IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

JANICE JAMAL, a/k/a JANICE CHEESEBORO	:	CIVIL ACTION
	:	
vs.	:	NO. 04-CV-5489
WMC MORTGAGE CORPORATION, THE FIRST NATIONAL BANK OF CHICAGO, as trustee under the pooling and servicing agreement dated September 1, 1998, WMC Series 1998-B Trust, EXPRESS FINANCIAL SERVICES and JOHN DOES #S 1-100	:	

MEMORANDUM AND ORDER

JOYNER, J. **March 28, 2005**

This case is now before the Court for disposition of the Plaintiff's Motion for Remand to the Court of Common Pleas of Philadelphia County. For the following reasons, the motion shall be granted.

Factual Background

According to the allegations in the plaintiff's complaint, she is an extremely frail individual who suffers from numerous health problems, including Graves Disease and Hypothyroid Disease. In September, 1998, an unidentified WMC representative approached Plaintiff at her home in Philadelphia and promised that she would be approved for a $40,000 home improvement loan with WMC Mortgage Corporation at a fixed interest rate of approximately 7%. Plaintiff subsequently received a packet in

the mail from WMC, informing her that she had been pre-approved for a mortgage with the same terms she was previously promised including a low fixed interest rate and a low, single monthly payment.

Contrary to these representations, however, at the loan closing on September 4, 1998, Plaintiff was presented with a Note and Mortgage prepared by WMC in the amount of $76,000 with an adjustable rate of 10.99% not to exceed 17.49% for thirty years. Despite Plaintiff's protests at the loan closing, certain unknown representatives of Express Financial told Plaintiff that she was required to pay off all of her debts, including a first mortgage in the amount of $11,140.07 and utilities or she would not be able to obtain the loan with WMC. In reliance on these representations and believing that she was required to incorporate her unsecured debt as well as her prior mortgage, Plaintiff executed the Mortgage and Note. Plaintiff also avers that there were prepaid finance charges that were not included in WMC's Truth in Lending disclosures, that WMC charged unreasonable fees in her loan in excess of the amount customarily charged for such services and that these fees were then financed into the mortgage, thereby increasing her indebtedness to WMC. Finally, Plaintiff also contends that WMC never informed her that it would not give her a loan on the terms she had requested or the reasons for their refusal to extend credit to her on those terms and that

Defendants failed to give her all of the disclosures required by the Truth in Lending Act, 15 U.S.C. §1601*, et. seq.*, ("TILA"), the Home Ownership and Equity Protection Act of 1994, 15 U.S.C. §1639(a) ("HOPEPA") and Regulation Z of the Federal Reserve Board, 12 C.F.R. §226.1, *et. seq.*

Six months after the loan closing, Plaintiff became extremely ill as her Graves Disease progressed, was hospitalized and shortly thereafter lost her job as a Philadelphia Housing Authority Manager at which she earned $45,000 per year. WMC then denied Plaintiff's requests for a forbearance agreement or a repayment plan on the mortgage and instead assigned the mortgage to the First National Bank of Chicago, which "securitized" Plaintiff's loan into the WMC Trust. Defendants then instituted foreclosure proceedings and obtained a judgment against Plaintiff in the amount of $103,705.14.

Plaintiff instituted this lawsuit in August, 2004 in the Philadelphia County Common Pleas Court alleging that the defendants violated the Pennsylvania Unfair Trade Practices and Consumer Protection Law, 73 P.S. §201-1, *et. seq.*, and the Pennsylvania Fair Credit Extension Uniformity Act, 73 Pa.C.S. §2270.1, *et. seq.* by, *inter alia*, imposing credit costs expressly prohibited by federal and Pennsylvania state law and failing to comply with TILA, HOEPA, the FCEUA as well as the Equal Credit Opportunity Act, 15 U.S.C. §1691, *et. seq.* ("ECOA") , and the

Real Estate Settlement Procedures Act, 12 U.S.C. §2601, *et. seq.* ("RESPA"). Defendant Express Financial timely removed the case to this Court on the grounds that Plaintiff's claims actually arise under federal law. As noted, Plaintiff now moves to remand.

Standards Governing Motions to Remand

Generally, the removal of actions from the state to the federal courts is governed by 28 U.S.C. §1441. Under subsection (a) of that statute,

> (a) Except as otherwise expressly provided by Act of Congress, any civil action brought in a State court of which the district courts of the United States have original jurisdiction, may be removed by the defendant or the defendants, to the district court of the United States for the district and division embracing the place where such action is pending. For purposes of removal under this chapter, the citizenship of defendants sued under fictitious names shall be disregarded.

Under this statute, the propriety of removal therefore depends upon whether the case originally could have been filed in federal court. City of Chicago v. International College of Surgeons, 522 U.S. 156, 163, 118 S.Ct. 523, 529, 139 L.Ed.2d 525 (1997).

It has consistently been held that §1441 is to be strictly construed against removal so that the congressional intent to restrict federal diversity jurisdiction is honored. Meritcare, Inc. v. St. Paul Mercury Insurance Co., 166 F.3d 214, 217 (3rd

Cir. 1999); Robinson v. Computer Learning Centers, Inc., 1999 U.S. Dist. LEXIS 15753 (E.D.Pa. 1999). All doubts as to the existence of federal jurisdiction must be resolved in favor of remand. Packard v. Provident National Bank, 994 F.2d 1039, 1044-45 (3rd Cir. 1993); Neff v. General Motors Corp., 163 F.R.D. 478, 480 (E.D.Pa. 1995). The Third Circuit has interpreted this "all doubts" principle to mean that so long as "there is any doubt as to the propriety of removal, the case should not be removed to federal court. Dunson v. McNeil-PPC, Inc., 346 F.Supp.2d 735, 737 (E.D.Pa. 2004). The burden of proof is on the party removing the case to show the presence of federal jurisdiction. Id., citing Abels v. State Farm Fire & Casualty Co., 770 F.2d 26, 29 (3d Cir. 1985).

Discussion

As a general rule, absent diversity jurisdiction, a case will not be removable if the complaint does not affirmatively allege a federal claim. Beneficial National Bank v. Anderson, 539 U.S. 1, 6, 123 S.Ct. 2058, 2062, 156 L.Ed.2d 1 (2003). Since a defendant may remove a case only if the claim could have been brought in federal court, the question for removal jurisdiction must be determined by reference to the "well-pleaded complaint" rule. Merrell Dow Pharmaceuticals, Inc. v. Thompson, 478 U.S. 804, 808, 106 S.Ct. 3229, 3232, 92 L.Ed.2d 650 (1986). Under this rule, federal question jurisdiction only exists where an

issue of federal law appears on the face of the complaint. DiFelice v. Aetna/U.S. Healthcare, 346 F.3d 442, 445-446 (3d Cir. 2003). The rule makes the plaintiff the master of the claim; he or she may avoid federal jurisdiction by exclusive reliance on state law. Caterpillar, Inc. v. Williams, 482 U.S. 386, 392, 107 S.Ct. 2425, 2429, 96 L.Ed.2d 318 (1987). Even the existence of a federal defense normally does not create statutory "arising under" jurisdiction, and "a defendant may not generally remove a case to federal court unless the plaintiff's complaint establishes that the case 'arises under' federal law." Aetna Health, Inc. v. Davila, 124 S.Ct. 2488, 2494, 159 L.Ed.2d 312 (2004), quoting Franchise Tax Board of California v. Construction Laborers Vacation Trust for Southern California, 463 U.S. 1, 10, 103 S.Ct. 2841, 77 L.Ed.2d 420 (1983) and Louisville & Nashville R. Co. v. Mottley, 211 U.S. 149, 29 S.Ct. 42 53 L.Ed. 126 (1908). See Also, Lazorko v. Pennsylvania Hospital, 237 F.3d 242, 248 (3d Cir. 2000)("If the defendant merely has a federal law defense, he may not remove the case, although he may assert the federal defense in state court.") Stated otherwise, a defendant cannot, merely by injecting a federal question into an action that asserts what is plainly a state-law claim, transform the action into one arising under federal law, thereby selecting the forum in which the claim shall be litigated. Caterpillar, 482 U.S. at 399, 107 S.Ct. at 2433.

Congress has, however, created certain exceptions to the well-pleaded complaint rule. Beneficial National Bank, 123 S.Ct. at 2062. Indeed, a state claim may be removed to federal court in only two circumstances–-when Congress expressly so provides or when a federal statute wholly displaces the state-law cause of action through complete preemption. Id., at 2063. When the federal statute completely preempts the state-law cause of action, a claim which comes within the scope of that cause of action, even if pleaded in terms of state law, is in reality based on federal law and is then removable under 28 U.S.C. §1441(b), which authorizes any claim that "arises under" federal law to be removed to federal court. Id.; Pascack Valley Hospital v. Local 464A UFCW Welfare Reimbursement Plan, 388 F.3d 393, 399 (3d Cir. 2004).

The complete preemption doctrine is stringently applied and the Supreme Court has found that complete preemption exists in only a few limited instances: usury actions against national banks, actions arising out of nuclear incidents, actions under section 502(a) of ERISA, possessory land claims brought by Indian tribes and certain actions arising under section 301 of the Labor Management Relations Act. Nott v. Aetna U.S. Healthcare, Inc., 303 F.Supp.2d 565, 568, 569 (2004). It should also be noted that conflict (or ordinary) preemption, which arises when a federal law conflicts with state law thus providing a federal defense to

a state law claim, is not synonymous with complete preemption. Id., at 569. Before the extraordinary force of complete preemption can apply, two elements must exist: (1) the state law cause of action must be covered by the civil enforcement scheme created by the federal statute and (2) Congress must have clearly intended that the federal statute would preempt all state law causes of action thus permitting removal even when the plaintiff's complaint relies exclusively on state law. Id., at 570, citing Goepel v. National Postal Mail Handlers Union, 36 F.3d 306, 311 (3d Cir. 1994) and Allstate Insurance Co. V. 65 Sec. Plan, 879 F.2d 90, 93 (3d Cir. 1989); Thibodeau v. Comcast Corporation, Civ. A. No. 04-1777, 2004 U.S. Dist. LEXIS 20999 at * 12-13 (E.D.Pa. Oct. 21, 2004).

In this case, we cannot find that the two elements which are prerequisite to complete preemption are present. Specifically, the TILA[1] provides in relevant part at 15 U.S.C. §1610(a)(1),

> Except as provided in subsection (e) of this section [relating to credit and charge card application and solicitation disclosures], this part and parts B and C of this subchapter do not annul, alter, or affect the laws of any State relating to the disclosure of information in connection with credit transactions, except to the extent that those laws are inconsistent with the provisions of this subchapter and then only to the extent of the

[1] The Homeowners' Equity Protection Act or "HOEPA" was enacted on November 23, 1988 and effectively amended the Truth in Lending Act, ("TILA") at sections 1632 and 1637 of Title 15, U.S.C. and enacting sections 1637a, 1647 and 1665b of that Title. Pub. L. 100-709, §1. See Also, In re Barber, 266 B.R. 309, 320 (Bankr. E.D.Pa. 2001).

inconsistency...

Similarly, Regulation Z, 12 C.F.R. §226.28(a) states in pertinent part:

> Inconsistent disclosure requirements. (1) Except as provided in paragraph (d) of this section [relating to special rule for credit and charge cards], state law requirements that are inconsistent with the requirements contained in chapter 1 (General Provisions), chapter 2 (Credit Transactions), or chapter 3 (Credit Advertising) of the act and the implementing provisions of this regulation are preempted to the extent of the inconsistency...

The language of the Equal Credit Opportunity Act, 15 U.S.C. §1691d(f) likewise reads:

> This subchapter does not annul, alter, or affect, or exempt any person subject to the provisions of this subchapter from complying with, the laws of any State with respect to credit discrimination, except to the extent that those laws are inconsistent with any provision of this subchapter, and then only to the extent of the inconsistencies. The Board is authorized to determine whether such inconsistencies exist. The Board may not determine that any State law is inconsistent with any provision of this subchapter if the Board determines that such law gives greater protection to the applicant.

Finally, RESPA provides at 12 U.S.C. §2605(h):

> Notwithstanding any provision of any law or regulation of any State, a person who makes a federally related mortgage loan or a servicer shall be considered to have complied with the provisions of any such State law or regulation requiring notice to a borrower at the time of application for a loan or transfer of the servicing of a loan if such person or servicer complies with the requirements under this section regarding timing, content, and procedures for notification of the borrower.

We find that the foregoing statutory language evinces that Congress intended TILA (as amended by HOPEPA), ECOA and RESPA to preempt the states' statutory scheme only in the event and to the

extent that a state law conflicts with these federal acts and accompanying regulations.[2] *In accord*, McCrae v. Commercial Credit Corp., 892 F.Supp. 1385, 1386-87 (M.D.Ala. 1995)("The TILA does not contain a civil enforcement provision that requires complete preemption of law, nor is there any other manifestation that Congress intended preemption."); Heastie v. Community Bank of Greater Peoria, 690 F.Supp. 716, 720 (N.D.Ill. 1988)("There is explicit language in the TILA and Regulation Z detailing their preemptive effect. State disclosure laws inconsistent with the TILA are preempted to the extent of the inconsistency... Preemption does not extend to general state statutes prohibiting fraud"). See Also, Knapp v. Americredit Financial Services, Inc., 245 F.Supp.2d 841, 850 (S.D. W.Va. 2003)("TILA does not preempt West Virginia usury law."); Alexiou v. Brad Benson Mitsubishi, 127 F.Supp.2d 557, 560 (D.N.J. 2000)("Where a federal statute requires 'inconsistency' in order for it to preempt state law, the federal statute cannot be one which preempts the field...This Court is guided by the Supreme Court and the above-cited case law, which clearly indicates that the TILA was not meant to preempt the field of laws relating to consumer lending

[2] Indeed, the ECOA requires aggrieved individuals to *choose* between state and federal remedies. 15 U.S.C. §1691d(e) states in relevant part: "[w]here the same act or omission constitutes a violation of this subchapter and of applicable State law, a person aggrieved by such conduct may bring a legal action to recover monetary damages either under this subchapter or under such State law but not both..."

practices.”)

As noted above, ordinary, “conflict” preemption does not equate to complete preemption and thus while the defendants here may raise preemption as a defense in the state court action, the raising of a federal defense also does not, of itself, support removal. For these reasons, we find that remand is proper and we therefore grant the plaintiff’s motion therefor pursuant to the attached order.

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ORDER

AND NOW, this 28th day of March, 2005, upon consideration of Plaintiff's Motion for Remand and Defendant Express Financial Services, Inc.'s Response thereto, it is hereby ORDERED that the Motion is GRANTED for the reasons set forth in the preceding Memorandum Opinion and this case is REMANDED to the Court of Common Pleas of Philadelphia County.

IT IS FURTHER ORDERED that Plaintiff's Request for counsel fees and costs for the instant removal proceedings is DENIED.

BY THE COURT:

s/J. Curtis Joyner
J. CURTIS JOYNER, J.