UNITED STATES BANKRUPTCY COURT
EASTERN DISTRICT OF WISCONSIN

In re

PAUL H. MADEL and
VERONIQUE R. MADEL,

Debtors.

Case No. 03-32367

Chapter 13

PAUL H. MADEL and
VERONIQUE R. MADEL,

Plaintiffs,

v.

Adversary No. 04-2060

GMAC MORTGAGE CORPORATION,
USA FUNDING, INC., and
AAA MORTGAGE CORPORATION,

Defendants.

MEMORANDUM DECISION GRANTING IN PART AND DENYING IN PART DEFENDANTS' MOTIONS TO DISMISS

The debtors filed a complaint challenging the validity and/or extent of a secured claim pursuant to 11 U.S.C. § 506, as well as for damages. The debtors' claims for damages fall under the Truth in Lending Act (TILA), 15 U.S.C. § 1601, et seq., the Real Estate Settlement Procedures Act, 12 U.S.C. § 2605 (RESPA), and misrepresentation.[1] Defendants USA Funding and AAA Mortgage

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[1]The debtors originally asserted a cause of action under § 100.20(5), Wis. Stats.; however, that claim was voluntarily withdrawn in the debtors' response brief to AAA Mortgage Corporation's motion to dismiss. In the same brief, the debtors indicated they wished to amend their complaint to add claims under §§ 100.18(9)(a), 224.77(b) & (c), and 224.80(2), Wis. Stats. AAA Mortgage, also in its brief, opposed allowing any amendment to the pleadings. This matter will be addressed if and when the

Corporation filed answers to the complaint, and Defendants GMAC Mortgage Corporation and AAA Mortgage Corporation filed motions to dismiss the complaint for failure to state a claim. GMAC objected to confirmation of the debtors' chapter 13 plan and the debtors objected to GMAC's motion for relief from the automatic stay and proof of claim. The parties fully briefed the issues involving whether the plaintiffs stated proper causes of action, and only the motions to dismiss are addressed by this decision. The debtors continue to make payments as adequate protection pending resolution of this adversary proceeding.

This court has jurisdiction under 28 U.S.C. § 1334 and this is a core proceeding under 28 U.S.C. § 157(b)(2)(B), (G), (K) and (O). This decision constitutes the court's findings of fact and conclusions of law under Fed. R. Bankr. P. 7052.

BACKGROUND

For purposes of deciding the motions to dismiss for failure to state a claim, the relevant facts that give rise to this controversy will be considered in a light most favorable to the debtors.

The debtors originally purchased their home in April 2002 through a $145,000 loan with ABN/AMRO Mortgage and brokered by AAA Mortgage. That loan required the payment of private mortgage insurance for $94.25 per month. According to the complaint, AAA Mortgage encouraged the debtors to make purchases for their new home as they could return in three to six months and

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debtors move to amend their pleadings.

refinance the mortgage to eliminate the private mortgage insurance, as well as obtain a second mortgage for the purchases.

The debtors returned to AAA Mortgage in August 2002 for refinancing, but the outcome was not as they had hoped. Because their credit rating had fallen, the debtors were not eligible for a second mortgage and were required to continue paying private mortgage insurance. Only Paul applied for the loan as Veronique's credit rating was too low, although she was required to sign the mortgage because it was her homestead. The new refinancing lender was USA Funding.

On September 18, 2002, AAA Mortgage provided Paul with a Good Faith Estimate dated August 23, 2002, of closing costs and the proposed payment of $1,338.64 per month inclusive of taxes, insurance and private mortgage insurance of $59 per month. On that same date, Paul also received a Preliminary TILA Disclosure Statement, prepared by AAA Mortgage, disclosing a monthly mortgage payment of $1,209.64 and no private mortgage insurance. Paul signed his loan application which estimated his new monthly payment at $1,338.64, inclusive of taxes, insurance and private mortgage insurance.

On September 11, 2002, the private mortgage insurer, Milwaukee Guaranty Insurance Corporation, had issued a private mortgage insurance commitment to USA Funding in the amount of $392.13 per month. Paul was not advised of this development.

The transaction closed on October 10, 2002. The Final TILA Disclosure Statement, prepared by the initial lender and first presented to Paul on that date, showed the monthly payment was over $300 higher than originally disclosed. According to the Final TILA Disclosure Statement, only hazard insurance was required for the transaction; the box next to private mortgage insurance was not

checked, even though it was included in the payment amount. The Initial Escrow Account Disclosure Statement, the Settlement Statement, the Escrow Instructions, the TILA Itemization of Amount Financed form, and the Payment Letter did, however, show private mortgage insurance in the amount of $392.13. The debtors were also presented with and signed a Notice Concerning Private Mortgage Insurance, which informed them Paul's loan required private mortgage insurance. Notwithstanding these discrepancies, the deal closed. In April 2003, the mortgage was assigned to GMAC Mortgage Corporation.

The debtors assert they were not provided signed copies of their loan documents at the closing. According to the debtors, because neither received any signed copies of the Notices to Cancel, they are uncertain whether or not the acknowledgments of receipt were actually signed. Defendant USA Funding has presented signed copies of the Notices to Cancel. However, these copies indicate that the copies received by the debtors at closing advised that they could rescind as to the additional amounts financed – a notice form which is required only when the refinance is with the same previous lender. Here, there was a complete refinance with a new lender, and the entire amount was subject to rescission, thus making the Notice of Cancel Paul received inapplicable to this transaction.

The HUD-1 Statement shows that $1,055.47 had been escrowed at closing for property taxes and $267.75 for hazard insurance. Because no funds were disbursed by the assignee GMAC Mortgage Corporation, in early 2003, the debtors were required to pay their own 2002 real estate taxes. Through counsel, the debtors made a RESPA "qualified request" on April 18, 2003, to GMAC for an explanation of the discrepancies in the closing TILA disclosures and the destination of the funds that had been escrowed for real estate taxes.

GMAC acknowledged receipt of the correspondence within 20 days. The required 60-day response letter was received June 26, 2003, wherein GMAC denied it had ever received the escrowed funds and referred debtors' counsel to AAA Mortgage or USA Funding to determine the destination of those funds.

On July 14, 2003, the debtors exercised their right under TILA to rescind the loan as they had never received the material disclosures required by the Act, including a proper notice of right to cancel. GMAC responded to the debtors' notice of rescission by agreeing to refund the $1,055.47 previously escrowed for 2002 real estate taxes, but unpaid to the taxing authority, upon receipt of an executed release. The release was a general release of all claims against GMAC Mortgage Corporation, including any claims under the notice of rescission. They refused to sign the release.

ARGUMENTS

Truth in Lending Act Cause of Action

According to the complaint, defendants USA Funding and GMAC Mortgage Corporation were creditors within the meaning of the Truth in Lending Act, 15 U.S.C. § 1601, et seq. The debtors' transactions with the defendants were consumer credit transactions within the meaning of TILA, and the defendants failed to provide the debtors with disclosure statements in compliance with TILA. The disclosure statements provided to the debtors failed to accurately disclose the Right to Cancel and failed to disclose the private mortgage insurance payment in a timely manner. Under these circumstances, the debtors retained the right to rescind the transaction for three years from the date of the transaction and properly exercised such right in a timely manner. The debtors thus seek a determination that any security interest held by GMAC on their residence is void, as well as that

GMAC holds no valid unsecured claim. The debtors also seek monetary damages, as well as costs and attorney fees for GMAC's failure to rescind the transaction in conformity with TILA.

GMAC asserts the complaint against it should be dismissed because, as an assignee of the mortgage, GMAC has no liability. There is nothing apparent on the face of the closing documents that would suggest to GMAC that any sort of TILA violation had occurred. GMAC points out that a creditor can rely on the documentation it receives from its assignor and has no obligation to further investigate its accuracy. GMAC further argues that the debtors may not rescind the transaction merely because they received the wrong rescission notice form. Thus, because the debtors did not give notice of the rescission before midnight of the third business day following the later of the consummation of the transaction or delivery of the notice disclosing the right of rescission, the debtors' rescission was untimely.

Real Estate Settlement Procedures Act Cause of Action

The debtors assert that GMAC was required, pursuant to 12 U.S.C. § 2605(e), to correct its records after being informed of its error by their "qualified request." Instead, GMAC represented that it did not have the escrowed funds. Later, it offered to return the funds but only if the debtors signed a release waiving their rescission rights.

GMAC argues that it has complied with the requirements of the Real Estate Settlement Procedures Act. After the debtors served GMAC with a qualified written request concerning their account, GMAC promptly acknowledged receipt of the request and responded to the substance of their inquiries in a timely manner. The information provided to GMAC from the prior servicer reflected

that the 2002 real estate taxes had been paid (it is not clear by whom), and that the next real estate tax disbursement would be in December 2003.

Misrepresentation Cause of Action

The complaint also seeks damages for the handling of increased costs by AAA Mortgage and USA Funding in failing to timely notify the debtors of the increase in the cost of the transaction because of the substantial increase of the private mortgage insurance. The debtors assert while legally they could have refused to close, they had relied on the representation to their detriment and did not believe that they were in a position to walk away from the loan.

AAA Mortgage counters that the debtors knew the actual private mortgage insurance amount and chose to proceed with the closing. The debtors failed to exercise their right to rescind the transaction within the three-day period after the closing. Because the debtors cannot establish that they reasonably relied upon any alleged untrue statement of fact by AAA Mortgage, the misrepresentation claim must be dismissed.

DISCUSSION

The Federal Rules of Civil Procedure require only that the plaintiff set forth a "short and plain statement of the claim showing that the pleader is entitled to relief." Fed. R. Civ. P. 8(a)(2). "The primary purpose of [Rule 8] is rooted in fair notice: under Rule 8, a complaint 'must be presented with intelligibility sufficient for a court or opposing party to understand whether a valid claim is alleged and if so what it is.'" *Vicom, Inc. v. Harbridge Merchant Servs., Inc.*, 20 F.3d 771, 775 (7th Cir. 1994) (citations omitted).

Under Rule 12(b)(6), a complaint or portion thereof may be dismissed for failure to state a claim "only if it is clear that no relief could be granted under any set of facts that could be proved

consistent with the allegations." *Hishon v. King & Spalding*, 467 U.S. 69, 73, 104 S.Ct. 2229 (1984) (citing *Conley v. Gibson*, 355 U.S. 41, 45-46, 78 S.Ct. 99 (1957)). In light of this liberal standard, a plaintiff can resist a Rule 12(b)(6) motion to dismiss by setting out facts sufficient to outline the basis of its claim. *Panaras v. Liquid Carbonic Indus. Corp.*, 74 F.3d 786, 792 (7th Cir. 1996).

In reviewing a complaint, the court must accept as true the plaintiff's allegations, *Hospital Bldg. Co. v. Trustees of Rex Hosp.*, 425 U.S. 738, 740, 96 S.Ct. 1848 (1976), and construe the complaint in the light most favorable to the plaintiff, resolving all doubts in his or her favor, *Jenkins v. McKeithen*, 395 U.S. 411, 421, 89 S.Ct. 1843 (1969). However, if a plaintiff can point to no legally cognizable theory of liability, dismissal is proper on Rule 12(b)(6) grounds. *Kirksey v. R.J. Reynolds Tobacco Co.*, 168 F.3d 1039, 1041 (7th Cir. 1999).

Because the defendant AAA Mortgage answered before filing the motion, this court will treat the motion as one for partial judgment on the pleadings under Fed. R. Civ. P. 12(c). *See, e.g.*, *Republic Steel Corp. v. Pennsylvania Eng'g Corp.*, 785 F.2d 174, 182 (7th Cir. 1986) (treating a 12(b)(6) motion that was not filed until after the answer as a 12(c) motion). In any event, the Rule 12(b)(6) standard also applies to motions under Rule 12(c). *Id.*; *see also United States v. Wood*, 925 F.2d 1580, 1581 (7th Cir. 1991).

Applicability of the Truth in Lending Act in General

The Truth in Lending Act is remedial and should be liberally construed in favor of borrowers. *In re Hatfield*, 117 B.R. 387, 391 (Bankr. C.D. Ill. 1990). TILA applies to each party[2] that offers or extends credit under the following circumstances: (1) the credit is offered or extended to consumers, (2) the offering or extension of credit is done regularly, (3) the credit is subject to a finance charge or is payable by a written agreement in more than four installments, and (4) the credit is primarily for personal, family, or household purposes. Reg. Z § 226.1(c)(1). This court is satisfied that the facts alleged are sufficient to show that TILA applies to this transaction. Therefore, this court will consider TILA itself, the Federal Reserve Board's Regulation Z which implements the Act, the Official Staff Commentary on Regulation Z, and case law.

Assignee Liability

As assignee of the mortgage loan, GMAC asserts that under 15 U.S.C. § 1641(c) it has no liability toward the debtors' TILA claims. The obligation must be initially payable to the entity in order for that entity to be considered a creditor. 15 U.S.C. § 1602(f)(2). The Commentary takes a strict position on the "initially payable rule." Even if the obligation by its terms is simultaneously assigned to another entity, the entity to whom it is initially payable is still the creditor and the entity to whom it is assigned is only the assignee. Official Staff Commentary § 226.2(a)(17)(i)-2. Here, GMAC is unquestionably an assignee.

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[2]In its answer, USA Funding stated it was without sufficient information to admit or deny that it was a creditor within the meaning of TILA. The other defendants admit, either explicitly or implicitly, to being under the constraints of the Act.

Nevertheless, an assignee may be liable for TILA violations under certain circumstances: rescission is available against assignees, 15 U.S.C. § 1641(c), and statutory penalties are available against assignees for violations which are apparent on the face of the documents, 15 U.S.C. § 1641(a).

According to the statute, a violation is apparent on the face of the disclosure statement if

> (A) the disclosure can be determined to be incomplete or inaccurate by a comparison among the disclosure statement, any itemization of the amount financed, the note, or any other disclosure of disbursement; or
> (B) the disclosure statement does not use the terms or format required to be used by this subchapter.

15 U.S.C. § 1641(e)(2). Because the complaint adequately places in issue the completeness, accuracy and format of the disclosures, GMAC's defense of liability protection for the assignee does not survive at this procedural stage of the case.[3]

While assignees are only liable for statutory damages for TILA violations which are apparent on the face of the loan documents assigned, they are subject to the rescission right to the same extent as the original creditor. This is true whether or not the TILA violation on which the rescission is based was apparent on the face of the disclosure statement. 15 U.S.C. § 1641(c); *McIntosh v. Irwin Union Bank & Trust Co.*, 215 F.R.D. 26 (D. Mass. 2003) (holding assignee liable for rescission regardless of whether violation was apparent on face of documents).

In addition to being liable for statutory damages for disclosure violations apparent on the face of the document, an assignee may be independently liable for its own violation of the Act if it fails to

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[3]This is not to say that any of the defendants may not have a "bona fide error" defense under 15 U.S.C. § 1640(c) for certain of the disclosure violations. *See, e.g., Henning v. Daniels*, 653 F.2d 104 (4th Cir. 1981) (failing to check appropriate box for comprehensive insurance coverage was bona fide error).

respond properly to a rescission notice. 15 U.S.C § 1635(b); Reg. Z §§ 226.15(d)(2), 226.23(d)(2). The complaint adequately alleges that GMAC's response to its notice of rescission was improper. Therefore, the debtors have stated a cause of action against the assignee, GMAC Mortgage Corporation, and the latter's motion to dismiss on this ground must be denied.

Disclosure of Higher Private Mortgage Insurance Charge at Closing

The disclosure of the finance charge is at the heart of Truth in Lending. The finance charge includes any charge, payable directly or indirectly by the consumer, imposed directly or indirectly by the creditor, as an incident to or a condition of the extension of credit. Reg. Z § 226.4(a). Any charge which meets this definition is a finance charge unless it is specifically excluded elsewhere in the TILA statute or Regulation.

Because charges need not be retained by the creditor to be "imposed by the creditor," finance charges may represent expenses passed through to a third party, i.e., Reg. Z § 226.4(b)(5) (mortgage guarantee insurance premiums). This is the case even if the expense is for something of some benefit to the borrower, such as required non-credit insurance premiums. Official Staff Commentary § 226.4(b)(7) and (8)-4. On the other hand, if the charge is imposed by a third party for services which the creditor does not require, and the creditor does not retain the charge, then it is not a finance charge. Reg. Z § 226.4(a)(1).

A charge for private mortgage insurance is a finance charge because creditors require its purchase in transactions in which the borrower cannot make a twenty percent down payment on the purchase of a home. *See* Official Staff Commentary § 226.4(a)(1)-1.

If any information necessary for an accurate disclosure is unknown, the creditor must make the disclosure based on the best information "reasonably available" and must state that the disclosure is an estimate. Reg. Z § 226.17(c)(2). The creditor may label disclosures estimates even when it knows that more precise information will be available by the point of consummation. Official Staff Commentary § 226.17(c)(2)(i)-1. The "reasonably available" standard requires that the creditor, acting on good faith, exercise due diligence in obtaining information. *Id*. The initial Good Faith Estimate and the Uniform Residential Loan Application listed the private mortgage insurance at $59. The Preliminary Truth-in-Lending Disclosure Statement listed $0.00 as mortgage insurance. At the time these statements were issued, the private mortgage insurer had already given a quote to the new lender. The debtors have adequately alleged that the correct amount was "reasonably available" and not supplied as required.

Furthermore, the creditor cannot disclose an estimate when the correct figure is known. *See In re Mitchell*, 75 B.R. 593 (Bankr. E.D. Pa. 1987) (holding TILA violated by giving estimated disclosures at time of closing when actual figures were known). On September 11, 2002, the private mortgage insurer issued a private mortgage insurance commitment to USA Funding. On September 18, 2002, AAA Mortgage provided Paul with the Good Faith Estimate dated August 23, 2002, as well as the Preliminary TILA Disclosure Statement. While the debtors did not plead the correct amount was actually known to AAA Mortgage when it gave the estimate, such an inference is allowable based on the timing. This is the sort of thing that will be discerned during discovery; the pleading relative to failure to disclose when the correct figure is known is adequate at this stage. It could also fall under the general category of misrepresentation.

The debtors further assert that the timing of the disclosure of the correct private mortgage insurance – at the closing – was insufficient. TILA requires that closed-end disclosures be made "before the credit is extended." 15 U.S.C § 1638(b)(1). Regulation Z uses the phrase "before consummation." Reg. Z § 226.17(b). Consummation is defined as "the time that a consumer become contractually obligated on a credit transaction." Reg. Z § 226.2(a)(13). For there to be consummation for TILA purposes, the consumer must be "legally obligated to accept a particular credit arrangement." Official Staff Commentary § 226.2(a)(13)-2. In this case, disclosure of the proper private mortgage insurance was made at closing, before consummation. For TILA purposes, the timing of the correct private mortgage insurance was sufficient.[4] The debtors' complaint stating a cause of action against the defendants for untimely disclosure of the higher private mortgage insurance is dismissed, without prejudice.

Contradictory Final Disclosures of Right to Rescind and Amount of Private Mortgage Insurance

Each person having a right to rescind must receive both notice of the right to rescind and the material TILA disclosures. Furthermore, each person must receive *two* copies of the notice, one to keep and one to use if the option is exercised. Reg. Z §§ 226.15(b), 226.23(b). Whether or not the

[4]There are certain circumstances, however, where a change in the period after the creditor has made disclosures and before consummation will trigger a redisclosure requirement: If the annual percentage rate changes by more than 1/8 of 1 percentage point in a regular transaction or 1/4 of 1 percentage point in an irregular transaction; in non-mortgage loans where the APR or other disclosed terms initially were not based on proper estimates and labeled as such; or if a variable feature is added to the credit terms. Reg. Z § 226.17(f). Because the facts of this case do not fall under those special circumstances, redisclosure was not required.

debtors each received two copies is a matter of fact. Since the debtors assert they may not have received the requisite copies, this alleged violation survives the motion to dismiss.

Additionally, the disclosures must reflect the terms of the legal obligation between the creditor and the consumer. Reg. Z § 226.17(c)(1). Several courts have considered whether or not contradictions between the TILA disclosure and the loan documents trigger the extended right of rescission. *See, e.g., In re Ralls*, 230 B.R. 508 (Bankr. E.D. Pa. 1999) (holding contradictions between TILA disclosure and loan note and mortgage regarding the total of payments and payment schedule violated the mandate that disclosures reflect the legal obligation); *England v. MG Investments, Inc.*, 93 F.Supp.2d 718 (S.D. W.Va. 2000) (holding disclosure statement was not accurate representation of terms of legal obligations between the parties where disclosure statement overstated the annual percentage rate and understated the amount financed, and included erroneous payment schedule).

The Act requires the Federal Reserve Board to publish model disclosure forms and clauses upon which creditors may rely. 15 U.S.C. § 1604(b). Although use of the forms and clauses is not required, TILA does give some protection to creditors choosing to use them. *Id*. However, the models may only be used if "appropriate." *Id.*; *In re Melvin*, 75 B.R. 952 (Bankr. E.D. Pa. 1987) (holding use of incorrect model rescission form was not protected by § 1604(b)).

The debtors correctly point out that an obligation refinanced by some other creditor is not a "refinancing" for TILA purposes, but rather a new transaction that requires new disclosures. The

unsigned copies[5] of disclosure forms received by the debtors at closing, Form H-9, advised that they could rescind "as to the additional amounts financed." This form is required only when the refinance is with the same lender; the proper notice form for a general financing with a new lender is Form H-8.

The consumer has an extended right to rescind if the creditor failed to provide the notice of rescission rights in the proper manner. The 1995 amendments to the Act give lenders a safe harbor for only one specific violation regarding the notice: use of the wrong model form in a transaction consummated prior to September 30, 1995. 15 U.S.C. § 1649(a)(2). Giving the refinancing notice of right to cancel when the transaction is not in fact a refinancing may give the consumer the extended right to cancel. *Cf. Gibbons v. Interbank Funding Group*, 208 F.R.D. 278 (N.D. Cal. 2002) (noting that, even if technical violation is insufficient to extend rescission period, this error is substantively misleading). The cause of action related to the incorrect notice of rescission form survives the motion to dismiss.

Additionally, the debtors were presented for the first time at the closing with the corrected private mortgage insurance figures. Although the Final Truth-in-Lending Disclosure Statement did not include private mortgage insurance as required insurance for the loan transaction, the Payment Letter and Settlement Statement listed the higher private mortgage insurance of $392.

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[5]For mortgage transactions to which the right to rescind applies, section 1635(c) provides that written acknowledgment of receipt of any required disclosures or rescission notices does no more than create a rebuttable presumption of delivery. 15 U.S.C. § 1635(c). USA Funding attached signed copies of acknowledgment to its answer, which would be proof of delivery of the disclosures. Since disclosure has been produced by the creditor, albeit with arguably inadequate content, the debtors would need to put forth some more credible evidence of non-receipt. *See, e.g., In re Maxwell*, 281 B.R. 101 (Bankr. D. Mass. 2002) (discussing shifting burden of proof of receipt).

Improper disclosure of the amount of the finance charge is a material violation for purposes of rescission. 15 U.S.C. § 1602(u). Likewise, failure to provide the material disclosures in the required manner, e.g., clearly and conspicuously, extends the rescission right. 15 U.S.C. § 1632(a); Reg. Z § 226.17(a). If a disclosure is capable of more than one plausible interpretation, it is not "clear." *See, e.g., Williams v. Empire Funding Corp.*, 109 F.Supp.2d 352 (E.D. Pa. 2000) (holding where financing agreement contained two paragraphs, one of which provided information about a three-day right to cancel, and the other of which discussed a one-day right to cancel, the TILA notice was not clearly and conspicuously disclosed).

In this case, where the final TILA disclosure did not include private mortgage insurance as required insurance for the loan transaction, and other loan documents listed the private mortgage insurance, such disclosure was not clear and conspicuous. These facts are sufficient to survive the instant motion to dismiss. The court notes that TILA is a strict liability statute and the consumer's actual knowledge is irrelevant if the disclosures were not given in the proper form. *Cf. Gibbons v. Interbank Funding Group*, 208 F.R.D. 278 (N.D. Cal. 2002) (noting that TILA is liberally construed and even technical or minor violations impose liability on the creditor).

Real Estate Settlement Procedures Act

The relevant portions of the Real Estate Settlement Procedures Act provide as follows:

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

12 U.S.C. § 2605(e)(1)(A).

> Not later than 60 days (excluding legal public holidays, Saturdays, and Sundays) after the receipt from any borrower of any qualified written request under paragraph (1) and, if applicable, before taking any action with respect to the inquiry of the borrower, the servicer shall –
> (A) make appropriate corrections in the account of the borrower, including the crediting of any late charges or penalties, and transmit to the borrower a written notification of such correction (which shall include the name and telephone number of a representative of the servicer who can provide assistance to the borrower);
> (B) after conducting an investigation, provide the borrower with a written explanation or clarification that includes –
>
> > (i) to the extent applicable, a statement of the reasons for which the servicer believes the account of the borrower is correct as determined by the servicer;
> > and
> > (ii) the name and telephone number of an individual employed by, or the office or department of, the servicer who can provide assistance to the borrower; or
>
> (C) after conducting an investigation, provide the borrower with a written explanation or clarification that includes –
>
> > (i) information requested by the borrower or an explanation of why the information requested is unavailable or cannot be obtained by the servicer; and
> > (ii) the name and telephone number of an individual employed by, or the office or department of, the servicer who can provide assistance to the borrower.

12 U.S.C. § 2605(e)(2). One court found that a mortgage servicer's failure to correct an error in the mortgagors' account within 60 days after receiving the mortgagors' qualified written request violated the time requirements of RESPA, even though the servicer's failure to timely correct the error was unintentional and was caused by the servicer's need for information from the mortgagors' prior servicer. *Rawlings v. Dovenmuehle Mortg., Inc.*, 64 F.Supp.2d 1156 (M.D. Ala. 1999). The debtors' allegations relative to their attorney's inquiry involving escrowed funds are sufficiently plead to survive the defendant's motion to dismiss.

Misrepresentation

Under common law, justifiable reliance is an element of a claim for misrepresentation. *Ollerman v. O'Rourke Co.*, 94 Wis. 2d 17, 25, 43, 288 N.W.2d 95, 99, 108 (1980). When a party learns that a misrepresentation has been made prior to closing the transaction, the party is no longer deceived and, as a matter of law, can no longer rely upon a prior representation. *Lambert v. Hein*, 218 Wis. 2d 712, 732, 582 N.W.2d 84, 92 (Ct. App. 1998); *see also Foss v. Madison Twentieth Century Theaters, Inc.*, 203 Wis. 2d 210, 551 N.W.2d 862 (Ct. App. 1996) (holding once plaintiff learned of misrepresentation he was no longer deceived and, as a matter of law, could no longer rely on the prior representation). Here, the debtors found out about the private mortgage insurance at the time of closing but closed anyway. The debtors' brief alludes to misrepresentations of AAA Mortgage in its advertising, but no determination will be made with respect to these allegations unless and until they are properly part of the pleadings. Therefore, the plaintiffs' motions to dismiss the claims for misrepresentation against AAA Mortgage and GMAC are dismissed, without prejudice.

Wis. Stat. § 100.20 Methods of Competition and Trade Practices

Section 100.20(5) provides:

> Any person suffering pecuniary loss because of a violation by any other person of any order issued under this section may sue for damages therefor in any court of competent jurisdiction and shall recover twice the amount of such pecuniary loss, together with costs, including a reasonably attorney's fee.

Wis. Stat. § 100.20(5). Debtors' response to AAA Mortgage's motion to dismiss admits that § 100.20(5), Wis. Stats., may not apply, but asserts that § 100.18, Wis. Stats., (fraudulent representations/advertising) should apply. Therefore, the cause of action under § 100.20(5), Wis.

Stats., will be dismissed. Whether or not debtors can amend their complaint is a different issue, and will be decided upon proper presentation, i.e., a motion for leave to amend the complaint, by the plaintiffs.

CONCLUSION

For the reasons stated above, AAA Mortgage's motion to dismiss the debtors' cause of action under 15 U.S.C. § 1638(b)(1) is granted, with prejudice. AAA Mortgage's motion to dismiss debtors' cause of action for misrepresentation is granted, without prejudice. The debtors' cause of action under Wis. Stat. § 100.20(5) is withdrawn, and dismissal is granted. AAA Mortgage's motion to dismiss all other TILA actions is denied.

Likewise, GMAC Mortgage Corporation's motion to dismiss all RESPA and TILA causes of action is denied.

The court will issue an order consistent with this decision.

Dated: November 8, 2004.

BY THE COURT:

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Honorable Margaret Dee McGarity
Chief United States Bankruptcy Judge