No. 13-56680

IN THE
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

ROBERT BURNS AND KRISTEN BURNS,
Plaintiffs-Appellants

— v. —

HSBC BANK USA NATIONAL ASSOC., AS TRUSTEE FOR ACE SECURITIES CORP. HOME EQUITY LOAN TRUST SERIES 2004-FM2 ASSET BACKED PASS THROUGH CERTIFICATES, et al.
Defendants-Appellees

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE CENTRAL DISTRICT OF CALIFORNIA No. 12-cv-01748

BRIEF OF *AMICUS CURIAE* NATIONAL CONSUMER LAW CENTER AND NATIONAL HOUSING LAW PROJECT SEEKING REVERSAL OF THE DISTRICT COURT'S DECISION

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April 10, 2014

CERTIFICATE OF INTEREST AND
CORPORATE DISCLOSURE STATEMENT

Burns v. HSBC Bank USA National, as Trustee – No. 13-56680

Pursuant to Rule 26.1 of the Federal Rules of Appellate Procedure *Amicus Curiae* the National Consumer Law Center makes the following disclosure:

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NONE.

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4) In all bankruptcy appeals counsel for the debtor or trustee of the bankruptcy estate must list: 1) the debtor, if not identified in the case caption; 2) the members of the creditors' committee or the top 20 unsecured creditors; and, 3) any entity not named in the caption which is an active participant in the bankruptcy proceedings. If the debtor or trustee is not participating in the appeal, this information must be provided by appellant.
NOT APPLICABLE.

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Dated: April 10, 2014

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NOT APPLICABLE.

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STATEMENT OF INTEREST

The National Consumer Law Center (NCLC) is a non-profit corporation organized in 1969 to conduct research, education and litigation to promote consumer justice. NCLC provides policy analysis and technical and legal support to legal services and private lawyers, state and federal consumer protection officials, journalists and others.

On behalf of its low-income clients, NCLC has conferred with the staff of the Consumer Financial Protection Bureau and the staff and governors of the Federal Reserve Board, as well as filed comprehensive comments on almost all proposed regulations promulgated since the Truth in Lending Act (TILA) was first passed in 1968. NCLC has authored the primary treatise on the Act, *Truth in Lending* (8th ed. 2012 and Supp.), with yearly supplements.

National Housing Law Project ("NHLP") is a law and advocacy center established in 1968. For over 40 years, NHLP has been dedicated to advancing housing justice for the poor by using the power of the law to increase and preserve the supply of decent affordable housing, to improve existing housing conditions, including physical conditions and management practices, to expand and enforce low-income tenants' and homeowners' rights, and to increase opportunities for racial and ethnic minorities.

The homeowners' suit in this case raised several common law claims and a claim under section 1641(g) of Truth in Lending Act, 15 U.S.C. § 1641(g), which requires the assignee of a mortgage loan to notify the borrower that the loan has been transferred. The district court dismissed the section 1641(g) claim against the assignee, HSBC, on the ground that the homeowner had not alleged actual damages. This brief addresses only the TILA claim under 1641(g). The district court's dismissal of the TILA claim was erroneous because it failed to recognize that statutory damages are available for a violation of section 1641(g) without the need to establish actual damages or detrimental reliance.

CERTIFICATION OF AUTHORSHIP

Pursuant to FRAP 29(c)(5), the undersigned counsel of record certifies that this brief was not authored by a party's counsel, nor did party or party's counsel contribute money intended to fund this brief and no person other than NCLC contributed money to fund this brief.

SUMMARY OF ARGUMENT

The district court erred in dismissing the Burns' TILA claim under 1641(g) for failure to plead actual damages and detrimental reliance. Congress enacted section 1641(g) for the common sense purpose of letting homeowners know who owned their mortgage loan. Congress specifically gave consumers a private right of action when assignees violated section 1641(g) and made the general liability provision of TILA, contained in section 1640(a), applicable to such violations. That general liability provision provides for actual damages, statutory damages, rescission for certain violations, and special damages for other enumerated violations.

Since TILA's enactment, courts have held that consumers may be awarded statutory damages under section 1640(a) even if the consumer does not allege actual damages. The district court's holding that actual damages are required is inconsistent with longstanding case law. Further the district court erroneously held that the consumer needed to show detrimental reliance in order to establish a violation of section 1641(g). This is wrong. This Court has held the detrimental reliance may be necessary to support and award of actual damages, but neither this court nor any other circuit court has held that detrimental reliance is a precondition to a statutory damages award under TILA.

I. STATUTORY FRAMEWORK

The Truth in Lending Act (TILA) is designed to provide consumers with accurate information about credit transactions. *See generally* 15 U.S.C. §§ 1601-1666j. TILA requires creditors to disclose certain information about loans both before and after the loan is originated. TILA includes a variety of substantive protections that seek to protect borrowers from abusive lending.

In 2009, Congress amended TILA to establish a new requirement for notifying consumers of the sale or transfer of their mortgage loans. Helping Families Save Their Homes Act of 2009, Pub. L. No. 111-22, § 404 (2009). This notice provision is contained in section 131(g), 15 U.S.C. § 1641(g). It applies to any consumer credit transaction secured by the principal dwelling of a consumer. The amendment was Congress's response to the chaos created by multiple transfers of mortgage loans, which made it difficult for homeowners to determine who owned their mortgage loan. As stated in the amendment's legislative history:

> It seems like common sense if you have a mortgage on your home, you ought to know who holds the mortgage. But in today's real estate market, where the original lender often sells the loan to another entity, you can lose track and not know who actually owns your mortgage. So we are doing a very simple amendment . . . It is very easy: When your mortgage is sold or transferred, the homeowner must be informed who owns that mortgage.

155 Cong. Rec. S5098, 2009 WL 1211529 (daily ed. May 5, 2009).

Under 1641(g), the new owner or assignee must notify the borrower in writing, within thirty days after the loan is sold or assigned, of its identity, address, and telephone number, and the date of transfer and location where the transfer is recorded. In addition, the new owner must disclose how the borrower may reach an agent or party with authority to act on behalf of the new owner, and any other relevant information.

Failure to comply with section 1641(g) subjects the creditor to the TILA general liability provisions contained in section 1640(a). Specifically the prefatory language of section 1640(a) refers to 1641(g): "any creditor who fails to comply with any requirement imposed under … subsection (f) or (g) of section 1641 of this title … with respect to any person is liable to such person …."

In turn, the general liability provision of TILA, section 1640(a), provides for actual damages, statutory damages, rescission for certain violations, and special damages for other enumerated violations. Section 1640(a) also carves out certain violations that are ineligible for statutory damages; violations of 1641(g) are not among these ineligible violations.

II. THE TRUTH IN LENDING ACT MAKES STATUTORY DAMAGES AVAILABLE FOR § 1641(g) VIOLATIONS WITHOUT A NEED TO SHOW ACTUAL DAMAGES.

A. Section 1640(a) of the Truth in Lending Act Provides For Statutory Damages Without the Need to Show Actual Damages.

The Truth in Lending Act's general liability rules are set forth in section 1640(a):

> Except as otherwise provided in this section, any creditor who fails to comply with any requirement imposed under this part, including any requirement under section 1635 of this title, subsection (f) or (g) of section 1641 of this title, or part D or E of this subchapter with respect to any person is liable to such person in an amount equal to the sum of--
>
> **(1)** any actual damage sustained by such person as a result of the failure;
>
> **(2)(A) …** (iv) in the case of an individual action relating to a credit transaction not under an open end credit plan that is secured by real property or a dwelling, not less than $400 or greater than $4,000; …
>
> **(3)** in the case of any successful action to enforce the foregoing liability or in any action in which a person is determined to have a right of rescission under section 1635 or 1638(e)(7) of this title, the costs of the action, together with a reasonable attorney's fee as determined by the court; and
>
> **(4)** in the case of a failure to comply with any requirement under section 1639 of this title, paragraph (1) or (2) of section 1639b(c) of this title, or section 1639c(a) of this title, an amount equal to the sum of all finance charges and fees paid by the consumer, unless the creditor demonstrates that the failure to comply is not material.

(emphasis added). Subsection (2)(A)(iv) is relevant to this case.

There are several important observations to be made about the statutory language. First, it is clear that subsection (2)(A)(iv) is a statutory damages remedy. If the action relates to a credit transaction secured by real property or a dwelling, other than an open-end credit plan, [1] the consumer is entitled to a flat amount of $400 to $4,000. The fact that subsection (1) explicitly provides for actual damages makes it even clearer that section (2)(A)(iv) is a statutory damages remedy, not an actual damages remedy. Neither subsection (2)(A)(iv) nor the prefatory language of this remedies provision places any condition, such as a showing of actual damages or detrimental reliance, on the right of a consumer to recover statutory damages.

Second, the statute's use of the word "and" between the third and fourth items of the list makes it clear that the remedies listed in section 1640(a) are cumulative. Thus, the statutory language allows a consumer to recover under any one of the four subsections that is applicable to the case, or under several of them, or under all of them. This reading is underscored by the prefatory language that the consumer is entitled to recover "the sum of" the four listed remedies.

The meaning of the plain language of the statute is confirmed by an enormous body of decisions, as this general remedy provision has been applied

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[1] Most residential mortgage loans are closed-end transactions. Open-end mortgage credit is commonly known as a home equity line of credit. The statutory damage provision for open-end mortgage credit is in section 1640(a)(2)(A)(iii).

countless times in contexts other than section 1641(g). *See Bateman v. American Multi-Cinema, Inc*., 623 F.3d 708 (9th Cir. 2010) ("We begin, as always, with the plain language of the statute."). This Court has held at least twice that this plain language means that statutory damages are available without the need to show actual damages. *See DeMando v. Morris*, 206 F.3d 1300, 1303 (9th Cir. 2000) ("DeMando has suffered the loss of a statutory right to disclosure and has therefore suffered injury in fact for purposes of Article III standing. In a class action, a lender liable for a TILA violation is subject to statutory damages even in the absence of any actual damages." (citation omitted)); *Baker v. C.G. Services Corp*., 677 F.2d 775, 780 (9th Cir. 1982) (comparing Fair Debt Collection Practices Act's statutory damages provision to TILA's; "Under TILA, statutory damages are available merely on proof of a violation; no proof of actual damages is required"); *see also* National Consumer Law Center, *Truth in Lending* § 11.6.1 (8th ed. 2012 and Supp.) (collecting cases). Other courts have uniformly agreed. *See, e.g., Purtle v. Eldrige Auto Sales, Inc.,* 91 F.3d 797, 800 (6th Cir.1996) ("A plaintiff in a TILA case need not prove that he or she suffered actual monetary damages in order to recover the statutory damages and attorney's fees."); *In re Whitley,* 772 F.2d 815, 817 (11th Cir.1985) (for TILA violations, "statutory civil penalties must be imposed ... regardless of the district court's belief that no actual damages resulted or that the violation is de minimis"); *Huff v. Stewart-Gwinn Furniture Co.*, 713 F.2d 67 (4th Cir. 1983) (creditor liable for technical violation even though borrower suffered no damage or actual injury and was not misled as a result of the violations); *Dryden v. Lou Budke's Arrow Finance Co*., 630 F.2d 641, 647 (8th Cir. 1980) (creditor's abandonment of transaction and refund of the consumer's money does not relieve creditor of liability; the consumer need not show any actual damages); *see also Mourning v. Family Publications Servs.*, 411 U.S. 356, 376 (1973) (statutory damages are available even when the finance charge is nonexistent or undetermined); *Schlueter v. Latek*, 683 F.3d 350, 356 (7th Cir. 2012) (including TILA in a list of statutes which provide statutory damages without requiring plaintiffs to prove injury).

Despite the clear and straightforward statutory language and the large body of decisions, a small number of cases have erroneously concluded that statutory damages are not available for section 1641(g) violations unless the plaintiff alleges actual damages or a levied finance charge. *See, e.g., Che v. Aurora Loan Services, L.L.C.*, 847 F. Supp. 2d 1205, 1209 (C.D. Cal. 2012); *Ramirez v. Kings Mortgage Services, Inc*., 2012 WL 5464359, at *12 (E.D. Cal. Nov. 8, 2012) (incorrectly holding claim for § 1641(g) violation fails without allegation of actual damages; no analysis); *Deerink v. Bank of N.Y. Mellon*, 2012 WL 3234027, at *5 (E.D. Cal. Aug. 6, 2012) (dismissing because actual damages speculative, wrongly failing to consider statutory damages). These decisions originated with *Beall v. Quality*

Loan Service Corp., 2011 WL 1044148, at *6 (S.D. Cal. Mar. 21, 2011), which addressed the issue in one paragraph without citing a single case. In many of these cases, which are characterized by little or no analysis, the consumers were proceeding *pro se* and may not have briefed the issue in any detail. More careful courts recognize the faulty reasoning in these cases. *See, e.g.*, *Fowler v. U.S. Bank*, ___ F. Supp. 2d ___, 2014 WL 850527, at *10 (S.D. Tex. Mar. 4, 2014) (refusing to dismiss § 1641(g) claim even though plaintiffs alleged neither actual damages nor payment of a finance charge); *Burns v. J.P. Morgan Chase Bank*, 2013 WL 6284058, at *4 (N.D. Tex. Dec. 4, 2013) ("Borrowers have 'a private right of action for civil liability against any creditor that fails' to comply with this requirement and may recover actual and statutory damages"); *Diunugala v. JP Morgan Chase Bank*, 2013 WL 5568737, at *7 (S.D. Cal. Oct. 3, 2013); *Hay v. Bank of America*, 2013 WL 1339729, at *6 (N.D. Ga. Mar. 29, 2013) (no need to plead actual damages or reliance to obtain statutory damages for violation of § 1641(g)); *Rider v. HSBC Mortgage Corp.*, 2013 WL 992510, at *7 (S.D. Ohio Mar. 13, 2013) (both statutory and actual damages available for violation); *Reed v. Chase Home Finance, L.L.C.*, 893 F. Supp. 2d 1250, 1253-54 (S.D. Ala. 2012) ("A violation of Section 1641(g) enables a plaintiff to recover both actual damages and statutory damages, and the latter are recoverable even in the complete absence of the former."), *aff'd on other grounds*, 723 F.3d 1301 (11th Cir. 2013) (affirming district court's conclusion that transfer was for administrative convenience, so § 1641(g) disclosure requirement was inapplicable, but without addressing availability of statutory damages); *Wise v. Wells Fargo Bank*, 850 F. Supp. 2d 1047, 1053 (C.D. Cal. 2012) (plaintiff alleging either statutory or actual damages survives motion to dismiss); *Foley v. Wells Fargo Bank*, 849 F. Supp. 2d 1345, 1350-52 (S.D. Fla. 2012) (rejecting *Beall* and similar cases in favor of the reasoning in *Brown v. CitiMortgage, Inc.*); *Flemister v. Citibank*, 2012 WL 6675273, at *3-4 (C.D. Cal. Dec. 20, 2012) (noting conflicting case law, finding consumer "may recover statutory damages for any violation of § 1641(g), even if plaintiff cannot demonstrate actual damages"); *Vieira v. Prospect Mortgage, L.L.C.*, 2012 WL 3329652, at *5 (C.D. Cal. Apr. 9, 2012) (actual damages not required in § 1641(g) case).

B. Detrimental Reliance is Not Necessary to Support an Award of Statutory Damages.

The District Court erred in imposing a detrimental reliance standard on plaintiff's claim for statutory damages. It did so only by misapplying this Court's holding in *Gold Country Lenders v. Smith (In re Smith)*, 289 F.3d 1155, 1157 (9th Cir. 2002) (per curiam).

In *Smith*, a bankruptcy court found that a creditor, Gold Country, had violated TILA by failing to conspicuously disclose and define the finance charge and annual percentage rate. *Id.* at 1156. The bankruptcy court found that Gold

Country was subject to civil liability for these violations. *Id.* at 1157. The court awarded Smith $1,000 in statutory damages, but held that she was not entitled to actual damages under § 1640(a)(1). *Id.* The Bankruptcy Appellate Panel for the Ninth Circuit affirmed the holding that because Smith did not show detrimental reliance she was not entitled to actual damages. *Id.* This Court affirmed, and held that for violations of TILA section 1638(a), a borrower must establish detrimental reliance to receive *actual* damages. *Id. But see Lyon v. Chase Bank USA*, 656 F.3d 877, 886 (9th Cir. 2011) (holding that detrimental reliance not required to support an award of actual damages for TILA sections 1666 or 1666a.). Importantly, this Court did not hold in *Smith* that detrimental reliance was necessary to support an award of statutory damages.

Despite the distinction in purpose between statutory and actual damages, some lower courts, including the district court below, have improperly imported the "detrimental reliance" standard in determining statutory damage awards. *See* District Court Opinion at 7 ("Plaintiffs must allege that they detrimentally relied on HSBC's failure to disclose the transfer of the loan."); *Derusseau v. Bank of America*, 2012 WL 1059928, at *4 (S.D. Cal. Mar. 28, 2012). These courts fail to recognize that this Court requires a showing of detrimental reliance to support an award for actual damages under TILA, and then only in some cases. *Smith* does not stand for the proposition that the lack of actual damages or detrimental reliance precludes an award of statutory damages. To the contrary, the lower courts in *Smith* did award the plaintiff the maximum statutory damages, but denied her claim for actual damages. *See also Lyon v. Chase Bank USA*, 656 F.3d 877 (9th Cir. 2011) (addressing statutory damages and actual damages separately; allowing recovery of statutory damages and remanding for determination of causation issues with respect to actual damages).

C. Congress specifically carved out violations that are ineligible for statutory damages and violations of section 1641(g) are not among them.

There can also be no question that the general rules about remedies that are set forth in section 1640(a) apply to violations of section 1641(g). The prefatory language of section 1640(a) refers specifically to section 1641(g): "any creditor who fails to comply with any requirement imposed under … subsection (f) or (g) of section 1641 of this title … with respect to any person is liable to such person …." Congress added this prefatory language at the same time as it enacted section 1641(g), thus unequivocally demonstrating its concern that the remedies of section 1640(a) be available for violations of the new notice requirement. Pub. L. No. 111-22, sec. 404(b), 123 Stat. 1632, 1658 (2009).

However, the analysis cannot end with the prefatory language of section 1640(a), because Congress has also carved out certain violations and made them ineligible for statutory damages. A long unnumbered paragraph at the end of section 1640(a) provides that a creditor is not liable for statutory damages in connection with certain disclosures required by sections 1637 and 1638 of the Truth in Lending Act. Significantly, this paragraph does not list the disclosures required by section 1641 as an exception to the general rule that statutory damages are available. As one of the leading District Court decisions notes:

> Had Congress wished to render statutory damages categorically unavailable for the entire class of § 1641(g) claims, surely it would have listed that section among the other disclosure provisions recited in the "carve-out" paragraph at the end of § 1640(a), which curtails access to statutory damages for certain disclosure violations. But § 1641(g) is not enumerated in that carve-out paragraph. Instead, § 1641(g) is specifically listed in the first paragraph of § 1640(a) as a section whose requirements expose violators to liability in an amount equal to the sum of actual damages plus statutory damages.

Brown v. CitiMortgage, Inc., 817 F. Supp. 2d 1328, 1335 (S.D. Ala. 2011). The absence of 1641(g) from this exclusionary language further supports the availability of statutory damages for violations of 1641(g).

III. ASSIGNEES ARE RESPONSIBLE FOR GIVING CONSUMERS NOTICE OF TRANSFER AND ARE LIABLE UNDER THE TRUTH IN LENDING ACT FOR FAILING TO DO SO.

A second question is whether the assignee that failed to send the transfer notice is the proper defendant liable for statutory damages. Although the District Court's decision did not turn on this question, *amici* are addressing it to make certain that it does not stand in the way of reversal of the District Court's decision.

The issue comes up because section 1640(a) imposes liability upon "creditor[s]," and the general definition of "creditor" at section 1602(g) includes only the original creditor.

It is clear from the statutory language that Congress intended assignees to be held liable as "creditors" for their violations of 15 U.S.C. § 1641(g). *See Fowler v. U.S. Bank*, ___ F. Supp. 2d ___, 2014 WL 850527, at *6-9, *10 n.55 (S.D. Tex. Mar. 4, 2014); *Flemister v. Citibank,* 2012 WL 6675273, at *4-5 (C.D. Cal. Dec. 20, 2012) (finding "Congress broadened the definition of 'creditor' in [TILA] through the passage of § 1641(g)" to include new owners or assignees of debt; even if trustee for securitized loans not liable as owner of debt, still liable as assignee) (citation omitted); *Valrie v. NationStar Mortgage, L.L.C*., 2012 WL 369455, at *5 (S.D. Ala. Jan. 18, 2012), *adopted by* 2012 WL 369288 (S.D. Ala. Feb. 3, 2012); *Squires v. BAC Home Loans Servicing, L.P*., 2011 WL 5966948, at *3 (S.D. Ala. Nov. 29, 2011) ("creditor" in § 1641(g) must be construed to include servicers; "Defendant does not explain how its argument that BAC is not a 'creditor' for § 1641(g) purposes can be squared with § 226.39 or statements by the Board ... . [n]or does defendant reconcile its belief that 'creditor' should be construed narrowly for § 1641(g) purposes with this Court's obligation to interpret TILA liberally in light of its remedial purposes."). In drafting section 1641(g), Congress referred to the assignee that is required to give notice as "the *creditor* that is the new owner or assignee of the debt." 15 U.S.C. § 1641(g)(1) (emphasis added). In addition, the subsection is titled in the U.S. Code as "Notice of new creditor," thus underscoring Congress's intent to define the assignee as a creditor for purposes of the notice of transfer of ownership.

Treating assignees as creditors for this purpose is the only way to give meaning to section 1640(a), which Congress amended at the same time to provide that any creditor who fails to comply with section 1641(g) is liable for the usual TILA remedies. 15 U.S.C. § 1640(a), *as amended by* Pub. L. No. 111-22, § 404(b) (2009)*; see also* 75 Fed. Reg. 58,489, 58,492 (Sept. 24, 2010) (Federal Reserve Sys., final rule) (stating that determination of remedies is outside FRB's rulemaking scope, but noting that "the 2009 Act specifically adds [§ 1641(g)] to the list of sections covered under" TILA's remedy provision, § 1640). By definition, the original creditor never need comply with section 1641(g); only a new owner must send the notice.[2] Thus, section 1641(g) will never apply to "creditors" if that term is confined to original creditors. The retention of the term "creditor" in section 1640(a) reflects Congress's understanding that it is generally

[2] An entity could, however, be both the original creditor and the new owner if the loan was assigned back to the original creditor. *See, e.g., Michel v. Deutsche Bank Trust Co.,* 2011 WL 4628691, at *5 (E.D. Cal. Oct. 3, 2011) (finding original creditor liable for making the § 1641(g) disclosures where the original creditor was also a subsequent assignee).

creditors who are liable for TILA violations, and that for purposes of section 1641(g) liability, assignees are treated as creditors.

This conclusion is also mandated by the last sentence of section 1640(a), which provides: "With respect to any failure to make disclosures required under this part ..., liability shall be imposed only upon the creditor required to make disclosure, except as provided in section 1641 of this title." This language specifically carves out section 1641 from the usual rule that liability is only imposed on the original creditor. The clear implication is that liability under section 1641 can be imposed upon any party that violates its requirements. By housing the transfer notice requirement in section 1641, Congress mandated that liability would be imposed on the assignees to which it applies.

By placing the transfer notice requirement in section 1641, and by referring to assignees as creditors in section 1641(g), Congress adopted a "belt-and-suspenders" approach to ensuring assignee liability for 15 U.S.C. § 1641(g) violations. Congress's failure to amend the definition of creditor in section 1602 to include an assignee is understandable; had Congress done so, assignees would have been liable for all disclosure violations, in contravention of section 1641(a)'s limitations. *See* 15 U.S.C. § 1602(f) (renumbered 1602(g) by Pub. L. No. 111-203). Congress worked a narrower change in the law, one entirely consistent with TILA's statutory framework: implementing direct assignee liability for assignees' failure to comply with specific disclosure obligations imposed on assignees, not creditors, by the Act.

The FRB expressed the same views when it adopted a rule to implement section 1641(g):

> Generally, TILA and Regulation Z apply to parties that regularly extend consumer credit. However, Section 404(a) of the 2009 Act is not limited to persons that extend credit by originating loans. Section 404(a) imposes the disclosure duty on the "creditor that is the new owner or assignee of the debt." The Board believes that to give effect to the legislative purpose, the term "creditor" in Section 404(a) must be construed to refer to the owner of the debt following the sale, transfer or assignment, without regard to whether that party would be a "creditor" for other purposes under TILA or Regulation Z. The Board declines to limit Section 404(a) to parties that originate consumer loans because such an interpretation would exempt a significant percentage of mortgage transfers which are acquisitions by secondary market investors that do not extend consumer credit and are not "creditors" for purposes of other provisions of Regulation Z.

74 Fed. Reg. 60,143, 60,145 (Nov. 20, 2009). Accordingly, HSBC was the proper defendant in this case and is subject to statutory damages if it failed to send the transfer notice required by section 1641(g).

CONCLUSION

Because an award of statutory damages does not require the presence of actual damages or detrimental reliance, the district court's dismissal of the homeowners' Truth in Lending claim should be reversed.

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STATEMENT OF RELATED CASES

Pursuant to Ninth Circuit Local Rule 28-2.6, Amicus states that it is aware of not other cases in this Court that may be deemed related.

CERTIFICATE OF COMPLIANCE

This brief, exclusive of the certifications, tables of contents and authorities and the identity of counsel at the end of the brief, is 4238 words in text and footnotes as counted by Microsoft Word, the word processing system used to prepare this brief. This brief has been prepared in a proportionally spaced typeface using Microsoft Word in Times New Roman 14-point font.

I certify under penalty of perjury that the foregoing is true and correct.

s/ Tara Twomey
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CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system on (date)

I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

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ADDENDUM

15 U.S.C. § 1640(a)

(a) Individual or class action for damages; amount of award; factors determining amount of award
Except as otherwise provided in this section, any creditor who fails to comply with any requirement imposed under this part, including any requirement under section 1635 of this title, subsection (f) or (g) ofsection 1641 of this title, or part D or E of this subchapter with respect to any person is liable to such person in an amount equal to the sum of—
(1) any actual damage sustained by such person as a result of the failure;
(2)
(A)
(i) in the case of an individual action twice the amount of any finance charge in connection with the transaction,
(ii) in the case of an individual action relating to a consumer lease under part E of this subchapter, 25 per centum of the total amount of monthly payments under the lease, except that the liability under this subparagraph shall not be less than $200 nor greater than $2,000,
(iii) in the case of an individual action relating to an open end consumer credit plan that is not secured by real property or a dwelling, twice the amount of any finance charge in connection with the transaction, with a minimum of $500 and a maximum of $5,000, or such higher amount as may be appropriate in the case of an established pattern or practice of such failures; [1] or
(iv) in the case of an individual action relating to a credit transaction not under an open end credit plan that is secured by real property or a dwelling, not less than $400 or greater than $4,000; or
(B) in the case of a class action, such amount as the court may allow, except that as to each member of the class no minimum recovery shall be applicable, and the total recovery under this subparagraph in any class action or series of class actions arising out of the same failure to comply by the same creditor shall not be more than the lesser of $1,000,000 or 1 per centum of the net worth of the creditor;
(3) in the case of any successful action to enforce the foregoing liability or in any action in which a person is determined to have a right of rescission under section 1635 or 1638 (e)(7) of this title, the costs of the action, together with a reasonable attorney's fee as determined by the court; and
(4) in the case of a failure to comply with any requirement under section 1639 of this title, paragraph (1) or (2) of section 1639b (c) of this title, or section 1639c (a)

of this title, an amount equal to the sum of all finance charges and fees paid by the consumer, unless the creditor demonstrates that the failure to comply is not material.

In determining the amount of award in any class action, the court shall consider, among other relevant factors, the amount of any actual damages awarded, the frequency and persistence of failures of compliance by the creditor, the resources of the creditor, the number of persons adversely affected, and the extent to which the creditor's failure of compliance was intentional. In connection with the disclosures referred to in subsections (a) and (b) ofsection 1637 of this title, a creditor shall have a liability determined under paragraph (2) only for failing to comply with the requirements of section 1635 of this title, 1637(a) [2] of this title, or any of paragraphs (4) through (13) of section 1637 (b) of this title, or for failing to comply with disclosure requirements under State law for any term or item that the Bureau has determined to be substantially the same in meaning under section 1610 (a)(2) of this title as any of the terms or items referred to in section 1637 (a) of this title, or any of paragraphs (4) through (13) of section 1637 (b) of this title. In connection with the disclosures referred to in subsection (c) or (d) ofsection 1637 of this title, a card issuer shall have a liability under this section only to a cardholder who pays a fee described in section 1637 (c)(1)(A)(ii)(I) orsection 1637 (c)(4)(A)(i) of this title or who uses the credit card or charge card. In connection with the disclosures referred to in section 1638 of this title, a creditor shall have a liability determined under paragraph (2) only for failing to comply with the requirements of section 1635 of this title, of paragraph (2) (insofar as it requires a disclosure of the "amount financed"), (3), (4), (5), (6), or (9) of section 1638 (a) of this title, or section 1638 (b)(2)(C)(ii) of this title, of subparagraphs (A), (B), (D), (F), or (J) of section 1638 (e)(2) of this title (for purposes of paragraph (2) or (4) of section 1638 (e) of this title), or paragraph (4)(C), (6), (7), or (8) of section 1638 (e) of this title, or for failing to comply with disclosure requirements under State law for any term which the Bureau has determined to be substantially the same in meaning under section 1610 (a)(2) of this title as any of the terms referred to in any of those paragraphs of section 1638 (a) of this title or section 1638 (b)(2)(C)(ii) of this title. With respect to any failure to make disclosures required under this part or part D or E of this subchapter, liability shall be imposed only upon the creditor required to make disclosure, except as provided in section 1641 of this title.

15 U.S.C. § 1641(g)

(g) Notice of new creditor
(1) In general
In addition to other disclosures required by this subchapter, not later than 30 days after the date on which a mortgage loan is sold or otherwise transferred or assigned to a third party, the creditor that is the new owner or assignee of the debt shall notify the borrower in writing of such transfer, including—
(A) the identity, address, telephone number of the new creditor;
(B) the date of transfer;
(C) how to reach an agent or party having authority to act on behalf of the new creditor;
(D) the location of the place where transfer of ownership of the debt is recorded; and
(E) any other relevant information regarding the new creditor.
(2) Definition
As used in this subsection, the term "mortgage loan" means any consumer credit transaction that is secured by the principal dwelling of a consumer.