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# Case Study: Cappuccio V. Prime Capital Funding

Law360, New York (September 13, 2011, 1:02 PM ET) -- A borrower's own, self-serving testimony is enough to rebut the presumption that she received two Truth in Lending Act ("TILA") right to cancel notices, says the Third Circuit. The TILA requires lenders to provide material information about a loan and to advise the borrower of her statutory right to cancel the loan within three days after closing. 15 U.S.C. § 1631(a).

Federal Reserve Board regulations require lenders to provide borrowers with two copies of a Notice of Right to Cancel a mortgage loan. 12 C.F.R. § 226.23(b). A presumption of receipt is created when a borrower signs an acknowledgment stating that they received the notices. 15 U.S.C. § 1635(c).

In August 2011, in a case that departed from a significant body of authority and a prior, unreported decision of its own, the Third Circuit determined that TILA's statutory presumption is like any other evidentiary presumption. Rebuttal does not require a particular quantum or quality of evidence. Cappuccio v. Prime Capital Funding LLC, No. 09-4055, 2011 U.S. App. Self-serving testimony is sufficient.

The material facts are these. Karen Cappuccio sought to consolidate two existing mortgage home loans. In exploring her options, she responded to an Internet ad and eventually retained a loan broker from Prime Capital Funding LLC. The loan broker arranged to replace Cappuccio's two existing loans with two new loans, one from Countrywide Home Loans Inc. and the other from First Magnus.

The lenders hired a title agent, and the title agent then hired a local notary to handle the closing. In November 2006, Cappuccio went to the notary's house, signed all the relevant documents, including an acknowledgement stating, "By signing below, I, the undersigned, hereby acknowledge that on date listed above I received two (2) completed copies of this notice of right to cancel in the form prescribed by law advising of my right to cancel this transaction."

In August of 2007, Cappuccio tried to rescind the loans. Both lenders refused to honor her claim for rescission or to make restitution. Cappuccio sued, stating she was entitled to rescind because the lenders had failed to give her two copies of her notice of right to cancel. The case went to trial. Cappuccio testified that she never received proper notices of right to cancel. The verdict form asked the jury the following question:

*1. Do you find by the preponderance of the evidence that the First Magnus Defendants provided Ms. Cappuccio with two copies of the Notice of Right to Cancel on November 3, 2006, the date of the loan closing?*

*Answer: Yes No*

The jury instruction associated with this verdict question provided:

*Where the borrower signs a document acknowledging that she received two copies of the Notice of Right to Cancel, a presumption that she actually did receive them arises. A presumption shifts the burden of proving a particular fact to the party opposing its existence. In a TILA case, something more than just the testimony of the borrower is needed to rebut the presumption that she received two copies of the Notice. In addition, the lender does not have to give the borrower two copies of the Notice at the closing. It can satisfy its obligations under TILA by mailing it to the borrower after the closing. Since Plaintiff signed an acknowledgement that she received two copies of the Notice from both Countrywide and the First Magnus defendants on November 3, 2006, she is presumed to have received the copies.*

The Third Circuit found this instruction to be improper. It noted that TILA provides that when a borrower signs a "written acknowledgment of receipt" of the right to cancel notices, his or her signature "does no more than create a rebuttal presumption of delivery thereof." 15 U.S.C. 1635(c). The statute created no special type of presumption applicable only to TILA cases. According to the court, it operates no differently than the presumption described in Federal Rule of Evidence 301:

*In all civil actions and proceedings not otherwise provided for by Act of Congress or by these rules, a presumption imposes on the party against whom it is directed the burden of going forward with evidence to rebut or meet the presumption, but does not shift to such party the burden of proof in the sense of the risk of nonpersuasion, which remains throughout the trial upon the party on whom it was originally cast.*

The Third Circuit concluded that the introduction of rebuttal evidence destroys the presumption. The fact that Cappuccio's testimony was self-serving was immaterial. As long as it was based on personal knowledge and was not conclusory, it was sufficient to rebut the presumption. Cappuccio's testimony "would appear to be sufficient to burst the presumption's bubble, leaving the decision of whether to credit her testimony, [or that of her opponent's], to the jury." The instruction also materially impacted the case given the trial court's repeated referral to it even after Cappuccio's rebuttal testimony.

This Third Circuit decision provides the most extensive analysis of the TILA presumption on record. The decision is consistent with some district court cases and the Eight Circuit's ruling in Stutzka v. McCarville, 420 F.3d 757, 762 (A borrowers denial of receipt "at the very least ... rebutted the presumption of delivery made the trial court's granting summary judgment response.") It arguably overrules without expressly saying so the unpublished Third Circuit decision in Jobe v. Argent Mortgage Co. LLC, 2010 U.S. App. (3d Cir. April 2, 2010). ("Where a borrower's testimony is self-serving and unreliable, such testimony has been found insufficient to rebut a presumption of delivery.")

Cappuccio also crystallizes an emerging conflict in the circuits on this issue. In Sibby v. Ownit Mortgage Solutions Inc., 240 F. App. X. 713, 2007 (6th Cir. 2007), the court determined that a plaintiff's deposition testimony that she only received one copy of the notice of right to cancel was insufficient to rebut the presumption created by her signed acknowledgement and her discovery admissions.

Other federal courts have discussed similar presumptions and barred self-serving testimony. For example, in McCarthy v. Option One Mortgage Corp., (7th Cir. 2004), the court ruled that the plaintiff's mere assertion that he did not receive Illinois-required disclosures was insufficient to raise a genuine issue of material fact as to the lender's compliance with Illinois law.

Cappuccio made this area of the law more uncertain for those outside the Third Circuit. It may be a harbinger of greater judicial acceptance of testimony which contradicts writings. Practitioners need quickly to determine what a borrower will say about receipt of the notice of right to cancel and get the issue before the court on motion as soon as practically possible. Additionally, lenders should reexamine and perhaps rewrite their acknowledgement forms to allow as little wiggle room as possible for a future plaintiff.

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