NCLC ? Rpts - TIL user manuals

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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO.: 92-433-CIV-MARCUS

KARL W. WALMSLEY,
on behalf of himself and
all others similarly
situated,

Plaintiffs,

v.

ORDER ON MOTIONS TO DISMISS

MERCURY FINANCE COMPANY;
MERCURY FINANCE COMPANY OF
FLORIDA; and AMERICAN
BANKERS LIFE ASSURANCE
COMPANY OF FLORIDA,

Defendants.

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THIS CAUSE comes before the Court upon Defendants' motion to dismiss, the Report and Recommendation of Magistrate Judge William C. Turnoff recommending dismissal of the federal claim in this action, and remand of the remaining claims to state court, and the objections filed thereto. Plaintiff filed his five-count Amended Complaint on April 1, 1992. Count I of the Amended Complaint alleges violations of the federal Truth In Lending Act, 15 U.S.C. § 1601 et seq. ("TILA") against Defendants Mercury Finance Company and Mercury Finance Company of Florida (collectively, "Mercury"), Count II alleges usury in violation of the Florida Consumer Finance Act, Fla. Stat. §§ 516.02, 516.031, against Mercury and American Bankers Life Assurance Company of Florida ("American"), Count III alleges unfair trade practices against all defendants for scheming to misstate finance charges in violation of the Illinois Consumer Fraud Act, Ill. Rev. Stats., ch. 121-1/2, ¶¶ 261 et seq., Count IV alleges unfair trade practices against Mercury in charging a higher interest rate than that agreed upon in violation of the Illinois Consumer Fraud Act, and Count V alleges unfair trade practices against Mercury in charging a higher interest rate than that agreed upon in violation of the Florida Consumer Finance Act. Magistrate Judge William C. Turnoff issued a Report and Recommendation, recommending that the motions to dismiss the federal claim be granted, and that the remaining state claims be dismissed for lack of jurisdiction. This Court heard oral argument on the issues raised by the motion to dismiss on April 28, 1993. For the reasons that follow, we do not adopt the Report and Recommendation of the Magistrate Judge, we DENY the motion to dismiss Count I, Count II, Count III (denied only as to Mercury), and Count IV, and GRANT the motion to dismiss Counts III (granted only as to American) and Count V.

Mercury is a consumer finance company in the business of making installment loans to consumers. American issues insurance policies which consumer finance companies, such as Mercury, sell in connection with consumer credit transactions. The plaintiff, Karl Walmsley, along with an uncertified class, alleges that TILA and its Florida and Illinois counterparts were violated by the improper categorization of charges for "non-filing insurance" (taken in lieu of perfecting a security interest in Plaintiff's collateral) as "amount financed" (principal) rather than "finance charge" (interest plus other costs of financing) on the TILA-mandated disclosure statements issued by Mercury. The net result, according to the Amended Complaint, was that the annual percentage rates and finance charges on the required disclosure documents were understated by Mercury on thousands of loan transactions. The Complaint seeks statutory and actual damages on behalf of Plaintiff and a putative class under TILA and the coordinate state statutes.

I. Motion to Dismiss Count I: Federal TILA Claim

According to the Complaint, Mercury lent approximately $500.00 to Walmsley and took a security interest in various personalty including Walmsley's car. Mercury did not perfect its security interest. Instead, it purchased a Chattel Mortgage Non-Filing Insurance Policy from American for $12.25. That $12.25 was charged to Walmsley and disclosed as part of the "amount financed" rather than as part of the "finance charge."

TILA (under section 106(d), 15 U.S.C. § 1605(d)(2), and Federal Reserve Board Regulation Z, 12 C.F.R. part 226 ("Regulation Z")) permits finance companies to categorize charges for non-filing insurance as "amount financed" rather than part of the "finance charge" up to an amount equal to the expense of filing the papers necessary to perfect a security interest. TILA does not permit finance companies to so categorize charges where the insurance is self-insurance (and the finance company is retaining the premiums itself), or for insurance against general default.[1] See Official

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[1] Non-filing insurance can be distinguished from insurance against default as follows:

> Scenario #1: Where collateral has been taken by Mercury to secure a loan, and no other creditor has perfected a security interest in that collateral, and the debtor defaults, the secured creditor (e.g., Mercury) is in no

Staff Interpretation, Regulation Z, 12 C.F.R. part 226, Supp. 1 at 286; 12 C.F.R. § 226.4(b)(5).

This is fair, because a bad-credit debtor should have to pay more to obtain credit. On the other hand, where the lender decides that it is more economical to buy non-filing insurance, rather than go to the trouble of filing to perfect its security interest, TILA permits the lender to include such charges as part of the principal -- and thus earn interest on it, and avoid the perils of state usury laws. This choice also benefits the borrower since the borrower is free to give a senior interest in the same collateral to another creditor. As long as the charges for this insurance are less than the amount it would cost the lender to perfect its security interest (by filing with the Secretary of State), the borrower is better off.

A consumer finance company may discover that the default rates on their loans are low. In fact, they may find that they can cover their defaults by collecting and retaining a nominal premium on each loan, and self-insuring by this pool of charges against the infrequent defaults. TILA, however, prohibits such charges for

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worse position because of its failure to perfect its security interest by filing a financing statement with the Secretary of State.

Scenario #2: however, where another creditor has filed against the same collateral, and the debtor defaults, Mercury is in a worse position by its failure to file, because its claim is subordinate to the lien creditor.

Non-filing insurance would pay a claim only based on scenario #2, but general default insurance would be required to pay a claim based on scenario #1.

retained self-insurance from being reflected as principal ("amount financed"). Instead, TILA requires them to be shown on the credit disclosure forms as part of the "finance charge." The finance company may be reluctant to proceed this way because this might push the annual percentage rate beyond state usury limits, and would not enable the finance company to earn interest on this amount. So, betting on its assumption about the low default rates, the finance company could collect and deliver these premiums to an insurance company. While the contract between them might call for payment only for "non-filing losses," the companies could agree that the insurance company will actually process <u>all</u> claims for default. For example, assume the amount of the pool delivered to the insurance company is $10,000, and the parties agree that the insurance company's liability is capped at 90% of the total premiums. The insurance company comes out ahead because it is never liable for more than $9,000, and has a minimum of $1,000 to invest. The finance company also wins as long as its defaults stay low, because by calling the premium "amount financed," it earns interest on the premium (for each borrower) and avoids state usury laws.

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The terms of the policy state that American is obligated to pay only for losses caused by Mercury's failure to file a financing statement (and thereby perfect its security interest). <u>See</u> Amended Complaint, Ex. A. The policy further limits American's liability to 90% of the aggregate pro-rata premiums paid by Mercury, and caps individual claims at $10,000. <u>See</u> <u>id</u>. Thus, while American may have to pay the entire amount of a claim by Mercury relating to a Walmsley default, if the total of all losses American pays under the master policy reaches 90% of the paid premiums, American's liability ceases.

Plaintiff premises his claim that Mercury is not entitled under TILA to reflect the charges for "non-filing insurance" as "amount financed" on two alternate theories. Walmsely first asserts that the Chattel Mortage Non-Filing Insurance Policy agreement with American is not insurance, because there is no shifting of the risk. Plaintiff contends that American is not put at risk at all since its maximum liability is only 90% of all premiums collected. Since the policy is not insurance, Plaintiff argues, Mercury cannot avail itself of the benefits of TILA § 106(d)(2), 15 U.S.C. § 1605(d)(2) (permitting allocation to principal of the costs of non-filing insurance), and thus TILA requires Mercury to reflect the costs of the arrangement as part of the "finance charge."

Alternatively, Walmsley argues that, in reality, the agreement with American was for general default insurance, and not non-filing insurance, since it was allegedly the practice of American to pay claims on any default, regardless of whether Mercury's inability to collect was due to failure to file. (E.g., American would pay a claim for the full amount of the loan where the debtor defaulted, but where there were no senior liens on the collateral. There, Mercury's loss was caused merely by the fact that the loan was inadequately collateralized, or that it cost too much to go to the trouble of enforcing the lien, rather than by its failure to perfect its security interest in the collateral.) TILA, Plaintiff urges, requires such general default insurance to be disclosed as part of the "amount financed" (because § 106(d) only provides the lender with the exemption for the more limited <u>non-filing</u> insurance).

Magistrate Judge Turnoff recommended dismissal of the TILA claim on two grounds: First, Magistrate Judge Turnoff concluded that the agreement was insurance, (a) because Florida law's definition of insurance, <u>see</u> <u>infra</u>, does not mention risk-shifting; and (b) because he found Plaintiff's argument -- that the failure to shift risk means that the policy at issue does not constitute insurance -- to be "unsupported by any applicable authorities." Report and Recommendation at 4. Second, Magistrate Judge Turnoff concluded that "American Banker's putative practice of processing claims other than those of a non-filing nature, does not vitiate the policy's status as one of non-filing insurance." <u>Id</u>.

In support of the result urged by the Magistrate Judge, Defendants argue that Florida law governs the definition of insurance and it does not require shifting of the risk. Florida Statutes § 624.02 defines insurance as "a contract whereby one undertakes to indemnify another or pay or allow a specified amount or a determinable benefit upon determinable contingencies." The failure of this agreement to shift the risk of loss to American thus would not divest the policy of its character-as-insurance. Thus, the charges could be shown as part of the principal amount financed in accordance with TILA.

Defendants also maintain that the terms of the policy govern, and therefore American's actual procedure for processing claims is irrelevant. The policy states on its face that American is obligated only to process claims for losses caused by Mercury's failure to file a financing statement. The fact that American gratuitously performs duties which it is not obligated to perform would not convert the policy to a general default policy rather than a non-filing policy for purposes of disclosure under TILA.

In his objections to the Magistrate Judge's Report and Recommendation, Plaintiff argues that, to the extent that Florida Law does not require risk-shifting, it is renegade in the universe of state insurance law, and should be disregarded. Walmsley reasons that it does not make sense for TILA to announce a uniform set of standards for credit disclosure, only to be disrupted by the vagaries of state insurance law. Federal law, he points out, has always understood insurance to require risk shifting.

Further, Walmsley contends that Defendants cannot elevate form over substance when TILA is involved. If the policy was <u>in practice</u> a general default policy, then its self-designation as a "non-filing" insurance policy cannot permit Defendants to evade the TILA requirements.

The Amended Complaint and the Motion to Dismiss thus address two alternative theories of recovery under TILA: (1) whether the contract was "insurance"; and (2) whether the court can look beyond the terms of the policy to determine whether this was "non-filing" insurance only, or whether it was really general insurance against default.

At this juncture, we need not decide whether the policy at issue is "insurance," or whether state or federal law applies. Even if we accept Defendants' contention that the policy is insurance,[2] Plaintiffs present an alternate theory of recovery,

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[2] Defendants point out that the applicable regulation under TILA indicates that state law governs definitions of terms (like "insurance") not defined by TILA. Defendants, as noted above, cite to the Florida statute which nowhere mentions risk-shifting. Plaintiff contends that the regulation directing a view towards state law is inapplicable here, and that such a regulation would in any event be contrary to the statutory aim of uniform disclosure requirements. Both sides disagree about the proper interpretation of a Florida Court of Appeals case, Professional Lens Plan, Inc. v. Dep't of Ins. 387 So.2d 548 (Fla. 1st DCA 1980), which discusses the requirements of insurance. Aside from Professional Lens, there is precious little guidance in defining "insurance" from the Florida courts.

We observe, in passing, that the former Fifth Circuit has clearly stated -- albeit in a different context -- that "Risk shifting or risk distribution is one of the requisites of a true insurance contract. In the present case, there was no shifting of the risk since ... losses were to be paid only out of a fund made up of premiums [the insured] had paid." Steere Tank Lines, Inc. v. U.S., 577 F.2d 279, 280 (5th Cir. 1978) (holding that a taxpayer could not deduct premiums paid since they were not paid for insurance, but rather into a non-deductible reserve for accident claims).

Similarly, by way of analogy, under the McCarran-Ferguson Act, 15 U.S.C. § 1011 et seq., the question of whether a practice falls under the "business of insurance" (such that a state regulation may not be superseded by federal law) is determined according to three factors:

> First, whether the practice has the effect of transferring or spreading a policyholder's risk; second, whether the practice is an integral part of the policy relationship between the insurer and the insured; and third, whether the practice is limited to entities within the insurance industry.

viz., the Court should look beyond the terms of the policy to determine whether it is "general default" insurance in order to uncover a TILA violation. Contrary to the arguments of Defendants, and the recommendation of the Magistrate Judge, we think such an inquiry is appropriate. Consequently, presented with a 12(b)(6) motion, we cannot say that there is no set of facts under which plaintiff could prove that this policy is actually one insuring general defaults, and not confined to non-filing losses. See Conley v. Gibson, 355 U.S. 41, 45-46, 78 S.Ct. 99 (1957).

More precisely, the central question presented becomes: whether the allegations of the complaint (i.e., that American paid claims for other than non-filing losses), are enough to contradict the express terms of the policy such that they can withstand a motion to dismiss. The Magistrate Judge thought not, and, agreeing with the defendants, recommended that this Court was bound by the nomenclature of the policy which designated the policy as "non-filing insurance," and could not look beyond the policy to determine whether the lender has complied with TILA. We hold, to the contrary, that the court may look beyond the terms of the policy to determine whether the lender has complied with TILA, for the following reasons:

First, at least two cases in the Eleventh Circuit indicate that for purposes of truth-in-lending disclosures, the court should look beyond the express terms of the contract to the economic

Union Labor Life Ins. Co. v. Pireno, 458 U.S. 119, 129, 102 S.Ct. 3002, 3009 (1982) (interpreting the McCarran-Ferguson Act) (emphasis altered).

realities of the situation. In Meyers v. Clearview Dodge Sales, Inc., 539 F.2d 511 (5th Cir. 1976), cert. denied sub nom. Chrysler Credit Corp. v. Meyers, 431 U.S. 929 (1977), the former Fifth Circuit held that Chrysler Credit Corporation was a "creditor" under TILA and required to make TILA disclosures, despite Chrysler Credit's argument that it was not an original party to the car-financing transaction, but only a subsequent assignee to the contract between Meyers and the dealership. The Court of Appeals for the Fifth Circuit stated: "[Chrysler Credit's] argument elevates form over substance in an effort to avoid the realities of the credit transaction." Id. at 515. Then, in Aidel v. Chase Fed. Sav. & Loan Ass'n, 810 F.2d 1051 (11th Cir. 1987), the Court of Appeals for the Eleventh Circuit again looked beyond the express terms of a credit agreement to hold the lender bound by TILA. In Aidel, a savings and loan institution had lent money to a townhouse builder under a mortgage agreement which was subsequently assigned by the builder to the buyers. TILA requires appropriate disclosures to be made for consumer loans, but not for commercial loans. The Court held the bank bound by TILA based on a finding that "the ultimate purpose of the loan was to extend consumer credit," that "[i]t was clearly contemplated at the outset that the ultimate obligation would run from [the consumers] to [the bank]," and that "to find that no consumer transaction occurred between [the plaintiffs-consumers] and [the bank] is "to ignore the commercial reality of the situation." Id. at 1053.

Second, although not binding precedent, the district court in

Dixon v. S & S Loan Svc. of Waycross, Inc. 754 F.Supp. 1567 (S.D. Ga. 1990), denied a motion for summary judgment on the issue of whether "nonfiling" insurance was really general default insurance based on the claims processing practices of the lender and insurer for purposes of the disclosure requirements of TILA. The Dixon Court assumed that "the exclusion [for non-filing insurance] is only available if the non-filing insurance is actually purchased." Id. at 754. In other words, the Court assumed that if it turned out as a factual matter that the agreement and practice of the lender and insurer contemplated insuring a risk beyond that created by non-filing, then the lender was required to include the premium for the insurance in the computation of the "finance charge." We find these arguments convincing.

Next, Plaintiff argues that even accepting Defendants' premise--that the Court cannot look beyond the four corners of the policy--the very face of the policy shows that it is not exclusively insurance for losses caused by failure to perfect a security interest: a term in the Chattel Mortgage Non-Filing Insurance Policy provides that "if the debtor is adjudicated bankrupt ... such adjudication shall be deemed a loss because of the creditor's inability to attach the secured collateral." See Complaint, Ex. A.

The trustee-in-bankruptcy has the rights of a hypothetical lien creditor who filed on the date of the bankruptcy petition. See 11 U.S.C. § 544(a). The clause quoted from the policy appears to obligate American to pay the full amount of the loan in the event of a bankruptcy. Walmsley argues that, in cases where Mercury is undersecured, non-filing insurance would only pay the value of the collateral, but this clause will pay the full amount of the loan. Therefore, Walmsley concludes, in the bankruptcy scenario at least, this policy is -- by its own terms -- default insurance, and not non-filing insurance. Defendants correctly defeat this argument in pointing out that the policy pays the lesser of the value of the collateral or the outstanding loan balance. See Amended Complaint, Ex. A, at p. 2 ¶ 1.

However, in his reply memorandum to the Report and Recommendation -- which brief was unauthorized under our local rules -- Plaintiff argues that the types of collateral in which Mercury takes security interests (personalty, cars), are usually subject to state-law exemptions, which are honored by the Bankruptcy Code. Such exemptions under the Bankruptcy Code (which turn on state law) void both unperfected and perfected secured interests in certain very limited classes of personal property. Thus, Mercury's security interest might be voided by bankruptcy regardless of whether Mercury had perfected by filing a financing statement with the Secretary of State. Accordingly, Plaintiff argues that where an exemption applies, such a loss would not -- strictly speaking -- be caused by nonfiling, since the bankrutpcy would void the lien either way.

This elegant theoretical argument[3] loses its persuasiveness in

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[3] Defendants did not respond, because it was presented in unauthorized brief, although they did not specifically object to it in their motion to strike which objected to other arguments.

practice because, in some states, exemption laws cover only particular items, and most put a cap on the value of exempt personalty. It is likely that, in the overwhelming majority of cases, Defendants could show that the value of the non-exempt personalty would be enough to cover the loan. In any event, the issue is a fact-bound one, appropriate for resolution at trial, or perhaps on summary judgment, but not on a motion to dismiss.

Finally, we are unpersuaded by Defendants' argument that the language of the statute, without more, forecloses Plaintiff's "not-non-filing-insurance" theory of recovery. The argument can be summarized as follows:

(1) TILA § 106(d) provides that "a creditor need not include ... in the computation of the finance charge ... the premium payable for <u>any</u> insurance in lieu of perfecting any security interest." 15 U.S.C. § 1605(d)(2)(emphasis added).

(2) Regulation Z (promulgated under TILA) restates this rule at 12 C.F.R. § 226.4(3)(2), but also states that the finance charge <u>may not exclude</u> "premiums or other charges for any guarantee or insurance protecting the creditor against the consumer's default or other credit loss." 12 C.F.R. § 226.4(b)(5). Walmsley relies on this regulation for his proposition that any charges for protection against default must be included in the computation of the finance charge.

(3) Defendants argue that in order to read the regulation

consistent with the statute, the lender is prohibited from including in the "amount financed" only premiums payable exclusively for default insurance or self-insurance. Thus, American argues, where any non-filing insurance is purchased, lender may properly designate the premium for the policy as part of the principal (and thereby earn interest on the amount and avoid usury problems). The lender is not forced to categorize the premium as "finance charge" just because the insurer happens to provide the lender with broader benefits than are necessary under the non-filing insurance policy.

Defendants' reading is unpersuasive. The policy behind TILA is protection of the consumer borrower and it is to be construed liberally in favor of the consumer. See Bizier v. Globe Fin. Serv., Inc. 654 F.2d 1, 3 (1st Cir. 1981); McGowan v. King, Inc., 569 F.2d 845, 848 (5th Cir. 1978). The former Fifth Circuit has stressed that the purpose of TILA is "to promote the informed use of credit and an awareness of the cost thereof by consumers," and "to assure a meaningful disclosure of credit terms so that the consumers will be able to compare more readily the various credit terms available." Smith v. Chapman, 614 F.2d 968 (5th Cir. 1980); see also Shroder v. Suburban Coastal Corp., 729 F.2d 1371, 1380 (11th Cir. 1984). "Liability will flow from even minute deviations from requirements of the statute and Regulation Z." Shroder, 729 F.2d at 1380 (emphasis added). Regulation Z clearly states that charges for "premiums or other charges for any guarantee or insurance protecting the creditor against the consumer's default" are part of the finance charge. 12 C.F.R. §226.4(b)(5) (emphasis added). The practice alleged between Mercury and American was that the premium paid protected the creditor [Mercury] against the consumer's default. Hence, Regulation Z requires it to be included in the finance charge.

We recognize that permitting this claim to go forward is somewhat anomalous since there is a serious question as to whether Walmsley is at all adversely affected by the assailed conduct. Indeed, Walmsley seems better off than if Mercury had filed financing statements (passing the full cost, in excess of the $12.25, off to Walmsley) and perfected their lien on his personal property. Thus, the question arises: why should the payment or non-payment of Mercury's claims under the insurance policy create any rights in Walmsley? The Plaintiffs have simply not alleged that Walmsley suffers at all from the putative practice that the insurance here may really also be insurance for default. Moreover, we note the irony that forcing Mercury to report the default insurance as "finance charge" could conceivably result in a tightening of the credit market, ultimately to the disadvantage of the putative class. Similarly, it is unclear that Walmsley could or would have done anything different had he possessed the information under the "finance charge" column. Whatever the economic realities may be, the Court of Appeals for the Eleventh Circuit has indicated unambiguously that "the statutory civil penalties must be imposed for such a [TILA] violation regardless of the district court's belief that no actual damages resulted [to this particular consumer] or that the violation is de minimus." Zamarippa v. Cy's Car Sales, Inc., 674 F.2d 877 (11th Cir. 1982). As this directive is clear, we must deny the motion to dismiss Count I.

II. American's Motion to Dismiss Count II for Usury under Florida Law

American argues that it should be dismissed from Count II because American was merely the insurance company, and did not extend the loan, so had no liability for the usury under the usury statutes, and was not engaged in an unfair trade practice under the unfair trade practices statutes because it had no direct relationship with the Plaintiff. However, Fla. Stat. § 516.02(c) states that "each person who in any manner participates" in a usurious loan "is subject to this chapter." (Emphasis added). The language of the statute is indeed broad, and we are not convinced that the usury statute aims at regulating the conduct only of persons participating in the loan process. Further, the statements from the Florida courts cited to us as supporting that proposition are excerpted from cases which were not confronting this question. See Continental Mortgage Investors v. Sailboat Key, Inc., 354 So.2d 67, 71 (Fla. 3d DCA 1977) (addressing a choice of law issue, and deciding to apply the Florida usury statute to void a contract imposing a usurious rate of interest, where Massachusetts -- which has no applicable usury statute -- would enforce the agreement); First Mortgage Corp. of Vero Beach v. Stellmon, 170 So.2d 302, 304 (Fla. 2d DCA 1964) (deciding whether a particular acceleration clause rendered a promissory note usurious). Moreover, the public policy of discouraging usurious loans is not furthered by narrowing the scope of the statute, especially given the broad phrasing adopted by the Florida legislature.

III. American's Motion to Dismiss Count III for Unfair Trade Practices under Illinois Law

Plaintiff has made no showing whatsoever that he should be able to sue American under an Illinois state statute (i.e., the Illinois Consumer Fraud and Deceptive Business Practices Act, Ill. Rev. Stat. ch. 121 1/2, ¶ 261 et seq. (1991)). Plaintiff has not established any connection between the State of Illinois and the conduct of American, which is incorporated in Florida, save the fact that both Mercury and counsel for Plaintiff are headquartered in Illinois. Accordingly, American must be dropped from Count III. See In re Burzynski, 989 F.2d 733, 741 (5th Cir. 1993).

IV. Mercury's Motion to Dismiss Count II

As Mercury's motion to dismiss Count II, for usury under Florida law, is premised on the same arguments directed at Count I which we have already reviewed and rejected, we must deny Mercury's motion to dismiss Count II as well.

V. Mercury's Motion to Dismiss Counts III and IV under Illinois Law

Mercury moves to dismiss Count III (for scheming to misstate finance charges and to evade TILA regulations) and Count IV (for collecting interest at a rate higher than that specified in the parties' agreement) on standing grounds. Specifically, Mercury argues that these two Counts, which allege unfair trade practices under the Illinois Consumer Fraud Act, Ill. Rev. Stats., ch. 121-1/2, ¶¶261 et seq.,[4] should be dismissed because the only contact Mercury has with Illinois is that Mercury is headquartered there, otherwise, the transaction was exclusively Floridian in character (i.e., Walmsley is a Florida resident, the contract was signed in Florida, and the choice-of-law clause in the contract selects Florida law).

The relevant portion of the Illinois Consumer Fraud Act provides that

> [t]he terms "trade" and "commerce" mean the advertising, offering for sale, sale, or distribution of any services and any property, tangible or intangible, real, personal or mixed, and any other article, commodity, or thing of value wherever situtated, and shall include any trade or commerce directly or indirectly affecting people of this State.

Ill. Rev. Stat. ch. 121-1/2, § 261(f). The statute's sweep is wide, and on its face the language appears to cover deceptive practices which are aimed at out-of-staters and which take place exclusively out-of-state. The irony would run high were Illinois unable to regulate the shady dealings of businesses which avail themselves of all the benefits of a Chicago office, simply because they target victims across the state line. Further, when an

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[4] The Illinois statute prohibits, among other things:

> § 2. Unfair and deceptive acts or practices, including but not limited to the use or employment of any deception, fraud, false pretense, false promise, misrepresentation or the concealment, suppression or omission of any material fact, with intent that others rely upon the concealment, suppression or omission of such material fact ... .

Ill. Rev. Stat. ch. 121-1/2 ¶262.

Illinois company deceives an out-of-state consumer, the people of Illinois are, at the very least, indirectly affected.

Plaintiff cites Martin v. Heinhold Commodities, 117 Ill.2d 67 (Ill. 1987) for the proposition that the Illinois Consumer Fraud Act can reach in-state companies alleged to have defrauded a class of out-of-state plaintiffs. Martin enumerated the contacts of the transaction with Illinois (among others, some plaintiffs were Illinois residents and the defendants were residents), citing the United States Supreme Court decision in Phillips Petroleum v. Shutts, 105 S.Ct. 2695 (1985). Although the contacts here are far more attenuated than in Martin, relying on Fry v. UAL Corp, 136 F.R.D. 626, 637 (N.D. Ill. 1991) (noting that the Act prohibits fraud "in the conduct of any trade of commerce" and that the Act was not intended to be limited to protecting Illinois resident consumers), we think that the Illinois Consumer Fraud Act fairly reaches transactions conducted by Illinois-headquartered companies (like Mercury, and unlike American) with out-of-state residents. Accordingly, we must deny the motion to dismiss Counts III and IV as to Mercury.

V. Mercury's Motion to Dismiss Count V under Florida Law

Mercury argues that Count V, for violation of Fla. Stat. § 516.031(2) should be dismissed because it does not state a claim under Fla. Stat § 516.031(2) which merely sets the maximum interest rate, but rather states some other type of claim, possibly for breach of contract. Count V alleges that collecting interest at a rate higher than that agreed upon violates Fla. Stat. § 516.031(2), a different section of the Florida usury statute from that alleged to have been violated in Count II. The relevant section reads:

> **Annual percentage rate under Federal Truth-in-Lending Act.**--The annual percentage rate of finance charge which may be contracted for and received under any loan contract made by a licensee under this chapter may equal, but not exceed, the annual percentage rate which must be computed and disclosed as required by the federal Truth in Lending Act and Regulation Z of the Board of Governors of the Federal Reserve System. The maximum annual percentage rate of finance charge which may be contracted for and received is 12 times the maximum monthly rate, and the maximum monthly rate shall be computed on the basis of one-twelfth of the annual rate for each full month. The department shall by regulation establish the rate for each day in a fraction of a month when the period for which the charge is computed is more or less than 1 month.

Fla. Stat. § 516.031(2) (West Supp. 1993). Evidently, this section sets the maximum percentage rate chargeable. What it does not do is create a right of action, distinct from that for usury, for collecting more interest than that specified by contract. Plaintiff may have a claim for breach of contract, but that is not what Count V pleads. For this reason, Count V must be dismissed.

Accordingly, it is hereby

ORDERED AND ADJUDGED as follows:

the motion to dismiss Count I against Mercury is DENIED;

the motion to dismiss Count II against all defendants is DENIED;

the motion to dismiss Count III against against all defendants is DENIED as to Mercury; but

the motion to dismiss Count III is GRANTED as to American;

the motion to dismiss Count IV against Mercury is DENIED; and, the motion to dismiss Count V against Mercury is GRANTED.

DONE AND ORDERED in Miami, this 10th day of September, 1993.

Stanley Marcus

STANLEY MARCUS
UNITED STATES DISTRICT JUDGE

copies to:
Magistrate Judge William C. Turnoff
counsel of record