IN THE THIRD DISTRICT COURT OF APPEAL
IN AND FOR THE STATE OF FLORIDA

CASE NO. 3D17-0001

JOHN M. BENNETT, et al.,

L.T. NO.: 12-41600

Appellants/Petitioners,

vs.

MORTGAGE ELECTRONIC REGISTRATION SYSTEMS, INC., et al.,

Appellees/Respondents.
_____/

MOTION FOR REHEARING
and
FOR REHEARING *EN BANC*

COME NOW the Appellants, by and through their undersigned counsel, and file this Motion for Rehearing, pursuant to Florida Rules of Appellate Procedure, Rule 9.330, and for Rehearing *En Banc*, pursuant to Florida Rules of Appellate Procedure, Rule 9.331(d), stating:

> [References herein to the Opinion of the court shall be to "Op" followed by the page number of the opinion and at times the ordinal number that would be assigned to each paragraph starting on that page, or the word "top" when the paragraph starts on a preceding page. References to Appellants' Initial Brief shall be to "AIB" followed by the page number. References to Appellants' Reply Brief shall be to "ARB" followed by the page number. References to the Appendix shall be to "Ax" followed by a page number. Parties are referred to by their proper names: Bennetts (homeowners/Appellants), Wilson (mortgage broker/Appellee), LF Loans (loan originator/assignor/Appellee), and GTE Mortgage (mortgagee/assignee/Appellee. At times, Wilson, LF Loans, and GTE Mortgage are collectively referred to as "the lender".]

1. The court has grossly misstated several points of law and fact in its decision.

2. Clearly, the court is not enamored by the provisions of TILA, even though the

action was triggered by forged disclosure documents, followed by an unfulfilled reply from LF Loans to the homeowner's demand for proper billing, followed by no communication from either LF Loans nor the assignee GTE Mortgage until after the action had been filed.

3. The opinion of the court, for the most part, states the story correctly but the court reaches factual summations that are wrong logically, legally, procedurally, and perhaps morally.

4. While a careful reading of the court's opinion reveals internal contradictions that are certain to raise eyebrows, a reading of the briefs and review of the record would turn those raised eyebrows into scowls of concern because of the obvious inescapable truths therein presented.

5. One inescapable truth, correctly recognized by the court [Op. 4, ¶1], is that the first time the lender learned that it was billing an amount higher than the amount disclosed at closing was by way of the Bennetts' demand letter.

6. Another inescapable truth is that LF Loans' response to the demand letter only stated what it "would do" [Op. 5, ¶4] and not what it "had done". The opinion fails to mention that LF Loans also stated that the changes would be "reflected in their next payment coupon" (i.e. that it would show in the monthly statement for payment due September 1, 2012) [Ax 257]. September's statement did not reflect a correctly billed amount.

7. Another inescapable truth is that LF Loan's response of what it "would do" did not include all of the Bennetts' demands, and accordingly the Bennetts' offered resolution was not accepted by the lender [Ax 257]. Likewise, the Bennetts'

never stated that they would accept the lender's limited resolution.

8. Another inescapable truth is that the lender continued to charge the higher undisclosed amount for the payment due September 1, 2012, and yet again for the payment due October 1, 2012 [Ax 262], despite the Bennetts' July 10, 2012 demand to be billed only the amount that was disclosed to them at closing [Ax 103]. The court's opinion recognizes that truth as well by stating that the correct billing was not disclosed until the payment due November 1, 2012 [Op. 5, ¶4, sent "supposedly" on October 17, 2012].

9. Another inescapable truth is that after LF Loans responded as to what it "would do," there was no further communication received from the assignor/LF Loans or the Assignee/GTE Mortgage in compliance with the homeowner's demand letter until after suit had been filed on October 23, 2012. The November 1, 2012 statement with the correct amount was received after suit had been filed [Ax 309, ¶7 & ¶8]. The check returning the overage amount was received after suit had been filed [Ax. 89; Op. 5, ¶4: "the following month, GTE refunded the $302.76"]. The check was never transacted.

10. Clearly, the court's factual summation that "the defendants fixed the mortgage insurance discrepancy and paid back the Bennetts for the premiums they paid within sixty days of discovering the error" is belied within the opinion. It is a *non sequitur* derived somehow from the inescapable truths. The lender did not discover the error — they were informed of the error by the Bennetts' demand letter. The lender did not pay back the excess premiums until weeks after the law suit was filed, and 127 days after the homeowners' demand letter.

Likewise, the statement that the law suit filed on October 23, 2012 came "three months after the mortgage insurance issue was resolved," is a *non sequitur*. LF Loans' statement of what assignee GTE Mortgage "would do" is not a resolution especially since TILA, which is to be strictly construed in favor of the borrowers, requires that adjustments must be made to the account "**to assure that the person will not be required to pay an amount in excess of the charge actually disclosed**." 15 U.S.C. §1640(b). No wound was healed by the mere words of the perpetrator.

11. Another inescapable truth is that the lender never complied with the Bennetts' demand letter, timely or otherwise, because the attorney's fees that were demanded were never addressed by the lender let alone paid. The opinion also recognized that fact [Op. 11, top, last sentence].

12. Likewise, the statement that "[w]ithin twenty one days,..., the Bennetts got everything they wanted" is a *non sequitur*. Aside from not getting attorney's fees, the Bennetts did not get assurance that the loan file would be purged of all forged documents, and the Bennetts did not get timely compliance with any portion of their demand letter which they also wanted [Ax 103 – 104]. Once the Bennetts filed their action they also wanted rescission [Ax 8, ¶44 and demand], which they did not get. The Bennetts wanted rescission because they no longer trusted the lender and feared GTE would reassign its servicing rights thus further complicating the Bennetts' case, and that reassignment could continue again, and again, since the loan file had apparently not been purged of forged documents.

13. Equally belied by the court's opinion is the statement that there were "no

damages for fraud." Yet, as the court readily admits, at the time the complaint was filed the lender had not submitted a repayment of the over-billed amount [Op. 5, "the following month (i.e. the months after October 2012), GTE refunded the $302.76 the Bennetts had paid under protest for the August, September and October 2012 insurance amounts"], and by that time the homeowners had incurred the fees and costs of litigation.

14. As stated above, another inescapable truth is that the lender, by continuing to bill the incorrect monthly amount, failed to make appropriate adjustments to the homeowner's account that were necessary to assure that the homeowners would "not be required to pay an amount in excess of the charge actually disclosed" until well after 60 days had passed since the lender was notified of the incorrectly billed amount. However, the relevance of this statement is contingent on whether 15 U.S.C. §1640(b) is even applicable. Section 1640(b) is not relevant. Section 1640(b) is never relevant to preclude the right of rescission. And, if it were relevant, there was no timely compliance.

15. The court grossly misread 15 U.S.C. §1640(b). The relevant provision of the statute comes out to:

> A creditor or **assignee** (i.e. GTE Mortgage) has no liability under this section . . . for any failure to comply with any requirement imposed under this part or part E, **if** within sixty days after discovering an error . . . and **prior to** . . . the receipt of **written notice of the error from the obligor**, the creditor or assignee notifies the person concerned of the error and makes whatever adjustments in the appropriate account are necessary **to assure that the person will not be required to pay an amount in excess of the charge actually disclosed**.

16. As recognized by the decision of the court, any attempt at making sure that the homeowners would not be required to pay an amount in excess of the charge

actually disclosed, came about AFTER the **written notice of the error from the obligor** (i.e. the Bennetts). Therefore, the "safe harbor" provision of 15 U.S.C. §1640(b) was no longer available to the lender [See ARB, page 16]. Following the **written notice of the error from the obligor**, the only legally available avenue to the lender for avoiding further consequences under TILA was to timely comply with the homeowners' demand letter — which the lender clearly did not do.

17. By its very terms, the "safe harbor" provision of 15 U.S.C. §1640(b), when it is applicable, only precludes penalties provided for by §1640(b). Those penalties include actual damages, statutory damages as prescribed by §1640(a)(2)(A)(i), and costs and attorneys Fees for successfully litigating a rescission action. However, §1640(b) does not preclude the right to rescission. Rescission under TILA is set forth "independently, explicitly, and in addition to civil damages under §1640." Vallies v. Sky Bank, 591 F.3d 152, fn 17 (3rd Cir., 2009). So, even if the court were correct, rescission itself must be recognized, although the damages under §1640 would be precluded.

18. Furthermore, only LF Loans responded to the demand letter, not GTE Mortgage — although GTE was already the assignee of the mortgage. This court's decision essentially finds that LF Loans was acting on behalf of GTE Mortgage, although the record is devoid of any evidence supporting that LF Loans or its principal Wilson were officers, agents, or attorneys for GTE Mortgage.

19. Certainly, GTE Mortgage's continued billing of "an amount in excess of the charge actually disclosed" (which continued well beyond the 60 days demanded for correction) does not constitute "making whatever adjustments in the

appropriate account" are necessary to "assure" that the homeowners would **"not be required to pay an amount in excess of the charge actually disclosed**." Failure to pay the amount billed by the non-responding mortgage holder would have subjected the homeowners to a possible foreclosure action which, although improper, would have only exacerbated the homeowners' expenses in pursuing rectification.

20. The court assumed a fact that is not in evidence, when it stated: "By October 23, when the initial complaint was filed, the Bennetts were not required to pay the insurance, even assuming LF Loans and its principal forged the loan documents." There is absolutely no sworn statement in the record supporting that assertion, and inferences from the record on appeal are to be made only in favor of the Bennetts in contest of the motion for summary judgment [AIB, page 26]. *RV-7 Prop., Inc. v. Stefani De La O, Inc.*, 187 So. 3d 915 (Fla. 3d DCA 2016) citing to *Campaniello v. Amici P'ship,* 832 So. 2d 870, 872 (Fla. 4th DCA 2002). The Bennetts on the other hand entered their sworn statement that they did not receive the November 1, 2012 statement until <u>after</u> suit was filed [Ax 309 – 310, ¶8]. More importantly, the lender's partial correction was late — coming about 100 days after the Bennetts' demand letter — and more than 30 days after the date LF Loans stated it would be reflected. So, whether the court's puzzling interpretation of the §1640(b) is accurate or not is wholly irrelevant to the Bennetts' rights to proceed with rescission.

21. In fact, this court fails to recognize that TILA statutory rescission, as demanded by the homeowners, is not a remedy. TILA rescission is <u>a right</u> subject to mandate [AIB, page 31]. The consequences of that exercised right were only

worsened by the lender's refusal of compliance, to its own detriment, and perhaps at the commission of malpractice by lender's counsel. Some counsel might have asked the lender: "Why ride a dead horse?"[1] Skewing the inescapable truths to arrive at *non sequiturs* in order to conclude that the lender was within the "safe harbor" provision of 15 U.S.C. §1640(b) appears as an improper attempt at judicial rescue, which at present is the only manner in which the lender could hope to avoid TILA rescission.

22. By not closely reading the provisions of 15 U.S.C. §1635(e), which section was not argued nor cited by the lender, the court did a poor job of attempting to further support its position for the lender. Under §1635(e), a lender is exempt ONLY IF the lender engaged in refinancing their own loan[2] as opposed to a third party loan as in this instance. *Kucera v. Citizens Bank & Tr. Co.*, 754 F.2d 280 (8th Cir. 1985); *Associates First Capital Corp. v. Booze*, 912 So. 2d 696 (Fla. 2005). The record clearly discloses that neither LF Loans nor GTE Mortgage held or serviced the prior existing mortgage which, as disclosed by the "pay-off" information at closing, and by the Bennetts, was held by Seterus [Ax 121; Ax 199; and see Ax 294, at page 7, lines 3 to 11]. Many reading the court's opinion would scratch their heads wondering why brokers, and a

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[1] "Dakota tribal wisdom says that when you discover you are riding a dead horse, the best strategy is to dismount."
http://www.tysknews.com/LiteStuff/riding_a_dead_horse.htm

[2] 15 U.S.C. §1635(e) Exempted transactions; reapplication of provisions.
This section does not apply to—

. . . . .

(2) a transaction which constitutes a refinancing or consolidation (with no new advances) of the principal balance then due and any accrued and unpaid finance charges of an existing extension of credit **by the same creditor** secured by an interest in the same property.

mortgage originator, would have been involved in a mortgagee held refinance, and they would likely correctly conclude that it was very highly improbable.

23. On the count for declaratory relief, the court improperly equates this case with the action in Santa Rosa County v. Administration Commission, 661 So. 2d 1190 (Fla. 1995). In the Santa Rosa case, there was an actual settlement of the issues. There was no settlement of the issue with MERS here, either in response to the Bennetts' demand letter, nor in response to the complaint, because no assurance was ever given that the loan file would be purged of all of the forged documents. Furthermore, neither party in the present action even accepted the others proposal.

24. If this same panel is placed to decided the separate appeal taken from the judgment awarding attorney's fees to the lender (i.e. Case No. 3D17-1254; there is no present order of consolidation), then on that basis alone the court should grant rehearing because the order of consolidation should have issued prior to the court's opinion in this case. Otherwise, there should be a new panel hearing the appeal on the issue of attorney's fees.

25. So what is the "take away" from the court's decision as presently worded? Is it a message to file TILA actions under 15 U.S.C. §1640(b) immediately, without making any demands, and thus further clog the courts while assuring a more handsome return for the borrower's attorney? Is the message that despite the clarity of 15 U.S.C. §1640(b), if the lender who relied upon a forged disclosure document states that they "would be" correcting the account after receiving written notice of the violation from the borrower, yet does not within the time they stated — and, not within 60 days as per the demand letter or the

statute — and, not even within 100 days, the borrower is obligated to wait indefinitely in the absence of any communication from the lender as to the reason for the delay; despite any status update from the lender; despite any request from the lender for additional time to comply? Is the message to counsel, "forget about representing those violated" because the law and the truth will be skewed to avoid all consequences of TILA and you will never be paid?

26. Tiresias the sayer speaking: "All men are liable to err; but when an error hath been made, that man is no longer witless or unblest who heals the ill into which he hath fallen, and remains not stubborn. Self-will, we know, incurs the charge of folly. Nay, allow the claim of the dead; stab not the fallen; what prowess is it to slay the slain anew?" Antigone, by Sophocles. Translated to this present drama, we would say: "The Bennetts are the slain as their rights have been denied. An error has been made, yet this court has the ability to correct it. However, the court must put aside any hubris as such is unbecoming. Allow the claim of the Bennetts, for it is the right thing to do."

27. Congress may well have had Antigone in mind when it drafted TILA. Antigone underscored a theme that power corrupts man in his existence, thought, and knowledge. The tragic heroine Antigone rebelled against the corrupted King Creon who prior to his coronation was a reasonable and just man. Antigone was committed to having justice prevail although she knew it would lead to her inevitable death. In the end, she found suicide more appealing than being entombed alive. So Congress, perhaps with Sophocles in mind, specifically made TILA very favorable to the consumer and intended the

law to be strictly construed. Creon is not Congress as suggested by the court's opinion. But — **WE ARE ANTIGONE!**

WHY IS THIS CASE OF SUCH IMPORTANCE THAT IT SHOULD BE REVIEWED *EN BANC*?

In addition to the opinion of the court sticking out like a big red outlier, it is of great importance because it is a case of first impression within the state. No known prior Florida case has construed 15 U.S.C. §1640(b). This issue is of great public importance potentially affecting thousands of mortgages throughout the state. Accordingly, **I express a belief, based on a reasoned and studied professional judgment, that the case and issue presented under 15 U.S.C. §1640(b) is of exceptional importance.**

WHEREFORE, the opinion and decision of the court should be retracted; the summary judgment should be reversed with the exception of that portion where judgment was entered for MERS under the TILA count (i.e. Count III); and, the action ought to then be remanded in full to the lower court for further proceedings consistent therewith.

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/s/

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CERTIFICATE OF SERVICE

I certify that a copy hereof has been furnished to Scott Jay Feder, attorney for the Appellees/Respondents herein, Defendants below, by e-mail delivery to scottj8@aol.com, on this September 21, 2017.

/s/

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