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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF WEST VIRGINIA
AT CHARLESTON

ENTERED
DEC 18 2002
SAMUEL L. KAY, CLERK
U.S. District & Bankruptcy Courts
Southern District of West Virginia

CARLOS A. MOORE and
BETTY LOU MOORE,

Plaintiffs

v.

Civil Action No. 2:01-0226

MORTGAGESTAR, INC., a corporation, and its affiliate, METROPOLITAN REAL ESTATE SERVICES, INC., a corporation, CONSECO FINANCE SERVICING CORP., a corporation, ASSOCIATED APPRAISERS, INC., and SAMANTHA L. JEFFERS,

Defendants

and

MORTGAGESTAR, INC., a corporation, and its affiliate, METROPOLITAN REAL ESTATE SERVICES, INC., a corporation,

Defendants/Third-Party Plaintiffs,

v.

HELEN M. WILBURN,

Third Party Defendant

MEMORANDUM ORDER

Pending before the court are the following motions: the motions to dismiss and for summary judgment of Conseco Finance Servicing Corporation ("Conseco") against plaintiffs,

filed on March 1, 2002, and August 30, 2002, respectively;[1] the motion for summary judgment of MortgageStar, Inc. and Metropolitan Real Estate Services, Inc. (collectively "MortgageStar"), filed August 30, 2002; and the motion for summary judgment of Associated Appraisers, Inc. ("Associated Appraisers"), Samantha Jeffers, and Helen Wilburn, filed September 3, 2002.[2]

I. Introduction

A. Statement of Facts[3]

1. The Loan

Approximately three months after plaintiffs, Carlos and Betty Moore ("Moores"), refinanced their home with First Security Mortgage Corporation ("First Security"), Bryan J. Owens, a loan officer with MortgageStar, contacted the Moores in February,

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[1] Conseco filed a motion to dismiss plaintiffs' third amended complaint on March 1, 2002, supplementing its memorandum in support of that motion and requesting summary judgment on August 30, 2002.

[2] Conseco also filed a motion for summary judgment against MortgageStar on August 31, 2002, on the grounds that MortgageStar owes it a duty of indemnification in this case. The court will decide the merits of that motion at a later date.

[3] These facts are presented in the light most favorable to plaintiffs, as the non-moving party.

2000, by telephone, inquiring as to whether the Moores were interested in refinancing their mortgage debt. (B. Moore Depo. at 39; Owens Affidavit at ¶ 3.) Owens informed Ms. Moore that he knew the Moores had assumed a high interest rate loan and that he could save them money. (B. Moore Depo. at 39.) The Moores were interested in obtaining a fixed rate loan and Owens obtained information from Ms. Moore about the Moores' indebtedness and income and partially completed a loan application over the telephone on their behalf. (Id. at 48, 52, 82; Owens Affidavit at ¶ 4.)

On March 21, 2000, Owens visited the Moores' home in order to complete the loan application. (Owens Affidavit at ¶ 5; B. Moore Depo. at 41.) While at their home, Owens represented that the Moores were pre-approved for a loan. (B. Moore Depo. at 69.) Owens made additional representations to the Moores including that the new loan would save them $250 per month, would satisfy all the Moores' indebtedness secured by the home and would require no money down. (Id. at 42, 46, 55.) The Moores verified the information regarding their income and liabilities, indicated to Owens that they wished to consolidate and refinance their loans with Washtenaw and Beneficial and acknowledged that the present market value of the home was $110,000. (Owens

Affidavit at ¶ 5.) The Moores initialed each page of the application, acknowledging that the information contained therein was true and correct. (Id..) The Moores also signed and dated the application, as well as other documents, but claim that no copies of the documents were left for them to review. (B. Moore Depo. at 42.) One of the documents signed by the Moores was a Universal Loan Application, which had been partially completed by Owens by hand. (B. Moore Depo. at 86.) When the Moores signed the application, it was still incomplete and indicated that the value of the Moores' home was $110,000. (Pl.'s Response to MortgageStar's Mot. for Summary Judgment at Exh. G.)

Following the March 21, 2000, meeting, Owens submitted the loan application to MortgageStar in an effort to obtain a fixed rate loan for the Moores. However, based upon the Moores' credit history, they only qualified for the "2/28" variable rate loan product offered by MortgageStar. (Owens Affidavit at ¶¶ 6-7.) Owens says he telephoned Ms. Moore and informed her that she and her husband did not qualify for a fixed rate loan. (Owens Affidavit at ¶ 8.) Although Ms. Moore indicated that she and her husband were not interested in a variable rate loan, Owens says she called later that same day or the next and advised that they had changed their minds and that they wished to apply for the

variable rate loan. (Id. at ¶¶ 9-10; see also Weiner Depo. at 61-62.) Owens then revised the loan application by changing the loan requested from a fixed rate loan to the 2/28 variable rate loan. (Id. at ¶ 11.) Owens submitted the revised loan application to MortgageStar. MortgageStar then accepted the application and agreed to offer the Moores the variable rate loan. (Id.)

On April 7, 2000, Owens visited the Moores at their home with John Thomas in order to close the MortgageStar loan. (Owens Affidavit at ¶ 12.) At the loan closing, Owens presented the Moores with a typed loan application which contained information that was similar to that contained in the handwritten variable rate loan application. (Id. at ¶ 13.) The market value of the Moore's home was reduced in the April 7, 2000, typed application from $110,000 to $98,000 in accordance with the recently obtained appraisal value for the Moores' home. (Id.) The Moores initialed each page of the completed loan application, acknowledging that the information contained in the loan application was true and correct. The Moores also signed and dated the completed application. (Id. at ¶ 13, and April 7, 2000, loan application attached thereto.)

At the April 7, 2000, closing, Owens says that he explained to the Moores the closing documents as Ms. Moore signed them, including the loan's variable rate. (Owens Affidavit at ¶ 14.) Ms. Moore signed the documents and directed Mr. Moore to sign them as well. (Id. at ¶¶ 14-16; Thomas Affidavit at ¶¶ 3-4; B. Moore Depo. at 47.)

According to the memorandum filed by Associated Appraisers, Samantha Jeffers and Helen Wilburn in support of their motion for summary judgment, at the time plaintiffs refinanced with MortgageStar for $93,100.00, they had approximately $89,418.93 principal indebtedness secured by their home. (See also B. Moore Depo. at 140.) Ms. Moore understood at the time of refinancing with MortgageStar that there were already more liens against her home than the home was worth.[4] (Id. at

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[4] The memorandum filed by Associated Appraisers, Samantha Jeffers and Helen Wilburn in support of their motion for summary judgment explains that plaintiffs purchased their home for $27,000.00 in November, 1977, financing $26,700.00 with Home Mortgage, Inc. In November, 1987, plaintiffs obtained a second mortgage on their home with Commercial Credit in the amount of $22,202.88. In November, 1988, and March, 1989, plaintiffs borrowed $20,032.32 and $33,387.60, respectively, from Commercial Credit. By 1989, plaintiffs loans from Commercial Credit exceeded $53,000.00. Each time plaintiffs obtained a loan, they used their home as collateral. Plaintiffs filed bankruptcy for the first time in 1991. In August, 1997, plaintiffs refinanced their mortgage, this time, with Associates Financial for $50,792.31. The plaintiffs then entered into a series of home equity loans with Associates Financial. In particular, in April,

79.) The refinancing reduced the Moores' monthly payment by approximately $200 each month and when the refinancing was complete, the Moores made their mortgage payments to Conseco, who had acquired the Moores' loan by assignment, until Mr. Moore retired and their monthly income declined substantially. (Id. at 53, 83-84, 34-36.) The Moores filed for bankruptcy in early 2001, and this case was filed shortly thereafter.

2. Assignment of the Loan

Conseco's corporate predecessor, Green Tree Financial ("Green Tree"), entered into a Mortgage Correspondent Agreement

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1998, plaintiffs borrowed $6,872.83, in January, 1999, plaintiffs borrowed $6,129.50, and in July, 1999, plaintiffs borrowed $6,896.11. For each, plaintiffs' used their home as collateral. As of July, 1999, the principal amount owed against plaintiffs' home exceeded $70,000.00. In December, 1999, plaintiffs sought to consolidate the four Associates Financial loans and entered into a mortgage loan agreement with First Security Mortgage for the amount of $69,750.00. Shortly thereafter, plaintiffs obtained a new second mortgage with Beneficial Finance in the amount of $19,668.93. In March, 2000, plaintiffs were approached by MortgageStar representative Bryan J. Owens regarding the consolidation and refinancing of their existing debt.

Plaintiffs do not specifically object to the characterization of their prior loans as set forth by defendants Associated Appraisers, Samantha Jeffers and Helen Wilburn, but rather rely upon the statement of facts set forth in plaintiffs' response to MortgageStar's motion for summary judgment. In that statement, plaintiffs explain that they "have been the victims of repeat loan flipping for several years," culminating with the MortgageStar loan at issue in this case. (Pl.'s Response to MortgageStar's Mot. for Summary Judg. at 2.)

with MortgageStar's corporate predecessor, First Federal Mortgage Corporation ("First Federal") on August 28, 1996.[5] (Conseco's Mot. for Summary Judg. Against MortgageStar at Exh. D.) When the 1996 Agreement was entered into, Green Tree was in the business of purchasing loans funded by third-party loan originators, such as First Federal (now, Mortgagestar), referred to as "correspondents." (Id. at p. 1.) First Federal was engaged in the business of originating and closing loans, transferring those to warehouse banks and subsequently selling the loans to third parties. (Id..) The 1996 Agreement was a written contract which governed the selling of loans by First Federal to Green Tree. (Id..)

Pursuant to the 1996 Agreement, First Federal would submit loan packages for Green Tree's review so that Green Tree could determine whether it would purchase a particular loan or group of loans from First Federal. This same practice continued as between Conseco and MortgageStar. Sometime between April 27

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[5] Conseco and MortgageStar entered into a subsequent Correspondent Mortgage Loan Purchase Agreement on June 12, 2000. (Conseco's Mot. for Summary Judg. Against MortgageStar at Exh. A.) Inasmuch as the Moores' loan was purchased pursuant to the 1996 Agreement, the 2000 Agreement has no bearing upon the parties and their relationship to one another in this case.

and April 30, 2000, the Moores' loan was purchased pursuant to the 1996 Agreement. (See Weiner Depo. at 55.)

According to the agreement, Green Tree maintained the discretion to decide whether to purchase loans funded by First Federal. (Conseco's Mot. for Summary Judg. Against MortgageStar at Exh. D at ¶ 1, p. 1.) With respect to each loan application submitted to Green Tree, First Federal made the following representations and warranties:

> Correspondent [First Federal] has not, in connection with the Loan Applications submitted to Green Tree or Loans purchased by Green Tree, violated any applicable federal, state or local law or regulation including without limitation, the Fair Credit Reporting Act and Regulations, the Federal Truth-in-Lending Act and Regulation Z, the Federal Equal Credit Opportunity Act and Regulation B, the Federal Real Estate Settlement Procedures Act and Regulations or usury laws and regulations.

(Id. at ¶ 4I, p. 3.)

On April 7, 2000, the date of the Moores' loan closing, the deed of trust to the Moores' home was assigned to Conseco. (Pls' Response to Conseco's Supp. Memo in Support of Mot. to Dismiss and Renewed Mot. for Summary Judg. at Exh. B.) A Notice of Assignment, Sale or Transfer of Servicing Rights, dated April

12, 2000, reflects that the servicing of plaintiffs' mortgage loan was being assigned by MortgageStar to Conseco. (Pls' Response to Mot. to Dismiss at Exh. D.) Several days later, between April 27 and April 30, 2000, Conseco purchased the Moores' loan from MortgageStar. (Weiner Depo. at 55.)

B. Procedural History

Plaintiffs forwarded to Conseco and MortgageStar a letter dated February 12, 2001, in which plaintiffs advised defendants that they were canceling their loan. In pertinent part, the letter states as follows:

> This is to advise you we are canceling the above loan. We were never properly advised of our rights to cancel, and only given one copy of the notice. The loan documents are very confusing. Different rates and amounts are in the different documents, resulting in a loan that was far different from the amount and fixed rate we were promised. Had we known the true rates and terms, we would not have gone ahead with this loan, which leaves us far worse off then [sic] we were with our existing loans.
>
> Arrangements as to this recission and all communications about the loan should be had with our lawyer, Bren J. Pomponio, at Mountain State Justice, Inc., 922 Quarrier Street, Charleston, West Virginia, 25301, (304)344-5565. In the event an acceptable rescission cannot be reached with our lawyer, we will ask a court for equitable modification.

(Pls' Response to MorgageStar's Mot. for Summary Judg. at Exh. U.)

On March 12, 2001, plaintiffs' filed a complaint, amending that complaint for a fourth time on May 22, 2002, and alleging thirteen separate counts against defendants MortgageStar, Conseco, Samantha Jeffers and Associated Appraisers. Counts I and II of the fourth amended complaint allege violations of the Truth in Lending Act (the "TILA"). Count I alleges that defendants MortgageStar and Conseco failed to timely offer a written right of rescission to plaintiffs, as required by 15 U.S.C.A. § 1635(a), and Regulation Z, 12 C.F.R. § 226.23, by failing to deliver two copies of a notice of rescission and one copy of the disclosure statement to plaintiffs. (Fourth Amended Complaint at ¶ 24.) Count I further alleges that the defendant lenders violated the disclosure requirements of the Federal Consumer Credit and Protection Act and Regulation Z by failing to clearly and conspicuously disclose all information in a form the plaintiffs could keep and by making contrary representations in the material disclosures with respect to the annual percentage rate, finance charge, and amount financed. (Id. at ¶ 25.) Count II alleges that defendant Conseco took no appropriate action within twenty days of the

plaintiffs' timely cancellation, in violation of 15 U.S.C.A. § 1635 and Regulation Z, 12 C.F.R. § 226.23. (Id. at ¶ 29.)

Counts III, IV and V allege claims for fraudulent misrepresentation. In Count III, plaintiffs claim that MortgageStar intentionally misrepresented that the annual percentage rate of the loan would be fixed at 8.9%, when, in actuality, the loan rate was "an exploding ARM." (Fourth Amended Complaint at ¶¶ 31, 33.) Count IV alleges that MortgageStar misrepresented that plaintiffs would not be required to provide any cash to close the loan, when plaintiffs were required to pay $205 in order to close. (Id. at ¶¶ 39-40.) In Count V, plaintiffs claim that MortgageStar misrepresented that defendants would pay off all the indebtedness secured by the plaintiffs' home. (Id. at ¶ 47.)

With Count VI, plaintiffs make a claim for unconscionable contract, specifically alleging that defendants engaged in a pattern of home equity skimming and predatory lending practices to make unfair loans in order to transfer the home equity from unsophisticated borrowers, like the plaintiffs, to defendants. (Fourth Amended Complaint at ¶ 53.) Plaintiffs claim that the loan agreement into which they entered contained unfair terms that constituted unfair surprise. (Id. at ¶ 56.)

Count VII alleges fraud and conspiracy as to MortgageStar and Conseco, claiming that defendants intentionally obtained a fraudulent appraisal of the market value of plaintiffs' home for the purpose of inducing plaintiffs into the loan contract. (Id. at ¶¶ 59, 61.)

In Count VIII, plaintiffs allege that the acts of defendants were done in furtherance of a joint venture in which each of the acts of the defendants was pursued with a joint purpose. (Fourth Amended Complaint at ¶ 67.) Plaintiffs further allege that the defendants conspired to commit unlawful acts, or lawful acts by unlawful means, and that the acts of MortgageStar were done as agent for Conseco, while the acts of defendants Samantha Jeffers and Associated Appraisers were done as agents for Conseco and MortgageStar. (Id. at ¶¶ 68-69.)

Counts IX and X are particular to Associated Appraisers and Samantha Jeffers. Count IX alleges that these defendants made a false appraisal and engaged in dishonesty, fraud, and misrepresentation with the intent to benefit themselves or another, and with the intent to injure another in violation of the Real Estate Appraiser Licensing and Certification Act, West Virginia Code § 37-14-23(3). (Fourth Amended Complaint at ¶ 72.) In Count X, plaintiffs contend that Jeffers and Associated

Appraisers accepted a fee that was contingent upon a predetermined conclusion, in violation of West Virginia Code ¶ 37-14-23(10). (Id. at 75.)

Count XI is alleged against Conseco and sets forth a claim for unlawful debt collection, in violation of West Virginia Code § 46A-2-128(e). In particular, plaintiffs claim that Conseco communicated with them in an effort to collect a debt, notwithstanding the knowledge that they were represented by counsel. (Fourth Amended Complaint at ¶ 77, Exh. B.)

In Count XII, plaintiffs allege a violation of the Equal Credit Opportunity Act, 15 U.S.C.A. § 1691. Plaintiffs specifically complain that defendants failed to provide plaintiffs with notice of action on their loan application within thirty days of March 21, 2000, the date on which plaintiffs made application for a $93,500 loan at an 8.99% fixed rate. (Fourth Amended Complaint at ¶¶ 79, 81.)

In Count XIII, plaintiffs allege that defendant MortgageStar committed fraud with respect to the annual percentage rate. In particular, plaintiffs claim that after having represented to plaintiffs that they would receive a fixed annual percentage rate of 8.99% and typing an application

reflecting the fixed rate, defendants "whited-out" the check indicating that the loan was for a fixed rate, checking instead a box indicating an adjustable rate. (Fourth Amended Complaint at ¶¶ 85, 87.) Plaintiffs further allege that the defendants altered the applications after plaintiffs had signed the documents in an attempt to conceal the fact that the loan would be on terms other than those represented to plaintiffs. (Id. at 87.)

Conseco filed a counter-claim against plaintiffs and a cross-claim for indemnification against MortgageStar. MortgageStar filed a cross-claim against Associated Appraisers, and Samantha Jeffers. Associated Appraisers and Jeffers filed a cross-claim against MortgageStar. MortgageStar filed a third-party complaint against Helen Wilburn, Samantha Jeffers' supervising appraiser, and Wilburn filed a counter-claim against MortgageStar.

II. Legal Standard Governing Summary Judgment

A party is entitled to summary judgment "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that

the moving party is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c). Material facts are those necessary to establish the elements of a party's cause of action. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986). A genuine issue of material fact exists if, in viewing the record and all reasonable inferences drawn therefrom in a light most favorable to the non-moving party, a reasonable fact-finder could return a verdict for the non-movant. Id. The moving party has the burden of showing -- "that is, pointing out to the district court -- that there is an absence of evidence to support the nonmoving party's case." Celotex Corp. v. Catrett, 477 U.S. 317, 325 (1986). If the movant satisfies this burden, then the non-movant must set forth specific facts as would be admissible in evidence that demonstrate the existence of a genuine issue of fact for trial. Fed. R. Civ. P. 56(c); Id. at 322-23. A party is entitled to summary judgment if the record as a whole could not lead a rational trier of fact to find in favor of the non-moving party. Williams v. Griffin, 952 F.2d 820, 823 (4th Cir. 1991).

Conversely, summary judgment is not appropriate if the evidence is sufficient for a reasonable fact-finder to return a verdict in favor of the non-moving party. Anderson, 477 U.S. at 248. Even if there is no dispute as to the evidentiary facts,

summary judgment is also not appropriate where the ultimate factual conclusions to be drawn are in dispute. Overstreet v. Kentucky Cent. Life Ins. Co., 950 F.2d 931, 937 (4th Cir. 1991).

In reviewing the evidence, a court must neither resolve disputed facts or weigh the evidence, Russell v. Microdyne Corp., 65 F.3d 1229, 1239 (4th Cir. 1995), nor make determinations of credibility. Sosebee v. Murphy, 797 F.2d 179, 182 (4th Cir. 1986). Rather, the party opposing the motion is entitled to have his or her version of the facts accepted as true and, moreover, to have all internal conflicts resolved in his or her favor. Charbonnages de France v. Smith, 597 F.2d 406, 414 (4th Cir. 1979). Inferences that are "drawn from the underlying facts ... must be viewed in the light most favorable to the party opposing the motion." United States v. Diebold, Inc., 369 U.S. 654, 655 (1962).

III. Analysis

A. Agency Relationship Between Conseco and MortgageStar

The main ground upon which Conseco bases its motion for summary judgment against plaintiffs is that the actions complained of occurred before Conseco purchased the loan as a bona fide purchaser for value and that the evidence does not

support a finding of joint venture or agency relationship as between it and MortgageStar. The correspondent mortgage agreement which governs the relationship between Conseco and MortgageStar states that the parties "are not partners or joint venturers and that the Correspondent [MortgageStar] is not acting as an agent" for Conseco "but shall have the status of and shall act in all matters hereunder as an independent contractor." (Pls' Response to Conseco's Supplemental Memo. to Mot. to Dismiss at Exh. A.)

Plaintiffs argue that the transaction between Conseco and MortgageStar was in actuality a table-funded loan, whereby the loan was immediately assigned to Conseco. Plaintiffs request that the court apply the reasoning in England v. MG Investments, Inc., 93 F.Supp.2d 718, 722-23 (S.D. W.Va. 2000) (Haden, C.J.), in which this court determined that a jury could find that a loan originator acted as the agent of the assignee where borrowers were presented with a blank servicing disclosure statement, where a loan purchase agreement was in existence between the originator and assignee, and where the loan was assigned about one month after the closing.

The court finds that the reasoning in England is applicable here to the end that a question of fact exists as to

whether MortgageStar was acting as Conseco's agent with respect to the loan origination and closing. As plaintiffs note, although the loan purchase did not occur until either April 27 or 30, 2000, the plaintiffs' deed of trust was assigned to Conseco by MortgageStar on April 7, 2000, the date of the loan closing. (Pls' Response to Mot. to Dismiss at Exh. B.) Also, a Notice of Assignment, Sale or Transfer of Servicing Rights, dated April 12, 2000, reflects that MortgageStar knew in advance that the servicing of plaintiffs' mortgage loan would be assigned to Conseco. (Id. at Exh. D.) Indeed, Conseco attaches a copy of a Notice of Assignment, Sale or Transfer of Servicing Rights to its March 1, 2002, motion to dismiss plaintiffs' third amended complaint reflecting that servicing of plaintiffs' loan was assigned to Conseco effective April 7, 2000, the date of the closing, as opposed to April 12, 2000. As earlier indicated, a correspondent mortgage loan agreement entered into between predecessors for MortgageStar and Conseco and dated August 28, 1996, sets forth the guidelines under which Conseco will purchase a loan from MortgageStar. (Conseco's Mot. for Summary Judg. Against MortgageStar at Exh. D, ¶¶ 1-4.)

As noted in England,

> [t]he agency relation is "created as the result of conduct by two parties manifesting that one of them is willing for the other to act for him subject to his control, and that the other consents so to act."

93 F.Supp.2d at 722 (quoting Restatement (Second) of Agency § 1 cmt. 1 (1958)). As further observed, the legal relationship of agency may exist between Conseco and MortgageStar as to third parties despite their contractual protestations to the contrary. Id. Based upon the legal principles governing agency and the circumstances of this case, the court finds that there are issues of material fact concerning the alleged agency relationship between Conseco and MortgageStar.

B. Truth in Lending Act Violations (Counts I, II)

As evidence of their claims alleging violations of the TILA, 15 U.S.C.A. § 1635, plaintiffs offer the testimony of Betty Moore to show that plaintiffs did not receive two copies of the notice of right to cancel and one copy of the material disclosures. (B. Moore Depo. at 72-73, 98-100.) Plaintiffs also assert that the loan files produced by defendants in this case support Ms. Moore's testimony inasmuch as they include only one copy of the notice of right to cancel for each of the plaintiffs.

(Rule 26(a)(1) Initial Disclosures of MortgageStar; Rule 26(a)(1) Initial Disclosures of Conseco.) Defendants offer the affidavits of Bryan Owens and John Thomas to prove that plaintiffs were each given two copies of the required notice of right to cancel. (Owens Aff. at ¶ 18; Thomas Aff. at ¶ 10.) The documents attached to Owens' affidavit include one copy of a notice of right to cancel signed by Carlos Moore on April 7, 2000, and one copy of a notice of right to cancel signed by Betty Moore on April 7, 2000. (MortgageStar's Mot. for Summary Judg. at Exh. B, Notices of Right to Cancel, Carlos Moore and Betty Moore.) The acknowledgment on the notices, which is located above the signature line states: "The undersigned each acknowledge receipt of two copies of NOTICE of RIGHT TO CANCEL and one copy of the Federal Truth in Lending Disclosure Statement." (Id.) Defendants also note that plaintiffs acknowledged receiving the Truth in Lending Act Disclosure Statement. (Id. at Exh. B, Truth in Lending Act Disclosure Statement; B. Moore Depo. at 102-103.)

Section 1635 governs the rights of consumers entering into credit transactions in which a security interest is retained in property used as the consumer's principal dwelling. 15 U.S.C.A. § 1635; see also 12 C.F.R. §§ 226.15(b), 226.17(d); Cooper v. First Government Mortgage and Investors Corporation,

___ F.Supp.2d ___, No. 00-0536, 2002 WL 31520158, *11 (D.D.C. Nov. 4, 2002). In any action subject to rescission, the creditor must deliver to the lender two copies of the Notice of Right to Cancel form. See 12 C.F.R. § 226.23(b)(1). Pursuant to the TILA,

> borrowers can seek rescission of loans against creditors until the later of (1) three days after the consummation of the transaction, or (2) once the creditor has delivered the information, two copies of the Notice Form, and the material disclosures required by TILA.

Cooper, 2002 WL 315 20158 at *11 (citing 15 U.S.C.A. §§ 1635, 1639(j)). Where the creditor fails to provide two copies of the notice form, the right to rescind the loan expires three years after the consummation of the transaction, or once the property is sold, whichever occurs first. Id.; see also 15 U.S.C.A. § 1635(f). Courts have construed the TILA liberally in favor of borrowers and the Supreme Court has instructed that courts are to defer to the interpretation of the TILA provided in 12 C.F.R. § 226, which was promulgated by the Federal Reserve Board. See Smith v. Fid. Consumer Discount Co., 898 F.2d 896, 898 (3rd Cir. 1990) (citing Anderson Bros. Ford v. Valencia, 452 U.S. 205, 219 (1981)).

The borrowers' written acknowledgment of receipt of the disclosures or documents mandated by the TILA creates a rebuttable presumption of the delivery of such items. 15 U.S.C.A. § 1635(c). In order to rebut this presumption, borrowers much present evidence to the contrary. See Williams v. First Gov't Mortgage & Investors Group, 225 F.3d 738, 751 (D.C. Cir. 2000) (citations omitted). As the court in Williams noted, a TILA plaintiff attempting to overcome the presumption of delivery of two copies of the Notice of Right to Cancel form faces a low burden. Id. at 751. The testimony of a borrower that she did not receive two copies of the notice form has been held to sufficiently rebut the presumption of delivery. See Cooper, 2002 WL 31520158 at *13; see also Hanlin v. Ohio Builders and Remodelers, Inc., 212 F.Supp.2d 752, 762 (S.D. Ohio 2002) (question of fact exists as to whether requisite number of copies of the notice form was delivered) (citing Weeden v. Auto Workers Credit Union, Inc., No. 97-3073, 1999 WL 191430 (6th Cir. March 19, 1999)).

Given the testimony of Ms. Moore that she did not receive two copies of the notice of right to cancel or one copy of the truth in lending disclosures, the court concludes that there exists a genuine issue of material fact as to whether

plaintiffs received the requisite number of copies of documents as mandated by the TILA. Summary judgment on Counts I and II of the fourth amended complaint is inappropriate.

C. Fraudulent Misrepresentation (Counts III, IV and V)

As to plaintiffs' claims for fraudulent misrepresentation, in order to be successful, plaintiffs must establish the following:

> (1) that the act claimed to be fraudulent was the act of the defendant or induced by him; (2) that it was material and false; that plaintiff relied upon it and was justified under the circumstances in relying upon it; and (3) that he was damaged because he relied upon it.

See Cordial v. Ernst & Young, 483 S.E.2d 248, 259 (W.Va. 1996) (citing Lengyel v. Lint, 280 S.E.2d 66, 69 (W.Va. 1981)). Plaintiffs specifically contend that defendants fraudulently misrepresented that plaintiffs would receive an 8.9% fixed rate loan, that plaintiffs would not be required to pay cash in order to close the loan, and that the loan would pay off all indebtedness secured by plaintiffs' home. Plaintiffs claim that such misrepresentations were made in order to induce plaintiffs into an abusive loan agreement.

The evidence of record is conflicting with respect to what representations were actually made to plaintiffs during the loan origination and closing. Bryan Owens maintains that he did not represent to the plaintiffs that their loan included a fixed rate of 8.9% and that he did not suppress the fact that the loan was an adjustable rate loan. (Owens Aff. at ¶¶ 21-22.) Owens further claims that although he prepared the loan for closing in a manner that would permit the plaintiffs to avoid paying closing costs, additional monies may have been due Beneficial or others after closing due to the Moores providing MortgageStar with mistaken payoff information or to unforeseen closing expenses. (Id. at ¶ 23.) Owens also denies representing to plaintiffs specifically how much money they would save each month as a result of refinancing with MortgageStar. (Id. at ¶ 24.) Testimony from the Moores indicates that the above-referenced representations were indeed made and that they relied to their detriment upon them. (C. Moore Depo. at 9; B. Moore Depo. at 229, 46, 55, 208.)

As to Count III, which alleges fraud with respect to the misrepresentation that plaintiffs would receive a fixed rate loan, plaintiff Betty Moore testified that she and her husband signed and initialed each document presented at the closing but

that neither she or her husband read any of the documents they were signing. (B. Moore Depo. at 90-96, 102-104.) In particular, plaintiffs each signed an Adjustable Rate Note, acknowledged receipt of the adjustable rate loan information, executed a Deed of Trust and an Adjustable Rate Rider and acknowledged receipt of a Truth-In-Lending Disclosure Statement. (MortgageStar Mot. for Summary Judg. at Exh. B and attachments thereto.) In West Virginia, contracting parties are presumed to be aware of the contents of the documents they sign. See Reddy v. Community Health Foundation, 298 S.E.2d 906, 910 (W.Va. 1982) (explaining that the failure to read a contract before signing it does not excuse a person from being bound by its terms and stating that "[a] person who fails to read a document to which he places his signature does so at his peril.").

The evidence does not support plaintiffs' claim that they justifiably relied on an oral misrepresentation by Bryan Owens that they were receiving a loan at a fixed rate. Although there is evidence that Mr. Moore is unable to read, Ms. Moore has that ability and informed her husband that he had to sign the documents presented by MortgageStar, without first reading them herself. (See B. Moore Depo. at 47-48.) The evidence also shows that no one prevented Ms. Moore from reading the loan documents.

(Id. at 104.) Some of the documents signed or initialed by plaintiffs clearly delineate that the loan is at an "Adjustable Rate."[6] Given West Virginia law on the point, plaintiffs should not be permitted to claim that they were fraudulently misled as to the variability of the interest rate when they failed to avail themselves of the information contained within written agreements they willingly signed. Defendants are thus entitled to summary judgment on Count III inasmuch as plaintiffs are unable to show that their reliance upon the representations of MortgageStar agent Bryan Owens regarding the fixed or variable nature of the interest rate was justified.

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[6] The heading of one of the documents initialed by plaintiffs is entitled "ADJUSTABLE RATE NOTE," in bold typeface, and sets forth the following immediately below the heading:

> THIS NOTE CONTAINS PROVISIONS ALLOWING FOR CHANGES IN MY INTEREST RATE AND MY MONTHLY PAYMENTS. THIS NOTE LIMITS THE AMOUNT MY INTEREST RATE CAN CHANGE AT ANY ONE TIME AND THE MAXIMUM RATE I MUST PAY.

(Owens Aff. at Exh. D.) Another document signed by plaintiffs bears the following heading:

> 2 YEAR FIXED/6-MONTH LIBOR ARM
> IMPORTANT ADJUSTABLE RATE MORTGAGE LOAN INFORMATION
> PLEASE READ CAREFULLY

(Id. at Exh. E.)

With respect to the claims for fraudulent misrepresentation found at Counts IV and V, none of the loan documents address whether Owens represented to plaintiffs that they would save a specific amount of money each month as a result of refinancing with MortgageStar. Nor do the documents show whether he promised plaintiffs a loan with no closing costs and assured them that the loan would satisfy all the indebtedness secured by plaintiffs' home. Viewing the facts in the light most favorable to plaintiffs, factual issues remain with regard to Counts IV and V and summary judgment on those counts is not warranted.

D. Unconscionable Contract (Count VI)

Under West Virginia law, a contract may be declared unconscionable and unenforceable

> if the court as a matter of law finds: (a) The agreement or transaction to have been unconscionable at the time it was made, or to have been induced by unconscionable conduct, ... or (b) Any term or part of the agreement or transaction to have been unconscionable at the time it was made ... .

W.Va. Code § 46A-2-121(1) (1999). If it is claimed that the agreement or any part thereof "may be unconscionable, the parties

shall be afforded a reasonable opportunity to present evidence as to its setting, purpose and effect to aid the court in making the determination." W.Va. Code § 46A-2-121(2) (1999).

The West Virginia Supreme Court of Appeals has held that "'[u]nconscionability means overall and gross imbalance, one-sidedness or lopsidedness that justifies a court's refusal to enforce a contract as written.'" Drake v. West Virginia Self-Storage, Inc., 509 S.E.2d 21, 24 (W.Va. 1998) (quoting Mcginnis v. Cayton, 312 S.E.2d 765, 776 (W.Va. 1984)). The court also held that in most commercial transactions, "'it may be assumed that there is some inequality of bargaining power,'" and that the court cannot undertake to write a special rule of such general application so as to remove such bargaining advantages or disadvantages. Id. (quoting Ashland Oil, Inc. v. Donahue, 223 S.E.2d 433, 440 (W.Va. 1976)). In determining whether a contract or term is unconscionable, an inquiry into the circumstances surrounding the execution of the contract and the fairness of the contract as a whole is necessary. Id. (citing Troy Min. Corp. v. Itmann Coal Co., Syl. pt. 3, 346 S.E.2d 749 (W.Va. 1986)). Factors to be considered include the relative positions of the parties, the adequacy of the bargaining position of the weaker party, the meaningful alternatives available to plaintiffs, and

the existence of unfair terms in the contract. Id. (citing Art's Flower Shop, Inc. v. Chesapeake and Potomac Telephone Co. of West Virginia, Inc., 413 S.E.2d 670, 674 (W.Va. 1991)).

The record contains evidence showing that plaintiff Carlos Moore cannot read and that he explained that to MortgageStar's agent, Bryan Owens. (C. Moore Depo. at 4-5, 25.) Betty Moore testified that she has a tenth grade education and was unable to comprehend the loan documents once she was finally read them. (B. Moore Depo. at 52.) Plaintiffs also claim that the loan closing occurred in their home, and not in a law office, and that the closing was rushed by Owens, lasting about twenty-five minutes. (B. Moore Depo. at 177.) Plaintiffs' evidence regarding their claims that misrepresentations were made to them in order to induce them into entering into the loan agreement with defendants has already been set forth. In addition, plaintiffs contend that the actual loan documents were altered in an attempt to suppress the fact that plaintiffs were not receiving a loan on the terms to which they had agreed. (Pls' Response to MortgageStar's Mot. for Summary Judg. at Exhs. G, H.) Plaintiffs offer the opinion of their expert witness, Kevin P. Byers, to support their claims that the loan documents were confusing and inconsistent and substantively unconscionable,

particularly in regard to the adjustable interest rate, the fees associated with processing the loan and the inclusion of the finance charge in the principal. (Id. at Exh. T, at pp. 2-4, 6-7.)

Defendants offer the loan documents in an effort to counter the testimony of plaintiffs and the opinions of plaintiffs' expert. Specifically, defendants claim that plaintiffs' signatures and initials on the documents prove that plaintiffs were not surprised by the terms of the loan, but rather received notice of and agreed to those terms.

As this court noted in Hager v. American Gen. Fin., Inc., 37 F.Supp.2d 778, 786-787 (S.D. W.Va. 1999),

> [g]ross inadequacy in bargaining power may exist where consumers are totally ignorant of the implications of what they are signing, or where the parties involved in the transaction include a national corporate lender on one side and unsophisticated, uneducated consumers on the other.

See also Knapp v. American Gen. Fin., Inc., 111 F.Supp.2d 758, 764-765 (S.D. W.Va. 2000). In light of the evidence in this case, particularly that regarding the confusion with which plaintiffs assert they came away from the loan transaction and the opinion of plaintiff's expert that the loan documents

themselves contain several inconsistencies regarding the performance of the loan, a reasonable finder of fact could find that the transaction was unconscionable. Summary judgment is unwarranted.

E. Joint Venture, Conspiracy, and Agency (Count VIII)

The questions of fact which exist as to whether MortgageStar was serving as the agent of Conseco during the origination and closing of plaintiffs' loan have been set forth. (See Memorandum Order, infra at pp. 18-21.)

As to the conduct of Samantha Jeffers and Associated Appraisers, plaintiffs contend that defendants MortgageStar and Conseco, along with Jeffers and Associated Appraisers, conspired to fraudulently misrepresent the market value of plaintiffs' home and that the misrepresentation was intentional and material. Plaintiffs claim that although the market value of their home is actually $52,500, Jeffers appraised the property at $98,000. (See Associated Appraiser's Mot. for Summary Judg. at Exhs. 13, 14.) Plaintiffs submit that Bryan Owens requested Jeffers perform an appraisal of plaintiffs' home, indicating on the written request for appraisal that the estimated value of the home was $98,000, and that the loan amount was $93,100. (Id. at

Exh. 4.) Plaintiffs contend that Samantha Jeffers wanted to assure that Associated Appraisers would receive additional requests for appraisals from MortgageStar and that this desire for repeat business caused her to appraise the property for the amount estimated by Owens, $98,000. (Id.)

As Jeffers and Associated Appraisers note, it is not unusual for an appraiser to know or be provided with information concerning the loan or the refinance amount. (Jeffers Depo. at 64.) Jeffers was also provided with a copy of a November, 1999 appraisal of plaintiffs' home prepared for First Security by Jack Weaver which estimated the market value of the home at $93,000. (B. Moore Depo. at 200.) Plaintiffs claim that Weaver's appraisal was grossly inflated and that Jeffers reliance on it was wrongful. Jeffers own testimony indicates her recognition that brokers will be less likely to provide repeat business to appraisers that provide appraisals below the value suggested by the lender. (Jeffers Depo. at 44.) Plaintiffs have also produced expert testimony observing that while it might not be unusual for an appraiser to have with her the loan amount and the estimated value of the home, it is unusual for the appraisal value to identically match the amount on the request. (Pls' Response to MortgageStar's Mot. for Summary Judg. at Exh. N, at ¶

5.) When this evidence is viewed in the light most favorable to plaintiffs, a reasonable jury could find that Samantha Jeffers was acting as an agent of MortgageStar in performing an appraisal of plaintiffs' home in order to obtain repeat business from the lender.

F. False Appraisal and Appraisal Based upon a Predetermined Conclusion (Counts IX and X)

1. False Appraisal

Plaintiffs claim that Samantha Jeffers' appraisal, which valued the plaintiffs' home at $98,000 when the home is actually worth $52,500, was fraudulent insofar as it matched exactly the estimated value MortgageStar provided Jeffers in the request for appraisal. Specifically, plaintiffs contend that Jeffers' appraisal was dishonest, a misrepresentation in violation of the Real Estate Appraiser Licensing and Certification Act, W.Va. Code § 37-14-23(3), and in breach of professional standards governing real estate appraisers.[7]

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[7] West Virginia Code §§ 37-14-1 to 37-14-45 were repealed effective April 3, 2001. The Real Estate Appraiser Licensing and Certification Act is now codified at West Virginia Code §§ 30-38-1, et seq.. The provision under which plaintiffs bring Count IX is now found at West Virginia Code § 30-38-12(3) which states the following as grounds for refusal to issue or renew a license or for disciplinary action:

Jeffers and Associated Appraisers argue that the appraisal provided by Jeffers as to the market value of plaintiffs' home was merely a statement of opinion and that the appraisal was not inappropriately inflated in order to induce plaintiffs to enter into a loan agreement with defendants.

Samantha Jeffers performed the appraisal of plaintiffs' property at the request of Bryan Owens. Over a period of approximately one and one-half years, Jeffers had performed six appraisals for MortgageStar at a cost of $300-$350 per appraisal. (Jeffers Depo. at 20, 22-23.) It is undisputed that Owens sent a request for appraisal via facsimile to Jeffers, on the face of which was the estimated value of the property and the amount of the loan. (See Associated Appraisers' Mot. for Summary Judg. at Exh. 4.) It is also undisputed that Jack Weaver performed an appraisal of plaintiffs' property in November, 1999, for First Security, estimating the property's value at $93,000, and that

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> [a]n act or omission in the practice of real estate appraising which constitutes dishonesty, fraud or misrepresentation with the intent to substantially benefit the licensee or another person or with the intent to substantially injure another person.

W.Va. Code § 30-38-12(3) (2002).

plaintiffs thereafter made improvements to their home prior to entering into the loan agreement with MortgageStar, including adding a new heating and cooling unit, new carpet and a home security system. (See B. Moore Depo. at 26-27, 112, 161-162, 168-169, 172-173.) In performing her appraisal, Jeffers met with plaintiffs and conducted an on-site inspection of the property that included taking measurements and photographs of the property. (Associated Appraisers' Mot. for Summary Judg. at Exh. 13, March 13, 2000, Appraisal.) Jeffers also obtained three comparable properties to which plaintiffs' property was compared, one of which had been relied upon by Jack Weaver in his November, 1999, appraisal. (Id..) Jeffers appraised the property's value at $98,000, and her supervisory appraiser, Helen Wilburn, acknowledged her agreement with that value by affixing her signature to the appraisal. (Id..)

Plaintiffs' evidence indicating that Jeffers appraisal was false includes a March, 2001, appraisal performed by Jeff Barth of Barth Appraisal Service, estimating the value of plaintiffs' property at $52,500, and the opinion of expert witness Mark Lee Levine regarding the adequacy of the appraisal performed by Jeffers. (Pls' Response to MortgageStar's Mot. for Summary Judg. at Exhs. E, N.) The Barth appraisal compares

plaintiffs' property to that of properties which are located closer in proximity to plaintiffs' home than the comparables used by Jeffers. [8] Plaintiffs' expert opines that absent substantial changes in the market or to the subject property, such as damage to the structure, there is no reasonable explanation for the inconsistency between the Jeffers' appraisal of the property, at $98,000, and the Barth appraisal of the property, at $52,500. (Pls' Response to MortgageStar's Mot. for Summary Judg. at Exh. N, at ¶ 3.) The expert further states that "a final appraisal opinion of value that is identical to the loan value sought would be very questionable as to implying a pre-determined value." (Id. at ¶ 5.)

Based upon the evidence indicated above, particularly the opinions offered by plaintiffs' expert, a material issue of fact exists as to whether Jeffers' appraisal was the result of

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[8] Plaintiffs' property is located at 3915 39th Street, Nitro, West virginia, and the comparable properties utilized by Barth are found at 1621 16th Street, Nitro, 1118 11th Street, Nitro, and 1936 19th Street, Nitro. (Pls' Response to MortgageStar's Mot. for Summary Judg. at Exh. E.) The comparable properties utilized by Jeffers are located at 107 Brookhaven, Nitro, 1328 Main Street, Nitro, each of which are located within one mile of plaintiffs' property, and 221 Midway Drive, Dunbar, which is within three miles of plaintiffs' property. (Associated Appraisers' Mot. for Summary Judge. at Exh. 13.)

dishonesty, misrepresentation or a breach of professional standards. Summary judgment as to Count IX is inappropriate.

2. Acceptance of a Fee Contingent on Predetermined Conclusion

Plaintiffs also contend that Jeffers violated West Virginia Code § 37-14-23(10) by accepting a fee for the performance of an appraisal contingent upon a predetermined conclusion as to the amount of the appraisal. This provision is now codified at West Virginia Code § 30-38-12 and states that the following conduct is prohibited:

> Acceptance of a fee that is or was contingent upon the appraiser reporting a predetermined analysis, opinion, or conclusion, or is or was contingent upon the analysis, opinion, conclusion or valuation reached, or upon the consequences resulting from the appraisal assignment.

W.Va. Code § 30-38-12(9) (2002).

In view of plaintiffs' expert report, which observes that while it might not be unusual for an appraiser to have with her the loan amount and the estimated value of the home, it is unusual for the appraisal value to identically match the amount on the request, the court finds that a question of fact exists as to whether plaintiff violated West Virginia Code § 30-38-12(9).

(Pls' Response to MortgageStar's Mot. for Summary Judg. at Exh. N, at ¶ 5.)

G. Unlawful Debt Collection (Count XI)

West Virginia Code § 46A-2-128 prohibits the use of unfair or unconscionable means by a debt collector to collect a debt. W.Va. Code § 46A-2-128 (1999). In particular, this provision prohibits the following conduct by a debt collector:

> [a]ny communication with a consumer whenever it appears that the consumer is represented by an attorney and the attorney's name and address are known, or could be easily ascertained, unless the attorney fails to answer correspondence, return phone calls or discuss the obligation in question or unless the attorney consents to direct communication.

W.Va. Code § 46A-2-128(e) (1999). West Virginia law also prohibits a debt collector from misrepresenting the character of a claim against a consumer, or its status in any legal proceeding. W.Va. Code § 46A-2-127(d) (1999).

The evidence in this case shows that by letter dated February 12, 2001, plaintiffs informed Conseco and MortgageStar that they were canceling their loan, indicating in the body of the letter that all communications about the loan should be had

with their attorney, Bren J. Pomponio, and offering the mailing address and telephone number for Pomponio. (Pls' Response to Conseco's Mot. to Dismiss at Exh. F.) Plaintiffs claim that they were contacted twice by Conseco after Conseco was notified that they were represented by counsel.

One item of correspondence, dated May 12, 2001, was entitled "Monthly Informational Statement" and notes at the outset that $1,501.88 is due from plaintiffs on June 1, 2001. (Pls' Response to Conseco's Supplemental Brief in Support of Mot. to Dismiss at Exh. F.) Although the correspondence includes a message indicating that "THIS IS NOT A BILL. THIS STATEMENT IS FOR INFORMATIONAL PURPOSES ONLY," and further states that "Conseco Finance is not attempting any act to collect or recover the discharged debt as your personal liability," a remittance coupon at the end of the correspondence reiterates that $1,501.88 is due on June 1, 2001. (Id.) The instructions on the remittance coupon are clear: "Detach and return bottom portion with payment." (Id.) Also in the body of the statement is the following warning: "If the above amount is not received by the stated date, Conseco Finance may exercise its right to seek possession of the collateral." (Id.)

In another letter, dated July 6, 2001, Conseco explains that plaintiffs' property taxes are delinquent and that failure to pay the taxes constitutes a default of the loan agreement. (Pls' Response to Conseco's Supplemental Brief in Support of Mot. to Dismiss at Exh. E.) The letter requests that plaintiffs forward a paid receipt or proof of payment of the taxes to Conseco and warned that failure to forward payment to the tax collector's office within thirty calendar days may result in Conseco beginning foreclosure proceedings. (Id.) The letter noted the base amount of taxes due for the year 2000, $358.10, and indicated that plaintiffs should contact the collecting official in order to obtain the actual amount to pay, including penalty. (Id.)

Plaintiffs contend that the May 12, 2001, statement from Conseco violates West Virginia Code § 46A-2-128(e) inasmuch as it plainly attempts to collect payment of $1,501.88 from plaintiffs by June 1, 2001. The court finds that given the conflicting nature of the statement, which notes that it is not a bill while at the same time including a remittance coupon demanding payment by June 1, 2001, a jury could find that Conseco communicated with plaintiffs after having been notified that they were represented by counsel in an effort to collect a debt.

With respect to the July 6, 2001, communication, plaintiffs claim that by threatening foreclosure unless plaintiffs remit their property taxes to tax collecting authorities, Conseco attempted to collect a debt, also in violation of West Virginia law. The court agrees that a reasonable jury could find that such a communication was an attempt to collect a debt and that it was sent to plaintiffs months after Conseco was informed of plaintiffs' representation by counsel.

As to their claim the communications violated West Virginia Code § 46A-2-127(d) as misrepresentations of the character of the claim, plaintiffs argue that Conseco's threats of foreclosure were misrepresentations inasmuch as the security interest Conseco held in plaintiffs' home had been terminated by operation of law as of February 12, 2001, when plaintiffs attempted a cancellation of their loan agreement. According to plaintiffs, because the security interest was terminated, Conseco's threats of foreclosure mischaracterized its rights with respect to plaintiffs' property. For reasons that are discussed later in this memorandum order, in connection with plaintiffs' assertion that the court should apply equitable modification to the TILA rescission provision and thereby declare the loan

agreement cancelled, a genuine issue of material fact remains as to whether Conseco has retained a security interest in plaintiffs' property as of the time it sent the July 6, 2001, notice. Thus, summary judgment in regard to Conseco's alleged violation of West Virginia Code § 46A-2-127(d) is inappropriate.

H. Equal Credit Opportunity Act (Count XII)

As grounds for their claim that defendants violated the Equal Credit Opportunity Act ("ECOA"), 15 U.S.C.A. § 1691(d)(1), plaintiffs allege that defendants failed to provide plaintiffs with notice of the adverse action of declining a loan to plaintiffs for a fixed rate of 8.99% in the amount of $93,100. The ECOA requires that

> [w]ithin thirty days (or such longer reasonable time as specified in regulations of the Board for any class of credit transaction) after receipt of a completed application for credit, a creditor shall notify the applicant of its action on the application.

15 U.S.C.A. § 1691(1) (1998). An applicant for credit against whom adverse action is taken must receive a statement of reasons for such action from the creditor and the statute sets forth the manner in which a creditor may satisfy this obligation. See 15 U.S.C.A. § 1691(2)(A)-(B). Adverse action includes a change in

the terms of an existing credit arrangement and a refusal to grant credit in substantially the amount or on substantially the terms requested. 15 U.S.C.A. § 1691(6).

In support of its request for summary judgment, MortgageStar has submitted to the court a copy of a Notice of Reasons for Credit Denial, Termination or Change, dated March 22, 2000, and indicating thereon that the Moores' request for credit had been withdrawn. (MortgageStar's Mot. for Summary Judg. at Attach. A, Exh. 2.) The notice reflects that it was mailed to applicant Carlos Moore on March 22, 2000. (Id.) The notice does not reflect that any adverse action occurred with respect to the Moores' March 21, 2000, application but only that it had been withdrawn. (Id.)

Plaintiffs counter MortgageStar's claim that they received notice of the change to their March 21, 2000, credit application by noting Betty Moore's testimony which states that plaintiffs did not receive such notice. (B. Moore Depo. at 70-71.) Plaintiffs further claim that the notice submitted by MortgageStar was not produced during discovery as part of the initial disclosures pursuant to Rule 26(a)(1), and was not produced in response to plaintiffs' written discovery requests, nor as part of any supplemental responses to discovery requests.

Plaintiffs also observe that the facsimile line at the top of the notice produced by MortgageStar shows that it was faxed from "MORTGAGESTAR-BETH" on August 29, 2002, the day before MortgageStar filed its motion for summary judgment. (MortgageStar's Mot. for Summary Judg. at Attach. A, Exh. 2.) Plaintiffs question the authenticity of the notice, given that it is not signed by any particular individual on behalf of MortgageStar, and observe that MortgageStar offers no explanation as to why the notice would not have been produced during discovery or was not included as part of plaintiffs' loan file.

Regardless of the authenticity of the notice or its late disclosure, the court finds that Betty Moore's testimony indicating that plaintiffs did not receive the notice creates a question of fact which precludes summary judgment as to Count XII.

I. Fraud (Count XIII)

Plaintiffs' assert a fraud claim against defendants on the grounds that after having initially completed a loan application for $93,500 at a fixed rate of 8.99%, defendants altered the application in such a manner as to include terms to which plaintiffs had not agreed. For the reasons set forth at

section C of this memorandum order with respect to Count III, infra pages 26 through 28, plaintiffs are unable to establish that their reliance on representations made by Bryan Owens concerning a fixed interest rate was justified. Plaintiffs were presented with the loan documents, some of which clearly indicated the variable nature of the loan, and chose not to read the information contained therein. Thus, insofar as Count XIII asserts a claim for fraud on the basis of any alleged misrepresentation concerning the variability of the interest rate, defendants are entitled to summary judgment.

To the extent that plaintiffs allege grounds other than that concerning the alleged fixed nature of the interest rate in support of the fraud claim at Count XIII, questions of fact exist and summary judgment is inappropriate. For the reasons set forth at section C of the memorandum order with respect to Counts IV and V, infra page 28, plaintiffs' assertions that Bryan Owens otherwise altered the loan applications in such a manner as to include various misrepresentations in an attempt to conceal the fact that the loan would be on terms other than those represented to plaintiffs is not subject to summary judgment.

J. Equitable Modification of the TILA's Recission Provision

As part of their TILA claims, which are set forth at Counts I and II, plaintiffs seek a declaration by the court that they have properly canceled their loan and that their rights have vested. According to defendants, however, plaintiffs have failed to take adequate measures to properly rescind the loan. Conseco argues that it, and not plaintiffs, should receive equitable modification of the recission provision. In particular, Conseco contends that equity dictates that it be entitled to retain its security interest and be entitled to retain any monetary amounts potentially due plaintiffs until tender of the funds expended by it on plaintiffs' behalf is made or until plaintiffs' ability to make tender is satisfactorily proved.

The TILA includes the following provision, governing the right of rescission as to certain transactions:

> (b) Return of money or property following recission
>
> When an obligor exercises his right to rescind under subsection (1) of this section, he is not liable for any finance or other charge, and any security interest given by the obligor, including any such interest arising by operation of law, become void upon such a rescission. Within 20 days, after receipt of a notice of recission, the creditor shall return to the obligor any money or property given as earnest money,

> downpayment, or otherwise, and shall take any action necessary or appropriate to reflect the termination of any security interest created under the transaction. If the creditor has delivered any property to the obligor, the obligor may retain possession of it. Upon the performance of the creditor's obligations under this section, the obligor shall tender the property to the creditor, except that if return of the property in kind would be impracticable or inequitable, the obligor shall tender its reasonable value. Tender shall be made at the location of the property or at the residence of the obligor, at the option of the obligor. If the creditor does not take possession of the property within 20 days after tender by the obligor, ownership of the property vests in the obligor without obligation on his part to pay for it. The procedures prescribed by this subsection shall apply except when otherwise ordered by a court.

15 U.S.C.A. § 1635(b) (1998). This provision and the regulations promulgated thereto, 12 C.F.R. § 226.23(d), set forth a three-step process which is triggered when a consumer elects to exercise his cancellation right. The pertinent regulation, entitled "Effects of recission," explains the process as follows:

> (1) When a consumer rescinds a transaction, the security interest giving rise to the right of rescission becomes void and the consumer shall not be liable for any amount, including any finance charge.
>
> (2) Within 20 calendar days after receipt of a notice of rescission, the creditor shall return any money or property that has been given to anyone in connection with the

> transaction and shall take any action necessary to reflect the termination of the security interest.
>
> (3) If the creditor has delivered any money or property, the consumer may retain possession until the creditor has met its obligation under paragraph (d)(2) of this section. When the creditor has complied with that paragraph, the consumer shall tender the money or property to the creditor, or where the latter would be impracticable or inequitable, tender its reasonable value. At the consumer's option, tender of property may be made at the location of the property or at the consumer's residence. Tender of money must be made at the creditor's designated place of business. If the creditor does not take possession of the money or property within 20 calendar days after the consumer's tender, the consumer may keep it without further obligation.

12 C.F.R. § 226.23(d)(1)-(3). The regulation further states that "[t]he procedures outlined in paragraphs (d)(2) and (3) of this section may be modified by court order." 12 C.F.R. § 226.23(d)(4).

Plaintiffs claim that with their February 12, 2001, letter addressed to MortgageStar and Conseco, they have rendered void the security interest held by Conseco.[9] Plaintiffs claim

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[9] Although plaintiffs' February 12, 2001, notice of cancellation of the loan was sent to Conseco and MortgageStar outside the three-day time period normally permitted for recission, plaintiffs have maintained throughout this action that they were not given sufficient copies of the notice of right to

that their obligations of tender were contingent upon Conseco's return of money associated with the transaction and performance of "any action necessary to reflect the termination of the security interest." See 12 C.F.R. § 226.23(d)(2)-(3). Because Conseco took no action within 20 calendar days following the receipt of plaintiffs' notice of cancellation, plaintiffs argue that their duty to tender the funds expended for their benefit never arose. As grounds for their request that the court deem the loan rescinded, plaintiffs rely upon the numerous allegations of wrongdoing and statutory violations which form the factual basis of each of their claims asserted in this case.

Conseco submits that plaintiffs' recission notice was deficient inasmuch as it failed to make a tender of money at Conseco's place of business. Rather, the notice directs Conseco to contact plaintiffs' counsel concerning "[a]rrangements as to this recission." (Pls' Response to Conseco's Supplemental Memo. in Support of Mot. to Dismiss at Exh. D.) Conseco argues that equity requires the court to modify the procedure as outlined in

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rescind and the evidence shows that a fact question remains as to whether each plaintiff received two copies of that notice, as required by statute. As plaintiffs observe, the recission right is absolute for three days but may last up to three years if the TILA disclosures were not provided correctly at the time of the original transaction, as is the allegation in this case. See 15 U.S.C.A. § 1635(f) (1998).

the statute and corresponding regulation and declare that it retains its security interest in the property. In support of its position, Conseco directs the court to the case of Powers v. Sims and Levin, 542 F.2d 1216 (4th Cir. 1976).

In Powers, the Court of Appeals for the Fourth Circuit reviewed circumstances in which a husband and wife sought recission of a home improvement loan and vesting of the property constituting home improvements in them without further obligation on their part to repay any of the funds advanced to them or in their behalf. 542 F.2d at 1216. In an attempt to rescind the transaction, plaintiffs wrote to defendant giving notice of cancellation of the loan agreement upon the ground that plaintiffs had not been furnished a disclosure statement. Id. at 1218. Defendant responded to plaintiffs' letter indicating that plaintiffs had been furnished the disclosure statement and rejecting plaintiffs' attempted cancellation. Id. Plaintiffs wrote defendant a second letter offering to rescind the loan transaction and this time offering to return the property constituting the home improvements. Id. Defendant responded and stated that it would not agree to a rescission unless plaintiffs returned the home improvements or their reasonable value, as well as the amount that had been expended in satisfaction of

plaintiffs' earlier debts. Id. Plaintiffs refused to reimburse defendant the amount it had spent to discharge their earlier indebtedness. Id.

The court recognized that even though debtors are given a right of recission within three days following the consummation of the transaction or the delivery of the required disclosures, the right of recission nevertheless continues where the debtors are not given the appropriate disclosures. 542 F.2d at 1220. Yet, the court found plaintiffs' attempt at recission fatally deficient, amounting instead to an anticipatory breach of contract. Id. The court states that while subsection (a) of 15 U.S.C.A. § 1635 provides for the right of recission, and subsection (b) relieves the rescinding obligor of any need to pay any finance or other charge, the statute does not relieve the obligor of any other obligation or of a "duty to proffer full restoration." Id. The court observed that upon receipt of a valid notice of recission, 15 U.S.C.A. § 1635(b) requires the creditor to take the first steps within ten days of receipt of that notice.[10] Within that period, during which the defendant in Powers should have returned payment to plaintiffs and cancelled

[10] The current statute requires action by the creditor within 20 days of receipt of the notice of recission.

its security interest, plaintiffs informed defendant that they would not comply with their obligations under the statute. Id. at 1221. It is this action that the court determined to be an anticipatory breach of their contractual obligation, and it is in the face of this anticipatory breach that the creditor was entitled to retain both the payment and its security interest. Id.

The court in Powers further observed that:

> [r]ecission is an equitable doctrine, and there is nothing in the statutory provision of the right of rescission which limits the power of a court of equity to circumscribe the right of recission to avoid the perpetration of stark inequity or to require that that be done now which ought to have been done in the first place.

542 F.2d at 1221. It further stated that

> surely Congress did not intend to require a lender to relinquish its security interest when it is now known that the borrowers did not intend and were not prepared to tender restitution of the funds expended by the lender in discharging the prior obligations of the borrowers.

Id. Conseco cites to this language by the court to support its contention that because plaintiffs' notice of rescission failed to mention tender of the funds expended on their behalf, Conseco

was excused from performing any action that would normally be required by it under the statute.

However, the debtors in Powers unequivocally refused to reimburse the lender the funds that had been paid on their behalf and notice of that refusal came within the statutory time frame during which the lender would have begun to perform its obligations. Having received such notification, the lender did not need to comply with its duties. Rather, the anticipatory breach had already occurred. In this case, Conseco made no attempt to contact plaintiffs or their counsel following receipt of the February 12, 2001, notice of rescission. Although Betty Moore testified in her deposition that she and her husband did not have the ability to pay back the money owed to Conseco on the loan and that they never offered to pay the money back, that testimony came on May 23, 2002, far more than 20 calendar days after Conseco received plaintiffs' notice of cancellation. (B. Moore Depo. at 134, 140.) Viewing the evidence in the light most favorable to the plaintiffs, it does not appear at this juncture that Conseco had actual notice on February 12, 2001, or within 20 days thereafter that plaintiffs could not repay the money owed, although that may well have been the case, nor does it appear that Conseco took action to discover such information.

Nevertheless, because of the factual issues that remain to be resolved in this case as to each claim alleged by plaintiffs, which claims serve as the basis for plaintiffs' request for equitable modification, and given Betty Moore's testimony that plaintiffs could not have made a tender of the funds, the court does not agree with plaintiffs that they are entitled to a declaration that the loan was effectively rescinded on February 12, 2001, or that the security interest held by Conseco is automatically void. Whether plaintiffs are entitled to recission of the loan without making any tender of the funds or a portion thereof received on their behalf and whether Conseco retains its security interest in plaintiffs' home are issues better resolved by the court after a jury has determined defendants' liability on the individual claims alleged by plaintiffs. The court notes that in determining whether plaintiffs are entitled to an equitable remedy in this case, it must consider, inter alia, the amount of indebtedness secured by plaintiffs' home prior to plaintiffs' loan agreement with MortgageStar and for which plaintiffs' would still be responsible had they not entered into the agreement at issue in this case, namely, $89,418.93.

IV. Conclusion

For the reasons stated, it is ORDERED that

(1) the motions to dismiss and for summary judgment of Conseco Finance Servicing Corporation ("Conseco") against plaintiffs be, and they hereby are, denied except insofar as they seek summary judgment as to Count III for fraudulent misrepresentation and Count XIII for fraud with respect to the alleged misrepresentation by Bryan Owens as to the fixed nature of the interest rate, and in that regard they are granted;

(2) the motion for summary judgment of MortgageStar be, and it hereby is, denied except insofar as it seeks summary judgment as to Count III for fraudulent misrepresentation and Count XIII for fraud with respect to the alleged misrepresentation by Bryan Owens as to the fixed nature of the interest rate, and in that regard it is granted; and

(3) the motion for summary judgment of Associated Appraisers, Samantha Jeffers, and Helen Wilburn, be, and it hereby is, denied.

The Clerk is directed to forward copies of this order to all counsel of record.

DATED: December 18, 2002

JOHN T. COPENHAVER, JR.
United States District Judge