(A)(i) in the case of an individual action twice the amount of any finance charge in connection with the transaction, (ii) in the case of an individual action relating to a consumer lease . . . 25 per centum of the total amount of monthly payments

➤➤➤

In *Koonz v Nigh* . . .
Continued

under the lease, except that the liability under this subparagraph shall not be less than \$100 nor greater than \$1,000, or (iii) in the case of an individual action relating to a credit transaction not under an open end credit plan that is secured by real property or a dwelling, not less than \$200 or greater than \$2,000²⁴

As worded, this section appears to create three distinct categories: (1) a general category of loans where the statutory damages are equal to twice the amount of any finance charge with no limitation as to amount; (2) consumer leases where damages are equal to 25% of the total amount of monthly payments under the lease subject to a \$100 minimum and \$1,000 maximum; “or”, (3) closed-end credit transactions secured by real property or a dwelling where damages were equal to twice the amount of the finance charge subject to a minimum of \$200 and a maximum of \$2,000.²⁵ The inconsistency between the new language and prior interpretations, which held all individual statutory damage awards subject to the \$100 minimum and \$1,000 maximum, created the framework for conflict between the circuit courts eventually requiring resolution by the Supreme Court. The two cases creating the conflict will be examined next.

The Circuit Courts Interpret the New Language

The Seventh Circuit was the first circuit to interpret the statutory damage provision after the 1995 amendment. The case was *Strange v. Monogram Credit Card Bank of Georgia*.²⁶ In *Strange*, defendant credit card company failed to credit plaintiff’s account for a return and continued to bill him, assessing finance charges even after he provided defendant with several notices of the mistake. The violations of the TILA by the credit card company resulted in improper finance charges of \$27.36. In awarding statutory damages, the trial court refused to apply the \$100 minimum contained in subsection 2(A)(i) and limited

statutory damages to twice the amount of the finance charge—\$54.72—treating subsection 2(A)(i) and independent.²⁷

The defendant had conceded both at trial and on appeal that plaintiff was entitled to the \$100 statutory minimum. Even so, the Court of Appeals viewed the interpretation of amended section as “a matter of considerable commercial interest” and decided to consider the issue.²⁸ Although acknowledging that a literal interpretation of the statute as creating three separate subparagraphs had “certain appeal”,²⁹ the Court relied on pre-amendment cases to conclude that the congressional intent of the 1995 amendment was not to alter the application of the minimum and maximum to loans in general.³⁰ The Court increased plaintiff’s award to the \$100 minimum.

In *Nigh v Koons Buick*,³¹ the Fourth Circuit reached the opposite conclusion. Rather than technical errors like those in *Strange*, *Koons* involved reprehensible conduct by the defendant car dealer. The consumer, Mr. Nigh, was the victim of multiple “yo yo” sales. He traded in his old vehicle and financed a used 1997 Chevrolet Blazer under a retail installment sales contract (RISA). The dealer failed to sell the RISA to a lender. Nigh was then reeled back into the dealership, which demanded he sign a second RISA containing different terms and requiring an additional down payment of \$2,000. When Nigh balked, demanding the return of his trade-in and the termination of the deal, the dealership lied to him, telling him he could not withdraw as his trade-in had already been sold. Unable to sell the second RISA, the dealership threatened to report the vehicle purchased by Mr. Nigh as stolen unless he came in and executed a third. Fearing arrest, Nigh signed his third RISA for the same vehicle he had purchased with the first. Later Nigh learned that one of the reasons the second could not be sold was that the Buyer’s Order contained a \$965 charge for a Silencer car alarm that he had neither requested nor received.³²

Nigh filed suit under TILA, the Federal Odometer Act, and the Virginia Consumer

Protection Act. After a jury trial, the jury returned a verdict, which included TILA damages of \$24,192.80, twice the finance charge.³³ The dealership appealed.

The *Koons* majority relied on the wording of the statute rather than pre-amendment interpretations to reach its conclusion that Congress had changed the application of the prior minimum and maximum.³⁴ The majority opined that there was only one reasonable interpretation of the statutory language; and if Congress had made a mistake, it was up to Congress rather than the courts to correct the error.³⁵ As a result of *Koons*, there was a clear conflict between the Fourth and Seventh Circuits. The Supreme Court granted certiorari in *Koonz* in order to resolve this conflict.³⁶

The Supreme Court Chooses “Intent” Over Wording

The Supreme Court voted eight to one to reverse *Koons* holding that the \$100 minimum and \$1,000 maximum contained in § 1640(a)(2)(A)(ii) also applies to general credit transactions under (2)(A)(i). They reached this result despite the fact that this interpretation appears to contradict the wording of the statute.³⁷ The relatively one-sided decision was not without differences in analysis. Justice Ginsburg wrote the opinion of the Court in which seven justices joined.³⁸ Justice Stevens filed a concurring opinion joined by Justice Breyer.³⁹ Justice Kennedy filed a concurring opinion joined by Chief Justice Rehnquist.⁴⁰ Justice Thomas filed an opinion concurring in the result⁴¹ and Justice Scalia filed the sole dissenting opinion.⁴² Within this diversity, two general approaches to statutory interpretation became apparent. The majority approach can be described as “holistic”.⁴³ “Textualist” is a good description of dissenting Justice Scalia’s approach.⁴⁴

The majority opinion engages in a rather extensive, yet unconvincing, attempt to analyze the term “subparagraph” in order to support the Court’s holding.⁴⁵ However, the main thrust of the holistic interpreters relies on prior statutory wording and its interpretation. In essence, these

justices believe that Congress could not have intended what they actually said, so they are willing to correct this mistake by interpreting the words Congress used to mean what they think Congress wanted to say. In Justice Steven's words, the majority opinion "has demonstrated that a busy Congress is fully capable of enacting a scrivener's error into law."⁴⁶

There are obvious dangers in using this "holistic" approach. First, it involves some level of guesswork in determining Congressional intent beyond the actual words enacted. Second, it may—and in this case does—result in an interpretation, which is inconsistent with or contradictory to the actual language used. Third, and most importantly, it intrudes upon if not violates the principal of separation of powers. When the Court attempts to correct a Congressional error, it is engaged more in legislation than interpretation. This is especially dangerous when the perceived Congressional "error" could have been easily avoided.⁴⁷

Justice Scalia, as a textualist, was much more reluctant to go beyond the statutory language. Absent an ambiguity or an absurd result, textualists will give meaning to the unambiguous language used by the legislative body. Relying on a respect for the proper limitations of judicial power, these judges will leave the corrections of mistakes to the legislative body.⁴⁸ As stated by Justice Scalia quoting *Lamie v. United States Trustee*:⁴⁹

If Congress enacted into law something different from what it intended, then it should amend the statute to conform it to its intent. It is beyond our province to rescue Congress from its drafting errors, and to provide for what we might think is the preferred result.⁵⁰

The danger in this approach, of course, is that until cured the unintended mistakes of Congress will remain law as will the unintended consequences resulting from the application of those mistakes.

Summary and Conclusion

Historically, the TILA's statutory damage section had been interpreted to contain a \$100 minimum and \$1,000 maximum

in all individual actions. Even though the minimum and maximum language was contained in § 1640(a)(2)(A)(ii) referring to leases, that language was held to apply to other credit transactions contained in § 1640(a)(2)(A)(i). In 1995, Congress enacted an amendment creating § 1640(a)(2)(A)(iii). This new subsection applied to credit transactions secured by real property or a dwelling and had a minimum of \$200 and maximum of \$2,000. The amendment appeared to establish three separate categories eliminating the maximum on general credit transactions. The Seventh Circuit held that the minimum and maximum still applied to general credit transactions under § 1640(a)(2)(A)(i).⁵¹ The Fourth Circuit held that they did not.⁵² The Supreme Court resolved this conflict by, in essence, correcting a Congressional error and holding that the minimum and maximum did still apply.⁵³

The opinions by the Supreme Court contain good examples of two opposing approaches to statutory interpretation. The majority and concurring opinions illustrate a holistic approach where justices are willing to correct errors in Congressional drafting when they believe the true Congressional intent is present in statutory history and prior interpretations. Justice Scalia's dissenting opinion, on the other hand, shows an example of the textualist interpretative approach. Under this approach, judicial power does not extend to the correction of legislative mistakes. Absent an absurd result, unambiguous language can only be changed by the legislature.

As a practical matter, the decision of the Supreme Court is of little consequence. Had the Court decided otherwise, it seems beyond doubt that Congress would have promptly corrected its error. What the Court's decision did do was close a window of opportunity for those litigating TILA cases. In the time between the 1995 amendment and the Supreme Court's decision in *Koons*, these attorneys had some additional leverage in negotiating settlements on the basis that the \$1,000 maximum no longer applied to general credit transactions. Now, such negotiations have returned to their pre-1995 amendment status.

Endnotes

- ¹ 15 USC. § 1601 *et seq.* The Federal Reserve Board has set forth the disclosure requirements for the TILA in Regulation Z, 12 CFR 226.
- ² See 15 USC § 1601(a). See also, *Mourning v. Family Publications Service, Inc.*, 411 US 356, 364-65 (1973).
- ³ See 15 USC § 1631-1632, 1635, 1637-1639.
- ⁴ 15 USC § 1640(a)(1).
- ⁵ 15 USC § 1640(a)(2)(A).
- ⁶ 15 USC § 1640(a)(3).
- ⁷ *Mars v. Spartanburg Chrysler Plymouth, Inc.*, 713 F2d 65 (CA4 1983). In *Mars*, the defendants used the term "amount financed" on their disclosure statement as opposed to the term "unpaid balance" and their disclosure statement contained certain items in eight point type rather than the required ten point type. 713 f2d at 66.
- ⁸ See, for example, the fact of *Nigh v Koons Buick*, 319 F3d 119 (CA4 2003), *infra* at p
- ⁹ 15 USC § 1640(a)(2)(A).
- ¹⁰ *Koons* at 125 SCt 463. Judge Ginsburg also stated: "The five separate writings this Court has produced demonstrate that § 1640(a)(2)(A) is hardly a model of the careful drafter's art". *Id* at 468, fn 7.
- ¹¹ *Strange v Monogram Credit Card Bank of Ga*, 129 F3d 943(CA7 1997).
- ¹² 319 F3d 119 (CA4 2003).
- ¹³ *Id.*
- ¹⁴ 540 U.S. 1148, 157 L. Ed. 2d 1041, 124 S. Ct. 1144 (2004),
- ¹⁵ ___ US ___; 125 S Ct. 460; 160 LE2d 389; 2004 US LEXIS 7979 (2004).
- ¹⁶ See *Koons* at 125 SCt 463-465.
- ¹⁷ Pub L 90-321, § 130, 82 Stat 157.
- ¹⁸ Pub L 93-495, § 408(a), 88 Stat 1518.
- ¹⁹ 15 U.S.C. § 1640(a) (1974 ed).
- ²⁰ Pub L 94-240, § 4(2), 90 Stat 260
- ²¹ 15 U.S.C. § 1640(a) (1976 ed).
- ²² See, e.g., *Purtle v Eldridge Auto Sales, Inc.*, 91 F3d 797, 800 (CA6 1996); *Cowen v. Bank United of Tex, FSB*, 70 F3d 937, 941 (CA7 1995); *Mars v. Spartanburg*



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Chrysler Plymouth, Inc., 713 F2d 65, 67 (CA4 1983); *Dryden v. Lou Budke's Arrow Finance Co.*, 661 F2d 1186, 1191, n. 7 (CA8 1981); *Williams v. Public Finance Corp.*, 598 F2d 349, 358, 359, n. 17 (CA5 1979).

²³ Truth in Lending Act Amendments of 1995, Pub L 104-29, § 6, 109 Stat 274.

²⁴ 15 USC § 1640(a)(2)(A).

²⁵ In his concurring opinion, Justice Stevens describes this interpretation of the actual wording of the statute as “unambiguous”. *Koons* at 125 SCt 469.

²⁶ 129 F3d 943 (CA7 1997).

²⁷ *Id* at 945.

²⁸ *Id* at 947.

²⁹ *Id*.

³⁰ *Id*.

³¹ 319 F3d 119 (CA4 2003).

³² *Id* at 122.

³³ *Id* at 121. It is interesting to note that in *Strange* the consumer is entitled to more in statutory damages where the statutory minimum and maximum apply; whereas in *Koons* the consumer would receive a great deal less when the maximum is applied—less than 5% of the amount equal to twice the finance charge.

³⁴ *Id* at 127.

³⁵ The majority stated:

It could well be, as Judge Gregory concludes, that Congress did not intend to alter the statutory cap ap-

plicable under subparagraph (A)(i) when it amended the statute in 1995. However, the critical point of law -- and it is critical-- is that we do not know what Congress intended; all that we have before us is the amended statute from which to determine intent. And, based upon that statute, the far better, and indeed compelled, interpretation is that Congress did alter the statutory cap regardless of its intent. It is the statute, not any inferential intent, that constitutes the law. Of course, it goes without saying, if Congress enacted into law something different from what it intended, then it can simply amend the statute to bring the statute in line with congressional intent. In this way, and in this way only, are the constitutional roles of the legislature and the courts respected. *Id* at 128.

³⁶ 540 U.S. 1148, (2004),

³⁷ As stated by Justice Stevens in his concurring opinion:

If an unambiguous text describing a plausible policy decision were a sufficient basis for determining the meaning of a statute, we would have to affirm the judgment of the Court of Appeals. *Koons* at 125 SCt 469.

³⁸ *Koons* at 125 SCt 463-469.

³⁹ *Id* at 469-470.

⁴⁰ *Id* at 470-471.

⁴¹ *Id* at 471-472.

⁴² *Id* at 472-476.

⁴³ *Id* at 466. Justice Ginsburg citing *United Sav Assn of Texas v Timbers of Inwood Forest Associates, Ltd*, 484 US 365, 371 (1988).

⁴⁴ See, Scalia, Antonin, *A Matter of Interpretation: Federal Courts and the Law* (Princeton, N.J.: Princeton University Press, 1997). See also, Rossum, Ralph A., *The Textualist Jurisprudence of Justice Scalia*, <http://salvatori.claremontmckenna.edu/publications/RARScalia.asp>

⁴⁵ *Koons* at SCt 467-468.

⁴⁶ *Id* at 470.

⁴⁷ For example, one simple but not particularly artful solution would be to include the “except that the liability under this subparagraph shall not be less than \$100 nor greater than \$1,000” in § 1640(a)(2)(a)(i). Many other and better changes could be made with little effort.

⁴⁸ See, *supra* at fn 35. See also, Scalia, Antonin, *Originalism: The Lesser Evil*, 57 U Cin L Rev 849 (1989).

⁴⁹ 540 U.S. 526, 54 (2004).

⁵⁰ *Koons* at 125 SCt 476.

⁵¹ *Strange v Monogram Credit Card Bank of Ga*, 129 F3d 943(CA7 1997).

⁵² *Nigh v Koons*, 319 F3d 119 (CA4 2003).

⁵³ *Koons v Nigh*, ___ US ___; 125 S Ct. 460; 160 LE2d 389; 2004 US LEXIS 7979 (2004).

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