

National Financing Law Digest™

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BANKRUPTCY	Bank's Lien On Debtor's Mobile Home Was Not Perfected And, Therefore, Was Avoidable.	2
	Labor Department's Wage And Overtime Action Is Excepted From Automatic Bankruptcy Stay	3
FORECLOSURE	Lenders' Sale Of Collateral Deemed Commercially Reasonable Despite Discrepancy Between Amount Of Bid And Appraisal Value Of Collateral	5
FRAUD	Physician Scammed Into Making Unsecured Loans Is Awarded \$800,000 In Damages.	7
LETTERS OF CREDIT	Evergreen Letter Of Credit Not Subject To Five-Year Expiration Period	9
STUDENT LOANS	Bankrupt Debtor Is Entitled To Discharge Of Her Student Loan Obligations Based Upon Undue Hardship	11
TILA	TILA Imposes Three-Year Statute Of Limitations On Rescission Claims	13
	State Law Fraud Claim Not Preempted By TILA Where Complaint Does Not Allege A TILA Or TILA-Type Violation	15

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BANKRUPTCY—BANK’S LIEN ON DEBTOR’S MOBILE HOME WAS NOT PERFECTED AND, THEREFORE, WAS AVOIDABLE

IN RE BARBEE

No. 10-8074 (U.S. Bankruptcy Appellate Panel, Sixth Circuit Dec. 12, 2011)

ISSUE: Did the bankruptcy court err in granting summary judgment in favor of a debtor seeking to avoid a bank’s lien on the debtor’s home?

FACTS: On Nov. 15, 1999, Gary Barbee and Rebecca Ruth Gaunce borrowed \$75,558.93 from Countrywide Home Loans Inc., repayment of which was secured by the grant of a mortgage lien in favor of Countrywide. The mortgage encumbered the real property and all improvements and fixtures located at 106 Vimont Street, Millersburg, Ky. On Oct. 22, 2009, the note and mortgage were assigned to BAC Home Loan Servicing (the bank).

Barbee and Gaunce used the proceeds of the loan to acquire the property from the estate of Joseph O’Nan. Barbee and Gaunce’s mobile home is located on the property. It is unclear as to whether a certificate of title has ever been issued for the mobile home.

On Nov. 11, 2009, Barbee filed a petition for relief under Chapter 13 of the Bankruptcy Code. Barbee filed a motion seeking derivative standing to file an adversary proceeding to avoid the bank’s lien on the mobile home. On May 17, 2010, the bankruptcy court granted Barbee’s motion.

Barbee filed an adversary complaint asserting that as a hypothetical lien creditor, he has superior title to the mobile home located on the property, and that any interest the bank has in the home is avoidable pursuant to 11 U.S.C. § 544 because the bank failed to perfect its lien on the home pursuant to Kentucky law. The bank and Barbee filed cross-motions for summary judgment.

Following oral argument, the bankruptcy court issued an order granting summary judgment in favor of Barbee and denying the bank’s motion for summary judgment. The bankruptcy court held that Barbee has standing to bring the avoidance action and that the bank’s lien on the home was avoidable because the lien was not noted on the certificate of title nor had the home been converted to real property. The bank appealed.

HELD: Summary judgment affirmed.

The Sixth Circuit affirmed the bankruptcy court’s entry of summary judgment in favor of the debtor on the ground that the creditor did not perfect its lien on the debtor’s mobile home and, therefore, the lien was avoidable:

The Bank’s assertion that the manufactured home is subject to the Bank’s mortgage lien as an improvement to real property is incorrect. Property interests are created and defined by state law unless some federal interest requires a different result. *Butner v. United States*, 440 U.S. 48, 55, 99 S.Ct. 914, 918, 59 L.Ed.2d 136 (1979). In Kentucky, a manufactured home is personal property for which a certificate of title is required. *See* Ky.Rev.Stat. Ann. § 186A.070(1); *see also* *Citizens Nat’l Bank of Jessamine Cnty. v. Washington Mut. Bank*, 309 S.W.3d 792, 796 (Ky. Ct. App. 2010). In order to perfect a lien on personal property, the lien must be noted on the certificate of title. *See* Ky.Rev.Stat. Ann. § 186A.190(2) (“[T]he sole means of perfecting and discharging a security interest in property for which a certificate of title is required by this chapter is by notation on the property’s certificate of title”); *see also* *In re Dickson*, 655 F.3d at 590; *Citizens Nat’l Bank*, 309 S.W.3d at 796. “However, a manufactured home may be converted from personal property to an improvement to real estate, KRS § 186A.297, thereby allowing perfection through first recording without notice, KRS § 382.110.” *In re Dickson*, 655 F.3d at 590. By filing an affidavit of conversion to real estate and surrendering the Kentucky certificate of title, a manufactured home will be deemed “ ‘an improvement to the real estate upon which it is located.’ ” *PHH Mortgage Servs. v. Higgason*, 345 B.R. 584, 586-87 (E.D. Ky. 2006) (quoting Ky.Rev.Stat. Ann. § 186A.297).

In *Dickson*, the Sixth Circuit held that a creditor can also obtain a perfected lien on a manufactured home by obtaining a state court order converting the manufactured home to an improvement to real property. *See Dickson*, 655 F.3d at 590-91. Thus, a creditor who is unable to obtain a lien on the certificate of title or an affidavit of conversion of the manufactured home to real property in accordance with Kentucky Revised Statute § 186A.297(1), can still obtain a perfected lien through the state court procedure used by the creditor in *Dickson*. It is undisputed that Debtor did not comply with Kentucky Revised Statute § 186A.297 by filing an affidavit of conversion and surrendering the certificate of title or by seeking a court order converting the property. Therefore, the manufactured home remained personal property, and the sole means of perfecting a lien on the home was by placing a notation of the lien on the certificate of title. It is undisputed that the Bank's lien was not noted on the certificate of title. Therefore, the Bank did not perfect its lien on Debtor's manufactured home.

* * * * *

... even if the Bank were correct in its position that it obtained a lien against the manufactured home by way of its mortgage, it did not perfect that lien. Therefore, the lien is avoidable pursuant to § 544.

BANKRUPTCY—LABOR DEPARTMENT'S WAGE AND OVERTIME ACTION IS EXCEPTED FROM AUTOMATIC BANKRUPTCY STAY

SOLIS v. SCA REST. CORP.

No. 09-02212 (U.S. District Court, Eastern District of New York Dec. 1, 2011)

ISSUE: Is a wage and overtime action brought by the U.S. Department of Labor (DOL) pursuant to the Fair Labor Standards Act (FLSA) stayed under the automatic stay provision pursuant to § 362 of the Bankruptcy Code?

FACTS: In an action brought against SCA Restaurant Corp. and its owner, Luigi Quarta, pursuant to §§ 16(c) and 17 of the FLSA, Hilda Solis, Secretary of the DOL, alleged the defendants violated §§ 7 and 15(a)(2) of the FLSA by failing to pay minimum wage and overtime compensation to the employees of SCA Restaurant Corp., and that the defendants violated § 11(c) and 15(a)(5) of the FLSA by failing to keep full and accurate records concerning their employees' wages, hours and conditions of employment. The DOL sought an injunction pursuant to § 17 of the FLSA permanently restraining the defendants from violating §§ 7, 11(c), 15(a)(2) and 15(a)(5) of the FLSA, and an order pursuant to § 16(c) finding the defendants liable for unpaid overtime compensation and an equal amount of liquidated damages.

After the DOL filed the action, Quarta filed for voluntary bankruptcy under Chapter 7 of the Bankruptcy Code. He then filed a motion, urging the district court to find that DOL's action was stayed under the automatic stay provision pursuant to § 362 of the Bankruptcy Code.

HELD: Motion denied.

The district court held that DOL's action was exempt from the automatic stay under the police and regulatory power exception set forth in § 362(b)(4) of the Bankruptcy Code:

Under 11 U.S.C. § 362(a)(1), the filing of a bankruptcy petition automatically stays the commencement or continuation of judicial proceedings against the debtor. ...

Section 362(b)(4) of the Bankruptcy Code provides an exception to the automatic stay for actions by a governmental unit to enforce its police or regulatory power. Specifically, it provides that the filing of a bankruptcy petition does not operate as a stay against:

commencement or continuation of an action or proceeding by a governmental unit ... to enforce such governmental unit's or organization's police and regulatory power, including the enforcement of a judgment other than a money judgment, obtained in an action or proceeding by the governmental unit to enforce such governmental unit's or organization's police or regulatory power.

11 U.S.C. § 362(b)(4). ...

In attempting to apply the § 362(b)(4) exception, courts look to the purposes of the law that the government seeks to enforce to distinguish between situations in which a “state acts pursuant to its ‘police and regulatory power,’ and where the state acts merely to protect its status as a creditor.” *Safety-Kleen, Inc. v. Wyche (In re Pinewood)*, 274 F.3d 846, 865 (4th Cir. 2001) (quoting *Universal Life Church, Inc. v. United States (In re Universal Life Church Inc.)*, 128 F.3d 1294, 1297 (9th Cir. 1997)); *United States ex rel. Fullington v. Parkway Hosp. Inc.*, 351 B.R. 280, 282-83 (E.D.N.Y. 2006). Two tests have been historically applied to resolve this question: (1) the “pecuniary purpose” test (also known as the “pecuniary interest” test), and (2) the “public policy” test. *See In re Methyl Tertiary Butyl Ether (“MTBE”) Products Liab. Litig.*, 488 F.3d 112, 133 (2d Cir. 2007); *Universal Life Church*, 128 F.3d at 1297; *Parkway Hosp.*, 351 B.R. at 283; *see also In re Chateaugay Corp.*, 115 B.R. 28, 31 (Bankr. S.D.N.Y. 1988). Under the pecuniary purpose test, a court looks to whether a governmental proceeding relates to public safety and welfare, which favors application of the stay exception, or to the government’s interest in the debtor’s property, which does not. *See MTBE*, 488 F.3d at 133; *Lockyer v. Mirant Corp.*, 398 F.3d 1098, 1108-09 (9th Cir. 2005)....

Other courts have backed away from the “pecuniary purpose” test, and apply a broader “pecuniary advantage” test. *United States v. Commonwealth Cos. (In re Commonwealth Cos.)*, 913 F.2d 518, 523-25 (8th Cir. 1990); *see also United States ex rel. Jane Doe 1 v. X Inc.*, 246 B.R. 817, 820 (E.D. Va. 2000). Under the “pecuniary advantage” test, the relevant inquiry is not whether the governmental unit seeks property of the debtor’s estate, but rather whether the specific acts that the government wishes to carry out would create a pecuniary advantage for the government vis-à-vis other creditors. *See Commonwealth Cos.*, 913 F.2d at 523; *Jane Doe 1*, 246 B.R. at 820. Thus, the “pecuniary advantage” analysis has been used as an alternative formulation of the first test.

The second test—namely, the public policy test—distinguishes “ ‘between proceedings that adjudicate private rights and those that effectuate public policy.’ ” *Chao v. Hosp. Staffing Servs. Inc.*, 270 F.3d 374, 385-86 (6th Cir. 2001) (quoting *In re Commerce Oil Co.*, 847 F.2d 291, 295 (6th Cir. 1988)); *see Eddleman*, 923 F.2d at 791. An action may further both public and private interests. Where “an action furthers both public and private interests,” reviewing courts should exempt the action from the automatic stay if “the private interests do not significantly outweigh the public benefit from enforcement.” *Chao*, 270 F.3d at 390.

* * * * *

The Second Circuit has not yet ruled on which test to apply. ...

However, in an abundance of caution, the Court has examined the facts of this case under each of the above-referenced tests and concludes ... that the § 362(b)(4) exception applies in the instant case regardless of which test is utilized. In other words, the instant lawsuit is exempt from the automatic stay under both the first test—whether the “pecuniary purpose” test or the “pecuniary advantage” test is utilized—as well as the “public policy” test. *See, e.g., In re Trinity Meadows Raceway Inc.*, Adversary No. 06-04165, 2007 WL 2713920, at *6 n. 29 (N.D. Texas Sept. 11, 2007) ...

* * * * *

In sum, the DOL brings this action under Sections 16(c) and 17 of the FLSA to serve the valid public policy purposes of enjoining further violations of the FLSA, protecting labor condi-

tions, preventing unfair competition in the labor market, and deterring unlawful behavior by others. Successful prosecution of this action will not create a pecuniary interest for the government in the debtor's property, nor will it result in a pecuniary advantage to the government over other creditors. Accordingly, this action is exempt from the automatic stay under § 362(b)(4), the police and regulatory power exemption.

FORECLOSURE—LENDERS' SALE OF COLLATERAL DEEMED COMMERCIALLY REASONABLE DESPITE DISCREPANCY BETWEEN AMOUNT OF BID AND APPRAISAL VALUE OF COLLATERAL

IN RE ADOBE TRUCKING INC.

No. 10-70353 (U.S. Bankruptcy Court, Western District of Texas Dec. 15, 2011)

ISSUE: Was a bank's personal property foreclosure sale of collateral securing a credit agreement commercially reasonable?

FACTS: Adobe Drilling Services Ltd. (Drilling) and Adobe Trucking Inc. (Trucking) (collectively, the Adobe defendants) are two of four Adobe companies under common ownership based in Odessa, Tex. Prior to 2009, Drilling provided contract drilling services and equipment to customers in west Texas and in southeast New Mexico. Trucking supported Drilling with a fleet of trucks and trailers, forklifts, loaders and other equipment. Trucking's equipment was used to transport, mobilize and demobilize drilling rigs for Drilling.

On Dec. 28, 2006, Drilling and Trucking entered into a revolving credit and security agreement (the credit agreement) for a \$37,500,000 five-year revolving credit facility with various financial institutions (collectively, the lenders). The credit agreement provided that New York law would control. PNC Bank N.A. was the lead bank and served as agent for the lenders. After defaults by the Adobe defendants, the parties amended the credit agreement two times to cure the defaults and increase the revolving credit available to the Adobe defendants to \$47,500,000. To secure the obligations of the Adobe defendants under the credit agreement, the lenders were granted a security interest in all of the assets of the Adobe defendants, including equipment and inventory (the collateral).

To ensure the priority of the lenders' security interest, PNC obtained two landlord waiver agreements at the time the credit agreement was executed. The first landlord waiver covered the premises located at 8124 Sprague Road in Odessa, Tex., and was signed by another Adobe related entity, the third-party defendant, Mesquite Bean Properties Inc. and the plaintiff, Adobe Oilfield Services Ltd. (AOS). The second landlord waiver covered the premises located at 960 South Pagewood in Odessa, Tex. It was signed by Mesquite, AOS and Adobe Ironworks Ltd. (Ironworks). Pursuant to the landlord waiver agreements, Mesquite, AOS and Ironworks subordinated any present or future liens they may have in the collateral to the lenders and agreed that PNC could enter the respective premises at any time to remove the collateral.

In December 2008, the Adobe defendants were in default under the credit agreement. PNC and the lenders chose to exercise their default remedies. On Dec. 31, 2008, PNC's counsel sent the Adobe defendants a foreclosure notice stating that a public foreclosure sale of the collateral would occur at 11:00 a.m. on Jan. 16, 2009. The Adobe defendants did not pay the obligations owed to the lenders. PNC repeatedly requested possession of the collateral prior to the foreclosure sale but the Adobe defendants did not comply. PNC's counsel published a notice of sale in three local Dallas newspapers that ran for one day.

Before PNC foreclosed on the collateral, AOS and Ironworks (collectively, the Adobe plaintiffs) filed suit in state court against the Adobe defendants and PNC claiming liens on the collateral for repair work, maintenance and related services that the Adobe plaintiffs provided. The Adobe defendants filed a cross-claim against PNC.

PNC was the winning bidder for all the collateral at the foreclosure sale, with a credit bid of \$41 million. On Jan. 16, 2009, pursuant to a transfer statement and bill of sale and assignment, PNC transferred all of its right, title and interest in the collateral to Land Holding L.L.C., an affiliate of PNC that holds and disposes of foreclosed assets. The bill of sale authorized PNC to take possession of the collateral and enforce Land Holding's rights to the collateral.

On Mar. 13, 2009, the state court signed a temporary injunction enjoining Mesquite and the Adobe plaintiffs from taking any action to interfere with or prevent PNC or its agents from entering the premises and removing the foreclosed collateral. PNC subsequently removed all of the collateral from both premises and auctioned it off for a net recovery of \$9,723,788. Trucking filed a case under Chapter 11 of the Bankruptcy Code and the adversary proceeding was removed from state court. The Adobe defendants filed a cross-claim alleging that PNC's foreclosure sale was not commercially reasonable.

HELD: Defendants' cross-claims denied.

The U.S. Bankruptcy Court for the Western District of Texas held that the lenders' sale of the assets was commercially reasonable under the proceeds and procedures analysis:

The Adobe Defendants claim that the foreclosure sale of the Collateral securing the \$47.5 million line of credit extended under the Credit Agreement was commercially unreasonable under the governing New York law. New York courts accept both the proceeds and procedures tests as valid and often apply both in the evaluation of a sale. In order for the sale at issue to be deemed commercially reasonable, this Court must be satisfied that the proceeds obtained were adequate and the procedures employed by the Lenders were undertaken in good faith to maximize return on the Collateral.

* * * * *

The Adobe Defendants complain about the amount of the Lenders' winning credit bid at the foreclosure sale. Under the proceeds analysis, however, "a significant discrepancy between the original purchase price and the sales price does not, by itself, create a triable issue of fact." *First Fed. Sav. & Loan Ass'n of Rochester v. Romano*, 253 A.D.2d 363, 676 N.Y.S.2d 163, 164 (1st Dept. 1998). Property offered at a foreclosure sale frequently produces a price substantially less than market value because such sales are of little interest to the public and those who bid seek to buy at bargain prices. *Polish Nat'l Alliance v. White Eagle Hall Co.*, 98 A.D.2d 400, 470 N.Y.S.2d 642, 650 (2d Dept. 1983). "Courts have consistently declined to disturb a foreclosure sale upon a challenge to amount recovered for the collateral, except in the narrow circumstance where the price alone is so inadequate as to shock the court's conscience." *DeRosa v. Chase Manhattan Mortg. Corp.*, 10 A.D.3d 317, 782 N.Y.S.2d 5, 9 (1st Dept. 2004).

* * * * *

Here, the sale price was more than 50% of what the Adobe Defendants argue was the Collateral's market value. In addition, PNC's appraiser who testified at trial estimated the value at \$33.85 million, which is actually *less* than the PNC credit bid. PNC's appraisal from a different appraiser, prepared well before the foreclosure sale and upon which the Adobe Defendants rely, was admitted by the appraiser in his deposition to be too high in light of the rapidly declining oil and gas market in the fall of 2008 and January, 2009. The \$81 million appraisal must be discounted by a factor of 25% to 35% because the price of oil and gas plummeted, and had a similar effect on the value of drilling rigs and related equipment. Finally, upon resale by an auctioneer who advertised the sale, moved the Collateral to a convenient place for sale, and repaired, painted, and set up the Collateral, the price obtained was \$31 million less than the PNC credit bid at the foreclosure sale. The sale was commercially reasonable under the proceeds test.

The Adobe Defendants complain that PNC did not sufficiently advertise the foreclosure sale by failing to otherwise advertise the sale in any trade journals, the *Wall Street Journal*, or on the internet. New York law, however, does not require that a seller advertise a foreclosure sale in any specific type of media or for any particular amount of time. *See DeRosa*, 782 N.Y.S.2d at 9 (holding that it was not unreasonable for secured party to advertise in newspaper published outside county of sale). In the present case, the Credit Agreement expressly provided that it is not commercially unreasonable for PNC, as the Lenders' agent, "to advertise dispositions of Collateral through publications or media of general circulation, whether or not the Collateral is of a specialized nature... ." Credit Agreement, § 11.1(b)(v).

* * * * *

PNC's sale of Adobe's assets was commercially reasonable. Under the proceeds analysis, the sale was commercially reasonable because PNC's credit bid of \$41 million was roughly equal to the value of the Collateral on the foreclosure date. At worst, the bid was 67% of the value of the Collateral. Under the procedures analysis, the sale was commercially reasonable because the standards set forth in the Credit Agreement were not manifestly unreasonable and PNC fully complied with its terms. . . .

FRAUD—PHYSICIAN SCAMMED INTO MAKING UNSECURED LOANS IS AWARDED \$800,000 IN DAMAGES

LIU v. WONG

No. A128668 (California Court of Appeal Dec. 8, 2011) *unpublished*

ISSUE: Did a jury err in awarding damages for breach of contract, fraud, intentional infliction of emotional distress and punitive damages to a Chinese physician scammed into making unsecured loans?

FACTS: Ning Liu, a Chinese physician, brought an action against William Wong arising out of loans Liu made to Wong between 1999 and 2007. Liu alleged Wong induced her to make unsecured loans to him using both her own funds and the life savings of her family members in China, promising to use the money to purchase foreclosed properties so that Liu's family would have a place to live when they came to the United States, and also promising to pay specific above-market interest on the loaned amounts. Liu further asserted Wong never intended to repay her or to transfer any of the foreclosed real properties he purchased with the funds to her.

The jury unanimously awarded Liu damages of \$311,000 for breach of contract, \$52,000 for fraud and \$115,000 for intentional infliction of emotional distress. In a second phase of trial, the jury awarded Liu an additional \$410,000 in punitive damages. The total judgment against Wong amounted to \$888,000. Wong appealed, raising numerous claims of error, including: (1) Liu was not a real party in interest and lacked standing to assert claims against Wong; (2) the amount awarded for breach of contract was without foundation; (3) the jury improperly awarded damages for fraud and emotional distress on what was merely a breach of contract case; (4) the finding of liability and the award of damages for intentional infliction of emotional distress were not supported by substantial evidence and the damage award was excessive; (5) the award of damages for fraud was unsupported by substantial evidence and was excessive; (6) the award of punitive damages was unsupported by substantial evidence and the amount awarded was excessive; and (7) the judgment improperly awarded punitive damages for non-tortious conduct.

HELD: Affirmed as modified.

The court of appeal held Wong's claims of error were without merit, except the claim that the jury awarded a double recovery for breach of contract and fraud; thus, the damage award attributable to fraud must be reduced by \$50,000:

Wong contends that the calculation of damages for the breach of contract claim was without foundation. We disagree. Evidence was presented, both in the form of promissory notes, post-dated checks, and testimony, that supported Liu’s claim that she had loaned Wong cash of at least \$184,000 from 1999 to 2007, and that the accrued interest on these transactions, which Wong affirmed by his post-dated checks and in the renewed promissory notes, amounted to a total debt of at least \$311,000. Wong contends that the five promissory notes reflect principal amounts of approximately \$248,000 and that no other damages were claimed with regard to the breach of contract. He contends the jury should have determined the amount of principal due and the judge should have added the appropriate amount of interest. We disagree.

The debt owed was the amount of principal plus interest on the loans to the date of trial. Liu’s daughter also testified that the amount Wong owed was “around \$180,000 U.S. dollars” and that the total was “almost \$310,000 U.S. dollars approximate interest.” The closing arguments that likely contained counsel’s interest calculations were not transcribed and are not before us. However, the parties appear to agree on appeal that the debts evidenced by the promissory notes and the post-dated checks totaled \$248,454 as of June 2007. Wong also agreed to pay Liu interest at a rate of 8 percent per year. Therefore, by the end of trial in March 2010, Liu calculates the total amount of damages Wong owed was \$317,153. The evidence presented as to the principal amounts Liu loaned to Wong, the interest rates, and Wong’s reaffirmation of those debts evidenced by the post-dated checks and promissory notes, support the jury verdict here. Wong has failed to demonstrate that it was erroneous for the jury to include the calculation of interest to the dates of trial as part of the amounts owing under the contract. Nor has Wong demonstrated any prejudice to himself from any error.

* * * * *

Wong contends that the jury improperly awarded damages for fraud and emotional distress on what was merely a breach of contract claim. We disagree. ...

* * * * *

Substantial evidence supports the jury verdict holding Wong liable for both breach of contract and intentional misrepresentation.

* * * * *

...Wong also argues that the jury awarded double recovery by awarding, in addition to contract damages, \$52,000 for fraud. “The general theory of compensatory damages bars double recovery for the same wrong.” (6 Witkin, Summary of Cal. Law, Torts, (10th ed.2005) § 1550, p. 1023; *Tavaglione v. Billings* (1993) 4 Cal.4th 1150, 1159; Hersh and Smith, Cal. Civil Practice Torts (2011) § 5:20 .) As recognized by our Supreme Court, the rule against double recovery of tort and contract compensatory damages may limit recovery of damages where an action may proceed both for breach of contract and for tort. (*Lazar v. Superior Court, supra*, 12 Cal.4th at p. 638; *Tavaglione v. Billings* at p. 1159.) “In contrast, where separate items of compensable damage are shown by distinct and independent evidence, the plaintiff is entitled to recover the entire amount of his damages, whether that amount is expressed by the jury in a single verdict or multiple verdicts referring to different claims or legal theories. [Citations.]” (*Tavaglione v. Billings* at p. 1159.)

Liu does not address the question of double recovery of tort and contract damages here, except in noting that she suffered intentional infliction of emotional distress, began taking medication in order to sleep, missed work as a result of Wong’s actions and incurred at least \$2,000 in medical expenses related to psychological counseling. The \$2,000 in medical expenses were recoverable under either the fraud or intentional infliction of emotional distress theories and we shall assume, consistent with the standard of review, that they were awarded for the former. The remaining \$50,000 fraud damages described by Liu relating to her emotional distress were, presumably, covered in the award of \$115,000 damages for intentional

infliction of emotional distress. Apart from the \$2,000 medical expenses, Liu points to no *additional* damages suffered from the fraud apart from her emotional distress damages and the damages awarded on the breach of contract theory. Although the jury could have awarded damages on Liu’s fraud theory rather than the breach of contract theory, or could have awarded damages on both, up to the total damages shown, the record shows that \$50,000 of the damages award violated the rule against double recovery. Therefore, we shall reverse that amount of the fraud damages award.

* * * * *

Emotional distress damages may be recovered in intentional fraud cases such as this. ...

* * * * *

Substantial evidence supported the jury’s finding Wong liable for intentionally causing Liu severe emotional distress.

* * * * *

There is some question whether the amount of emotional distress damages must be tied to economic damages or simply proportionate to the distress suffered by the plaintiff. [cites]. We needn’t trouble with that question here as the amount of emotional distress damages awarded here were reasonably proportionate to the \$313,000 compensatory economic damages award.

* * * * *

Wong attacks the \$410,000 punitive damages award as unsupported by substantial evidence. He asserts that the record at trial is “seriously deficient of any substantial evidence demonstrating that [he] committed wrongful acts of such a despicable nature to justify a punitive damages award.” Once again, we disagree.

* * * * *

Viewing the entire record most favorably to the judgment, we conclude that the punitive damages award was not the result of passion and prejudice (*Bardis v. Oates* (2004) 119 Cal.App.4th 1, 25), and that the amount awarded was not excessive. (*Bullock v. Philip Morris USA Inc.*, *supra*, 198 Cal.App.4th at pp. 558-559.)

LETTERS OF CREDIT—EVERGREEN LETTER OF CREDIT NOT SUBJECT TO FIVE-YEAR EXPIRATION PERIOD

MICHIGAN COMMERCE BANK v. TDY INDUS. INC.
 No.11-235 (U.S. District Court, Western District of Michigan Dec. 1, 2011)

ISSUE: Was an irrevocable letter of credit (LOC) issued by a bank to a purchaser of real property a “perpetual” letter of credit that expired after five years?

FACTS: Michigan Commerce Bank issued an irrevocable LOC on Oct. 10, 2002, in connection with the sale of certain real property located in Muskegon, Mich. The seller of the real property was TDY Industries Inc. and the purchaser was Lakefront Development L.L.C. (LFD). The LOC irrevocably authorized TDY to draw on the bank for sums not to exceed \$1.7 million.

An environmental remediation agreement (agreement) was attached to the LOC. In the agreement, TDY agreed to pursue a remedial action plan with the Michigan Department of Environmental Quality (MDEQ) for purposes of bringing the real estate into environmental compliance. LFD is obligated to pay the purchase price for the property once TDY obtains government approval of the re-

medial action plan. No version of the remedial action plan has been approved by the MDEQ. In addition, TDY has never presented a draft or otherwise attempted to collect under the LOC.

On Feb. 3, 2011, the bank filed a complaint for declaratory judgment seeking a declaration that it is not obliged to honor drafts under the LOC because the LOC expired by operation of law pursuant to §5-106 of the Michigan Uniform Commercial Code (UCC). The parties filed cross-motions for summary judgment.

HELD: Defendant’s motion for summary judgment granted.

The U.S. District Court for the Western District of Michigan found in favor of the defendant on the bank’s request for a declaration that the LOC is perpetual and, therefore, expired after five years:

The Bank’s first contention is that the LOC expired after five years, because it is a “perpetual” letter of credit within the meaning of U.C.C. § 5-106(d), MICH. COMP. LAWS § 5106(4). This argument misconstrues the provisions of the Uniform Commercial Code, is contrary to the only appellate decision on the subject, and is supported by no authority.

* * * * *

The courts and commentators have widely recognized that “evergreen clauses” fall within the second type of agreed-upon duration contemplated by section 5-106(c)—a provision determining the duration of the letter. An evergreen clause is a term in a letter of credit providing for automatic renewal of the credit. *See Molter Corp. v. Amwest Surety Ins. Co.*, 267 Ill.App.3d 718, 205 Ill.Dec. 54, 642 N.E.2d 919, 921 (Ill. Ct. App. 1994). “An evergreen clause in a letter of credit reflects the parties’ intent to make credit available for an indefinite period of time.” *Id.*; *accord P.A. Bergner & Co. v. Bank One Milwaukee N.A. (In re P.A. Bergner & Co.)*, 140 F.3d 1111, 1114-15 (7th Cir. 1998); *see generally* JOHN F. DOLAN, THE LAW OF LETTERS OF CREDIT ¶ 5.03[3][F] EVERGREEN CLAUSESS (4th ed.2007). The provisions of section 3 of the LOC in the present case clearly establish an evergreen letter, as section 3(a) provides that the initial term of the letter extends to March 10, 2003, “after which this Letter of Credit shall automatically renew on a month to month basis.” (ID# 121). The parties thereby exercised their freedom of contract under section 5-106(c) to adopt an “other provision that determines [the LOC’s] duration.”

* * * * *

If the Bank’s construction were adopted, every evergreen letter of credit would be subject to a five-year durational requirement. As evergreen clauses are a commonplace in standby letters of credit, one would expect that the Bank would be in a position to cite a case, or even a respected commentary, for the proposition that evergreen letters of credit are in effect “perpetual” and therefore subject to a five-year duration. To the contrary, the only available authority is directly opposed to the Bank’s arguments. The parties have both cited the recent Ninth Circuit decision in *Golden West Refining Co. v. SunTrust Bank*, 538 F.3d 1233 (9th Cir. 2008). Despite the Bank’s efforts to distinguish *Golden West*, it is directly on point. The letter of credit in that case had a one-year duration, but contained an evergreen clause under which the letter “shall be deemed automatically renewed without amendment for additional one-year periods,” subject to the *beneficiary’s* ability to cancel. 538 F.3d at 1235. SunTrust presented the same argument that plaintiff advances in the present case: that the letter of credit was perpetual under article 5 and therefore expired five years after it was issued. The Ninth Circuit held that “the plain language of U.C.C. § 5-106(d) requires that a letter of credit state that it is perpetual to qualify as a perpetual letter of credit.” *Id.* at 1237. The court conceded that the exact word “perpetual” was not necessary, as long as the letter used “synonyms that clearly declare that the letter of credit will remain outstanding in perpetuity.” *Id.* at 1238. The court went on to say that it is “essential that the words of the letter of credit definitively provide that it will continue in perpetuity.” *Id.* The court found that the letter of credit did not “state” that it was perpetual. To adopt SunTrust’s interpretation, which would subject evergreen letters to the five-year duration provision of section

5-106(d) “would introduce grave uncertainties into the use of letters of credit and impair their utility for domestic or foreign commerce.” *Id.* at 1239. The court further noted that SunTrust’s construction of section 5-106(d) would make section 5-106(c) superfluous. *Id.* Section 5-106(c) allows the parties to avoid expiration of a letter of credit by including in the letter “a provision that determines its duration.” This would be overridden by SunTrust’s interpretation, which would allow subsection (d) to trump the parties’ express exercise of their rights under subsection (c) to determine the duration of the letter. *Id.*

* * * * *

When read as a whole, the LOC in this case discloses clear limits on its duration. Paragraph 3 provides for an expiration date, as well as renewing terms on a month-to-month basis, but this does not state or imply that the letter is “perpetual.” The letter, after all, merely guarantees the obligation of Lakefront Development to pay for the parcel of land that it purchased from TDY, the beneficiary of the letter of credit. Hence, paragraph 2 of the LOC provides that its face amount decreases as TDY received proceeds from the sale of real estate. The method that the parties chose under section 5-106(c) to define the duration of the letter is to tie it to the duration of the underlying real estate sales transaction. In no sense can this letter of credit be construed to “state” that it is perpetual. “Indefinite” is not synonymous with “perpetual.”

The Bank would transform article 5 from a gap-filling statute to a legislative diktat designed to protect banks from themselves. To be sure, it is unwise business practice for a bank to burden its balance sheet with a long-term letter of credit. But unwise is not illegal. Although article 5 prevents banks from *inadvertently* issuing indefinite letters, by providing that a letter without an expiration date expires in one year, U.C.C. § 5-106(c), banks are free to contract expressly for longterm letters, and beneficiaries are entitled to rely on the banks’ undertaking. With the exception of letters that expressly state a “perpetual” duration, freedom of contract remains the rule.

The Bank has not borne its burden of showing that the LOC has expired by operation of law. Judgment will therefore be entered on behalf of defendant, declaring that the LOC has not expired.

STUDENT LOANS—BANKRUPT DEBTOR IS ENTITLED TO DISCHARGE OF HER STUDENT LOAN OBLIGATIONS BASED UPON UNDUE HARDSHIP

IN RE SHAFFER

No. 10-30109 (U.S. Bankruptcy Court, Southern District of Iowa Dec. 1, 2011)

ISSUE: Is a bankrupt debtor entitled to a discharge of her student loan obligations pursuant to 11 U.S.C. § 523(a)(8), which provides that a student loan cannot be discharged unless an undue hardship for the debtor is demonstrated?

FACTS: Susan Shaffer (the Debtor) began her college education as a freshman at the University of Northern Iowa in Cedar Falls, Iowa. At the end of her first year, Shaffer returned to Iowa City, Iowa to be closer to her family, and in August 1995 she became a student at the University of Iowa (U of I). She attended the U of I as both a full-time and part-time student until 2002 when she received a Bachelor of Arts degree in Psychology. She also attended Kirkwood Community College at various intervals to obtain pre-pharmacy credits and to remain qualified under her parent’s health insurance coverage.

Since her mid-teens, the Debtor has been challenged by mental health conditions, including eating disorders, depression, self-harm and anxiety. Consequently, her higher education has been impacted as demonstrated by a delay in obtaining her bachelor’s degree and a low grade point average which resulted in three semesters being removed from her academic record at the U of I.

Shaffer enrolled as a full-time student at the Palmer College of Chiropractic Medicine in Davenport, Iowa in March 2007. She left this program in June 2008, prior to completing her degree. During this time, Shaffer's moods affected her decisions, but not her grades. The Debtor explained her primary reason for leaving her dream of becoming a chiropractor was due to the fact that she realized she would never be able to repay her outstanding student loans.

To fund her education, the Debtor obtained loans which now total approximately \$204,525. Not including current interest accruals, the U.S. Department of Education (DOE) was owed \$57,489.11; Education Credit Management Corp. (ECMC) was owed \$47,900; and Iowa Student Loan Liquidity Corp. (ISLLC) was owed \$99,136. At various intervals, payment deferments have been granted to the Debtor.

After leaving Palmer, the Debtor returned to Iowa City to live with her mother. She became employed at the U of I in the Women's Health Clinic in November 2008. Fearing she would be laid off by the U of I, she sought other employment. In August 2009, she began working as an accounts receivable specialist at precision revenue strategies (PRS). The Debtor's duties required her to contact insurance companies to resolve claims. The job was stressful, and Shaffer began to experience medical issues which resulted in two leaves of absence and hospitalization for depression, for which she received disability insurance payments.

Believing she would be terminated at PRS, Debtor voluntarily left this job. To meet her living expenses, the Debtor worked at temporary employment, cashed in retirement funds, utilized the disability insurance payments and accepted contributions from family members. Eventually, she obtained employment at the U of I as a clerk for which she was to receive 90% of a full-time salary of \$26,975 plus pro-rated benefits.

On Apr. 15, 2010, the Debtor filed a voluntary Chapter 7 proceeding. She commenced an adversary proceeding on July 23, 2010, seeking discharge of her student loan obligations pursuant to 11 U.S.C. § 523(a)(8). The named defendants included the DOE and ISLLC. A motion to intervene was granted as to ECMC. A trial on the complaint was then conducted.

HELD: So ordered.

The district court held that the Debtor established an undue hardship and the student loans owing to the DOE, ECMC and ISLLC were entitled to be discharged:

Treatment of student loans in a bankruptcy proceeding is governed by 11 U.S.C. section 523(a)(8), which provides in relevant part, that educational loans or those made, insured or guaranteed by a governmental unit are not discharged unless an undue hardship for the debtor or debtor's dependents is demonstrated. "The policy of this provision [is] clear. Congress intended to prevent recent graduates who were beginning lucrative careers and wanted to escape their student loan obligations from doing so." *Long v. Educ. Credit Mgmt. Corp. (In re Long)*, 322 F.3d 549, 554 (8th Cir. 2003). ... The concept of "undue hardship" is not defined by the bankruptcy code. The Eighth Circuit has adopted an analysis involving the totality of a debtor's circumstances for the purpose of determining undue hardship. See *Walker v. Sallie Mae Servicing Corp. (In re Walker)*, 650 F.3d 1227, 1230 (8th Cir. 2011); *In re Long*, 322 F.3d at 554; *Andrews v. S.D. Student Loan Assistance Corp. (In re Andrews)*, 661 F.2d 702, 704 (8th Cir. 1981); *Sederlund v. Educ. Credit Mgmt. Corp. (In re Sederlund)*, 440 B.R. 168, 171 (B.A.P. 8th Cir. 2010). Undue hardship can be substantiated by a showing of a disability that prevents meaningful employment or by a verified inability to pay based upon income and living expenses.

* * * * *

This is not a case where a disability or physical condition precludes gainful employment. This is also not a case where the debtor has a lack of some skills to obtain employment. However, it appears that Shaffer has been unable to be employed in the area of her undergraduate degree, does not have the requisite management experience to obtain higher paying employ-

ment, and does have medical conditions that impact her ability to perform in stressful environments. These facts taken as a whole do not result in a finding that the Plaintiff's income limitations are "self-imposed." *See Sederlund v. Educ. Credit Mgmt. Corp. (In re Sederlund)*, 440 B.R. 168, 175 (B.A.P. 8th Cir. 2010) (court not discharging student loans when debtor's income limitations were self-imposed). While Debtor's employment and education decisions may not have been objectively reasonable, the fact remains that even under the available payment options, Shaffer does not have the ability, based upon her education and employment history, to make payments on the student loans and maintain a minimal standard of living.

TILA—TILA IMPOSES THREE-YEAR STATUTE OF LIMITATIONS ON RESCISSION CLAIMS

SOBIENIAK v. BAC HOME LOANS SERVICING L.P.

No. 11-110 (U.S. District Court, District of Minnesota Dec. 8, 2011)

ISSUE: Are defendant banks entitled to dismissal of borrowers' claims seeking rescission of their mortgage under the Truth in Lending Act (TILA)?

FACTS: Stephen J. Sobieniak and Victoria McKinney (the plaintiffs) contacted Countrywide Home Loans Inc. and requested to convert a previous adjustable rate mortgage loan to a conventional fixed rate loan. On Mar. 22, 2007, the plaintiffs executed a promissory note with a principal value of \$562,600 and a fixed annual percentage rate of 5.875%, leading to a total payment amount of \$1,198,077. The note was secured by the plaintiffs' principal residence, located at 3399 Crystal Bay Road, Wayzata, Minn. At closing, the plaintiffs each signed two copies of a notice of right to cancel attesting that "each acknowledge receipt of two copies of *NOTICE of RIGHT TO CANCEL* and one copy of the federal Truth in Lending Disclosure Statement." The plaintiffs each also signed and "acknowledge[d] reading and receiving a complete copy of [the TILA disclosure statement]."

On Jan. 15, 2010, the plaintiffs sent notice of rescission to Countrywide and BAC Home Loans Servicing L.P. The notice instructed BAC to provide documentation "[i]f you believe that you are not required to rescind." BAC denied the request to rescind based on the signed copies of the notices of right to cancel and TILA disclosures.

On Jan. 14, 2011, the plaintiffs sued Countrywide and BAC seeking rescission, damages and a declaration that the mortgage is void. The defendants move to dismiss for failure to state a claim.

HELD: Motion to dismiss granted.

The U.S. District Court, District of Minnesota granted the defendants' motions on the ground that the plaintiffs did not file suit until nearly four years after consummation of the transaction and, therefore, their TILA claim is time-barred:

Defendants argue that plaintiff's signatures attesting receipt of the required number of notices and disclosures create a rebuttable presumption of receipt. *See* 15 U.S.C. § 1635(c). Plaintiffs respond that they kept the transaction documents together in a safe place and that they "did not receive a *signed copy* of Truth in Lending Disclosure Statement." Sobieniak Aff. ¶¶ 3-4, Aug. 12, 2011 (emphasis added). Merely contradicting a prior signature does not overcome the statutory presumption. *See, e.g., Siffel v. NFM*, 386 F. App'x 169, 170-71 (3d Cir. 2010); *Sibby v. Ownit Mortg. Solutions, Inc.*, 240 F. App'x 713, 717 (6th Cir. 2007); *McCarthy v. Option One Mortg. Corp.*, 362 F.3d 1008, 1011 (7th Cir. 2004) (finding mere assertion of non-receipt insufficient to rebut written evidence that disclosures were provided); *Williams v. First Gov't Mortg. & Investors Corp.*, 225 F.3d 738, 751 (D.C. Cir. 2000); *Williams v. GM Mortg. Corp.*, No. 03-74788, 2004 WL 3704081, at *8 (E.D. Mich. Aug. 18, 2004) ("[A] Plaintiff's bare bones, self-serving denial is not sufficient to rebut § 1635(c)'s statutory presumption."); *Golden v. Town & Country Credit*, No. 02-3627, 2004 WL 229078, at *2 (D. Minn. Feb. 3, 2004) (Frank, J.) (deposition testimony insufficient to overcome pre-

sumption). *But see Stutzka v. McCarville (Stutzka I)*, 420 F.3d 757, 761-62 (8th Cir. 2005) (finding erroneous district court’s failure to consider several affidavits).

In the present case, plaintiffs offer no evidence that their signatures on the cancellation notices and TILA disclosure do not mean what they say. For example, there is no evidence that Countrywide procured their signatures by misrepresentation, forged their signatures, coerced them to sign under duress or wrested a second copy of the disclosures from them before they left the closing. Instead, plaintiffs offer only a bald assertion that, years later, they determined that they did not receive two copies of the disclosures, contrary to what they acknowledged at the time they consummated the transaction. This assertion is not sufficient to overcome the presumption, and summary judgment is warranted.

Even if not entitled to monetary damages, plaintiffs argue that the court should rescind the loan. *See Peterson-Price v. U.S. Bank Nat’l Ass’n*, No. 09-495, 2010 WL 1782188, at *3 (D. Minn. May 4, 2010) (explaining that claims for monetary damages and rescission are separate causes of action). Plaintiffs argue that their claim for rescission was timely, because it was received by BAC within three years of the March 22, 2007, closing. The court disagrees.

The TILA imposes a three-year statute of repose on claims for rescission. *See* 15 U.S.C. § 1635(f); *Beach v. Ocwen Fed. Bank*, 523 U.S. 410, 417-19 (1998). Unlike a statute of limitation, which regulates remedies, a statute of repose regulates rights and “operates as a statutory bar independent of the actions (or inaction) of the litigants.” *Nesladek v. Ford Motor Co.*, 46 F.3d 734, 737 (8th Cir. 1995); *see Beach*, 523 U.S. at 417 (“[Section 1635] talks not of a suit’s commencement but of a right’s duration as well.”). As a result, the ability to rescind a transaction under the TILA expires three years after consummation of the transaction.

* * * * *

Recently, this court agreed with the reasoning of *Geraghty v. BAC Home Loans Servicing L.P.*, No. 11-336, 2011 WL 3920248 (D. Minn. Sept. 7, 2011) (Ericksen, J.), in holding that a suit for rescission filed more than three years after consummation of an eligible transaction is barred by the TILA’s statute of repose. *See Keiran v. Home Capital Inc.*, No. 10-4418, 2011 WL 6003961, at *3-5 (D. Minn. Nov. 30, 2011). The language of the TILA, the holding in *Beach* and the strong public policy favoring certainty of title all support “the majority view that Congress intended that any lawsuit to enforce the right of rescission be brought within the three-year repose period.” *Geraghty*, 2011 WL 3920248 at *5.

As the court noted in *Keiran*, the history of the statute further supports the majority position. As originally enacted, the rescission period continued until a lender provided the required TILA disclosure statements. In 1974, however, Congress amended the TILA, changing the potentially indefinite rescission period to three years. *See* Act of Oct. 28, 1974, Pub.L. No. 93-495, § 405, 88 Stat. 1500, 1517. Under plaintiffs’ interpretation, a borrower who sends a letter claiming some disclosure defect, but who does not file suit, has indefinitely tolled the rescission period. Such an interpretation is improper, because it contradicts Congress’s intent to create repose from the threat of rescission after three years.

In the present case, plaintiffs did not file suit until nearly four years after consummation of the transaction. Therefore, the claim is barred, and summary judgment is warranted.

TILA—STATE LAW FRAUD CLAIM NOT PREEMPTED BY TILA WHERE COMPLAINT DOES NOT ALLEGE A TILA OR TILA-TYPE VIOLATION

RAMIREZ v. NAT'L COOP. BANK (NCB)

No. 08810 (New York Supreme Court, Appellate Division, First Department Dec. 6, 2011)

ISSUE: Are a plaintiff's state law claims alleging fraud and fraud in the inducement against an assignee of a retail installment contract (RIC) preempted by the Truth in Lending Act (TILA)?

FACTS: Sixto Ramirez alleged that Giuffre Hyundai Ltd., a car dealership, engaged in a scheme to entice consumers to the dealership with false promises of a cash prize or a free cruise. Ramirez, a Spanish-speaking Honduran immigrant on disability and food stamps, went to the dealership to collect what he believed was a prize after receiving three phone calls and a letter from Giuffre.

Ramirez alleged that Giuffre misrepresented that the first car Ramirez purchased from Giuffre was irreparably damaged and that Ramirez had to purchase a second car, a Ford Escape. Giuffre showed Ramirez a piece of paper illustrating lower monthly payments for the Escape, which led Ramirez to believe that the Escape was cheaper than the first car. Ramirez alleged that he received paperwork in English that included a RIC, which he signed. Ramirez claims that he was advised that he could reduce his payments by refinancing at a later date.

When Ramirez returned to the dealership, Giuffre refused to refinance the transaction or take back the Escape. Instead, Giuffre sold Ramirez a third car. Giuffre told Ramirez to call the loan servicer to repossess the Escape and that his credit would be unaffected.

Ramirez sued Giuffre, Hyundai Finance and National Cooperative Bank (NCB) for fraud, fraud in the inducement, unconscionability and violation of New York state law. NCB is the assignee of Giuffre's rights in the RIC for the Escape. Ramirez claims that NCB is liable pursuant to 16 CFR 433.2 (the holder rule) and New York personal property law, which preserve consumer claims and defenses by mandating that "[a]ny holder of [a] consumer credit contract is subject to all claims and defenses which the debtor could assert against the seller of goods or services obtained."

NCB moved to dismiss the complaint against it for failure to state a cause of action and on the grounds that Ramirez's action is preempted by 15 U.S.C. § 1641(a), a TILA provision that limits assignee liability to violations that are "apparent on the face of the disclosure statement." NCB argued that although "the [c]omplaint does not allege any TILA violation," Ramirez's action must be dismissed because the "claims of wrongdoing" are not "apparent on the face of the disclosure document." The motion court granted NCB's motion. While not explicitly finding that Ramirez stated a TILA claim, the motion court dismissed on the ground that the alleged "misrepresentations" are not "apparent on the face of the disclosure document." Ramirez appealed. On appeal, NCB argued that Ramirez alleges a "TILA-type" violation and, therefore, the TILA assignee liability limitation applies.

HELD: Order reversed.

The New York Supreme Court, Appellate Division, First Department, concluded that the plaintiff did not allege a TILA or "TILA-type" violation and, therefore, the plaintiff's state law claims are not preempted by TILA:

In *Matter of People v. Applied Card Sys. Inc.*, a Court of Appeals decision addressing TILA preemption in the context of deceptive credit card solicitation schemes, the Court specifically distinguishes between allegations of "affirmative deception" and allegations "relate[d] to the disclosure of credit information," and provides clear guidelines for determining when TILA preempts state law. 11 N.Y.3d 105, 114, 863 N.Y.S.2d 615, 620, 894 N.E.2d 1, 6 (2008), *cert. denied*, ___ U.S. ___, 129 S.Ct. 999, 173 L.Ed.2d 292 (2009). The Court held that TILA preempts "those state laws that relate to 'disclosure of information' in credit card applications and solicitations ... not those that prevent fraud, deception and false advertising." *Id.* Although the Court in *Applied Card Sys.* analyzed TILA's preemption provision under section 1610(e), which applies to credit and charge cards, the preemption provision at issue in this

case uses identical language to limit preemption only to state laws “relating to the disclosure of information.” See 15 U.S.C. § 1610(a) (applying to closed end credit contracts such as RICs). The Court concluded that TILA preempts a state law that “purport[s] to alter the format, content, and manner of the TILA-required disclosures” or “require[s] credit issuers to affirmatively disclose specific credit term information not embraced by TILA.” *Applied Card Sys.*, 11 N.Y.3d at 114, 863 N.Y.S.2d at 620.

TILA requires that a dealership’s RIC disclose credit terms such as the amount financed, finance charge, annual percentage rate, total of payments, total sale price, and the number, amount, and due dates or period of payments to repay the total of payments. See generally 15 U.S.C. § 1631 *et seq.* In this case, the plaintiff claims that the RIC he signed for the Escape stated the credit terms accurately. Thus, the plaintiff in this case, as in *Applied Card Sys.*, “‘take[s] no issue’ with the substance or sufficiency of ... TILA disclosures.” 11 N.Y.3d at 116, 863 N.Y.S.2d at 621.

* * * * *

Contrary to NCB’s assertion, the plaintiff does not state a “paradigmatic TILA hidden finance charge claim” merely because he alleges that he was charged a grossly inflated price for the Escape. A hidden finance charge claim requires proof of a “causal connection” between the higher base price of the vehicle and the purchaser’s status as a credit customer. *Diaz v. Paragon Motors of Woodside, Inc.*, 424 F.Supp.2d 519, 530 (E.D.N.Y. 2006) (citation omitted); see *Ringenback v. Crabtree-Cadillac Oldsmobile Inc.*, 99 F.Supp.2d 199, 203 (D. Conn. 2000) (in determining whether a plaintiff is charged a hidden finance charge, factors including cost to seller, profit from the sale, whether seller distinguishes between cash and credit prices, and percentage of seller’s cash and credit sales should be considered). In this case, the plaintiff does not allege and there is no evidence supporting a connection between the inflated price of the Escape and his status as a credit customer.

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