

**IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION**

IVELISSE G. RODRIGUEZ and)	
WILFREDO RODRIGUEZ,)	
individually and on behalf of the classes)	
defined herein,)	
)	
plaintiffs,)	
)	
vs.)	
)	
CAPITAL ONE HOME LOANS, LLC;)	
HSBC MORTGAGE SERVICES, INC.;)	
MORTGAGE ELECTRONIC)	
REGISTRATION SYSTEMS; and)	
DOES 1-5,)	
)	
Defendants.)	

JURY DEMAND

COMPLAINT - CLASS ACTION

INTRODUCTION

1. Plaintiffs, on behalf of themselves and the classes defined below, bring this action for rescission of a “subprime” mortgage loan and damages for multiple violations of the Truth in Lending Act, 15 U.S.C. §1601 et seq. (“TILA”), and implementing Federal Reserve Board Regulation Z, 12 C.F.R. part 226. Plaintiffs also sue for statutory damages for violations of the Illinois Interest Act, 815 ILCS 205/4(2)(a).

JURISDICTION AND VENUE

2. This Court has subject matter jurisdiction under 28 U.S.C. §§ 1331 (general federal question), 1337 (interstate commerce), 15 U.S.C. §1640 (TILA) and 1367 (supplementary jurisdiction).

3. Defendants transact business in the District and are deemed to reside here.

PARTIES

4. Plaintiffs Ivelisse and Wilfredo Rodriguez own and reside in a home with their four daughters at 4618 West Dickens Avenue, Chicago, Illinois, 60439. They are high-school educated, ordinary consumers.

5. Defendant Capital One Home Loans, LLC (“Capital One”), is a corporation with offices located at 7311 West 132nd Street, Suite 300, Overland Park, Kansas, 66213. On information and belief, it is headquartered in McLean, Virginia. Capital One is engaged in the business of originating sub-prime, residential mortgage loans. It does business in Illinois. In 2006, it made more than 26 loans per year.

6. Defendant Mortgage Electronic Registration Systems, Inc. (“MERS”) is a corporation that holds title to mortgages, as nominee. It does business in Illinois. Its registered agent and office are CT Corporation System, 208 South LaSalle Street, Suite 814, Chicago, Illinois, 60604.

7. Defendant HSBC Mortgage Services, Inc. (“HSBC”), is a Delaware Corporation that is engaged in the business of purchasing, holding and servicing sub-prime residential mortgage loans. It does business in Illinois. Its registered agent and office are CT Corporation System, 208 South LaSalle Street, Suite 814, Chicago, IL, 60604.

8. HSBC is the current servicer of plaintiffs’ loan. On information and belief, HSBC is also the legal and/or beneficial owner of plaintiffs’ loan.

9. If HSBC is not the owner of plaintiffs’ loan, the current actual owner(s) is/are named as Does 1-5.

FACTS COMMON TO ALL COUNTS

10. Prior to January, 2006, plaintiffs had a credit card account with a Capital One affiliate. On one of the monthly statements that plaintiffs received was an advertisement for account holders to refinance their homes with Capital One. On information and belief, the advertisement mentioned a 5.5% interest rate and indicated that plaintiffs had been “pre-approved” for mortgage refinancing.

11. When Ivelisse Rodriguez called the phone number given on the account statement on or about January 5, 2006, she reached Ben Jacobs at Capital One, who promised her that he could consolidate and pay off she and her husband’s debts and “save them money” on a refinance.

12. In that conversation, Jacobs took plaintiffs’ financial information as well as, on information and belief, ran plaintiffs’ credit profiles, then told Mrs. Rodriguez that she and her husband qualified for a loan. At Jacobs’ request, plaintiffs later sent documents verifying their income along with a signed authorization to release information.

13. On information and belief, Jacobs completed plaintiffs’ computerized loan application over the phone during the initial conversation.

14. On or about January 5, 2006, Capital One mailed plaintiffs a package containing preliminary disclosures for a loan.

15. Although the form cover letter in the package (Exhibit A) listed the Consumer Handbook on Adjustable Rate Mortgages as being “attached,” in actuality that handbook was not enclosed in plaintiffs’ package.

16. Plaintiffs needed and used the loan for personal, family or household purposes, namely, refinancing of prior debt incurred for such purposes.

17. The loan was closed on or about January 18, 2006. At that time, plaintiffs jointly owned the home, and both signed the new mortgage, which was in favor of MERS (Exhibit B).

18. “Closing” occurred as follows. Plaintiffs received, via Express Mail or other overnight courier, a single set of closing documents with instructions to sign them, take specified ones to a notary for notarization (Exhibit C), and send the signed documents back to Capital One via overnight courier. Plaintiffs followed these and other Capital One, written instructions.

19. No second or duplicate set of closing documents was included in the overnight package for plaintiffs to review and keep for their records. Referring to these two documents, another written instruction sheet from Capital One told plaintiffs to “retain” the HUD-1 Settlement Statement and a copy of the note (Exhibit D). The instruction stated that “these are the primary documents of your closing package” and that “you may need to reference these documents” in the future. In order to view or obtain copies of any other closing documents, plaintiffs had to access Capital One’s website within 90 days.

20. However, only one copy of the note, i.e., the copy plaintiffs were instructed to sign and return, was actually enclosed in the package. A third, written instruction sheet from Capital One, conflicting with the second, informed plaintiffs that “the note will be forwarded by your loan officer” (Exhibit E).

21. In fact, plaintiffs never received a copy of their note and, to this day, do not fully know or understand the structure and terms of the loan program Capital One put them in. On information and belief, plaintiffs have a three-and-a-half year, adjustable rate, interest-

only loan with an initial interest rate of 8.99% and an initial Annual Percentage Rate (“APR”) of 10.76%.

22. Plaintiffs had web access at the time they obtained the loan but lost it thereafter. Plaintiffs recently tried to access their closing documents on Capital One’s website but were no longer allowed access (Exhibit F).

23. Besides a truncated copy of a HUD-1 (Exhibit G), a minimum of three pages of instructions from Capital One (Exhibits C, D and E), and a copy of the ARM Handbook (Exhibit H), plaintiffs retained only one other document from the closing package they received, namely, a single, executed copy of a federal Notice of Right to Cancel form (Exhibit I).

24. Among other documents that were not provided to plaintiffs in a form they could keep was a final TILA Disclosure Statement.

25. Capital One made plaintiffs a \$351,000 loan. On information and belief, the loan amount was 100% of the value of plaintiffs’ home. In the alternative, Capital One inflated the appraised value of plaintiffs’ home. At this time, plaintiffs do not have the documents that would indicate how much Capital One or its agent appraised their home for.

26. On information and belief, Capital One gave plaintiffs a loan with a higher interest rate and a higher monthly payment amount than plaintiffs’ previous loan.

27. In addition, plaintiffs later learned through HSBC that Capital One put a three-year prepayment penalty. At plaintiffs’ request, HSBC faxed a copy of the first page of the Prepayment Penalty Note Rider (Exhibit J).

28. On information and belief, plaintiffs’ interest rate is scheduled to enter its adjustable phase next year. Plaintiffs have struggled to afford the mortgage payment and will

certainly be unable to afford the higher payment amounts once the interest rate starts increasing.

At present, plaintiffs are current on their payments.

29. In March, 2006, Capital One notified plaintiffs that it had assigned the servicing rights to the loan to HSBC (Exhibit K). As a servicer, HSBC claims certain rights in the loan, including the right to receive payments, to report to credit bureaus and to pursue foreclosure as a means of enforcing payment. HSBC is, therefore, joined as a necessary party.

30. On information and belief, HSBC also owns plaintiffs' loan (Exhibit L).

31. In the event HSBC does not own plaintiffs' loan, the actual owner(s) is/are named as Does 1-5. Actual ownership is not a matter of public record.

32. As the holder of title to the mortgage that resulted from the transaction, MERS also claims certain rights in plaintiffs' loan, including the rights to transfer interests in, and to foreclose on, the mortgage. Therefore, MERS is joined as a necessary party.

33. Plaintiffs may amend or add allegations and/or legal claims to their complaint once they receive, through discovery, a complete set of the closing documents they signed for the loan. At present, these and other documents are in defendants' sole possession and control.

COUNT I – TRUTH IN LENDING ACT – INDIVIDUAL CLAIM

34. Plaintiffs incorporate paragraphs 1-33. This count is against all defendants. MERS is a necessary party.

RIGHT TO RESCIND

35. Because the transaction was secured by plaintiffs' home, and was not entered into for purposes of the initial acquisition or construction of that home, it was subject to

the right to cancel provided by 15 U.S.C. Sect. 1635 and 12 C.F.R. Sect. 226.23. Sect. 226.23 provides:

(a) Consumer's right to rescind.

(1) In a credit transaction in which a security interest is or will be retained or acquired in a consumer's principal dwelling, each consumer whose ownership interest is or will be subject to the security interest shall have the right to rescind the transaction, except for transactions described in paragraph (f) of this section.[fn]47

(2) To exercise the right to rescind, the consumer shall notify the creditor of the rescission by mail, telegram or other means of written communication. Notice is considered given when mailed, when filed for telegraphic transmission or, if sent by other means, when delivered to the creditor's designated place of business.

(3) The consumer may exercise the right to rescind until midnight of the third business day following consummation, delivery of the notice required by paragraph (b) of this section, or delivery of all material disclosures,[fn]48 whichever occurs last. If the required notice or material disclosures are not delivered, the right to rescind shall expire 3 years after consummation, upon transfer of all of the consumer's interest in the property, or upon sale of the property, whichever occurs first. In the case of certain administrative proceedings, the rescission period shall be extended in accordance with section 125(f) of the Act. [15 U.S.C. §1635(f)]

(4) When more than one consumer in a transaction has the right to rescind, the exercise of the right by one consumer shall be effective as to all consumers.

(b) Notice of right to rescind. In a transaction subject to rescission, a creditor shall deliver 2 copies of the notice of the right to rescind to each consumer entitled to rescind. The notice shall be on a separate document that identifies the transaction and shall clearly and conspicuously disclose the following:

(1) The retention or acquisition of a security interest in the consumer's principal dwelling.

(2) The consumer's right to rescind the transaction.

(3) How to exercise the right to rescind, with a form for that purpose, designating the address of the creditor's place of business.

(4) The effects of rescission, as described in paragraph (d) of this section.

(5) The date the rescission period expires. . . .

(f) Exempt transactions. The right to rescind does not apply to the following:

(1) A residential mortgage transaction [defined in 15 U.S.C. §1602(w) as one where a "security interest is created or retained against the consumer's dwelling to finance the acquisition or initial construction of such dwelling"].

(2) A credit plan in which a state agency is a creditor.

GROUNDS FOR RESCISSION

36. In connection with the loan, Capital One failed to provide the required financial disclosures, in violation of 15 U.S.C. Sect. 1637, 12 C.F.R. Sect. 226.18 and the corresponding sections of the Official Federal Reserve Board (“FRB”) Commentary on Regulation Z, and failed to provide clear and conspicuous notice of plaintiffs’ federal right to rescind the loan.

37. Regulation Z specifically requires that these disclosures be provided to the consumer in a form that he or she can keep. This applies to transactions any part of which are conducted electronically.

38. Capital One did not provide plaintiffs with a final TILA Disclosure Statement in a form that they could keep.

39. Capital One provided plaintiffs with only one federal Notice of Right to Cancel in a form that they could keep (Exhibit I), instead of the four required (i.e., two per mortgagor) by Sect. 226.23(b) (see above).

40. In addition, the single, paper copy of the federal Notice of Right to Cancel provided to plaintiffs (Exhibit I) was provided using the wrong form, the Federal Reserve Board's H9 form, which is appropriate only when an existing or immediately prior mortgage creditor is providing additional or "increased" credit to the consumer. Capital One was a new mortgage creditor vis-à-vis plaintiffs, and, therefore, the H8 was the appropriate model form. The H9 was misleading in this context because it states that plaintiffs could only rescind the "increase of credit" when, in fact, they could rescind the entire extension of credit.

41. Further, the TILA Disclosures and Notice of Right to Cancel were all obfuscated and otherwise rendered less than clear and conspicuous by the combination of Capitol One's (a) failure to provide plaintiffs with copies of them in a form they could keep and (b) its instructions to plaintiffs that "the primary loan documents" were the note and the HUD-1 Settlement Statement, i.e., not the TILA Disclosures (Exhibit D). In fact, retained TILA Disclosures and Notice of Right to Cancel forms are crucial to the consumers' understanding of the terms of the credit transaction and to their ability to effectively exercise their rights.

42. Any one of these violations alone entitles plaintiffs to rescind the loan.

43. Notices of rescission were sent to all defendants on March 22, 2008 (Exhibit M).

44. The loan has not been rescinded.

45. Under 15 U.S.C. Sect. 1641(c), the right to rescind may be exercised against "any assignee."

46. In addition, 15 U.S.C. Sect. 1635(g) provides:

Additional relief

In any action in which it is determined that a creditor has violated this section, in addition to rescission the court may award relief under section 1640 of this title for violations of this subchapter not relating to the right to rescind.

WHEREFORE, plaintiffs request that the Court enter judgment in favor of plaintiffs and against defendants for:

- a. A judgment voiding plaintiffs' mortgage, capable of recordation in the public records, and binding on defendants;
- b. Refund of all finance charges, as required by TILA rescission;
- c. Statutory damages for failure to rescind, if appropriate;
- d. Attorney's fees, litigation expenses and costs; and
- e. Such other or further relief as the Court deems appropriate.

COUNT II – TRUTH IN LENDING ACT – CLASS CLAIMS

47. Plaintiffs incorporate paragraphs 1-46. This count is against all defendants. MERS is a necessary party.

48. Capital One regularly closed residential mortgage refinancing transactions in the manner described above without providing consumers, in a form that they could keep, with (a) the TILA Disclosure Statement or (b) the requisite number of Notice of Right to Cancel forms, (c) while at the same time instructing consumers that “the primary loan documents” were the HUD-1 Settlement Statement and the Note, i.e., not the TILA disclosures. The instruction sheet in Exhibit D is a standard form document, used by Capital One in thousands of “ghost” closings.

49. Failing to provide either of these disclosures in a form that the consumer can keep, and suggesting to the consumer that these disclosures are not “primary” to the transaction, violates TILA, Regulation Z and the Official FRB Commentary on Regulation Z.

50. In addition, on information and belief Capital One frequently used the H9 form in credit situations that called for the H9. Capital One’s H9 (Exhibit I) form is a standard form document.

51. Use of the wrong model rescission form violates TILA, Regulation Z and the FRB Commentary.

CLASS ALLEGATIONS

52. Plaintiffs sue on their own behalf and on behalf of two classes, A and B. Class A consists of (a) all natural persons with Illinois, Indiana and Michigan residences; (b) who entered into a residential mortgage credit transaction with Capital One; (c) in which Capital One did not provide the TILA Disclosure Statement, the required number of federal Notices of Right to Cancel or both in a form that the consumer could keep; (d) in which Capital One provided an instruction that the “primary closing documents” were the HUD-1 and the note; and (d) the loan was closed on or after a date three years prior to the filing of this action.

53. Class B consists of (a) all natural persons with Illinois, Indiana and Michigan residences who (b) entered into a residential mortgage credit transaction with Capital One (c) in which Capital One provided the H9 model rescission form when the transaction was not one in which the consumers’ previous creditor was providing additional credit and (d) the loan was closed on or after a date three years prior to the filing of this action.

54. The classes are so numerous that joinder is impracticable. Plaintiffs do not know at present the exact size of the proposed classes or the identities of the proposed class

members, since such information is in the sole possession and control of defendants. But plaintiffs believe that each class encompasses several thousand individuals. On information and belief, there are more than 50 members of each class.

55. There are questions of law and fact common to the members of the classes, which common questions predominate over any questions that affect only individual class members. The predominant common questions include whether:

(a) Capital One regularly closed loans in the manner in which it closed plaintiffs' loan, using the same procedures and instruction sheets;

(b) Capital One's manner of providing/not providing the required TILA disclosures constitutes clear and conspicuous disclosure under TILA; and whether

(c) providing notice of the federal right to cancel using the H9 model rescission form in transactions where Capital One is a new creditor violates TILA.

56. Plaintiffs' claims are typical of the claims of the class members and do not conflict with them in any way. All are based on the same factual and legal theories.

57. Plaintiffs will fairly and adequately represent the interests of the class members. They are committed to the vigorous prosecution of the class claims, and they have retained counsel experienced in the prosecution of TILA cases and class actions.

58. A class action is superior to other alternative methods of adjudicating this dispute. Individual cases are not economically feasible. A class action concerning the issues in this case does not create any problems of manageability.

59. In the alternative, defendants have acted or refused to act on grounds generally applicable to the classes, thereby making appropriate the Court's rendering of corresponding declaratory relief with respect to each class as a whole.

WHEREFORE, plaintiffs request that the Court enter judgment in favor of plaintiffs and the class and against defendants for:

- a. A declaration that class members have the right and the option to rescind, should they choose to exercise that right upon receiving proper notice;
- b. Attorney's fees, litigation expenses and costs of suit; and
- c. Such other or further relief as the Court deems proper.

COUNT III – ILLINOIS INTEREST ACT

60. Plaintiffs incorporate paragraphs 1-33. This count is against Capital One.

61. On information and belief, the note recites that it is governed by the Alternative Mortgage Transaction Parity Act of 1982, 12 U.S.C. Sect. 3802 ("AMTPA").

62. Otherwise the note would violate Sect. 4(2)(a) of the Illinois Interest Act, 815 ILCS 205/4(2)(a), which provides:

Whenever the rate of interest exceeds 8% per annum on any written contract, agreement or bond for deed providing for the installment purchase of residential real estate, or on any loan secured by a mortgage on residential real estate, it shall be unlawful to provide for a prepayment penalty or other charge for prepayment.

63. The AMTPA requires that loans be made in compliance with regulations issued by the Office of Thrift Supervision ("OTS"), successor to the Federal Home Loan Bank Board. 12 U.S.C. Sect. 3803(a)(3).

64. The OTS regulations, 12 C.F.R. Sect. 560.220, condition a lender's rights under AMTPA upon compliance with 12 C.F.R. Sect. 560.210, which provides that a lender "must provide the initial disclosures described at 12 C.F.R. Sect 226.19(b) and the adjustment notices described at 12 C.F.R. Sect. 226.20(c) for variable rate transactions, as described in those regulations."

65. 12 C.F.R. Sect. 226.19, part of Federal Reserve Board Regulation Z, provides:

SECTION 226.19 Certain Residential Mortgage Transactions

(a) (1) Time of Disclosures.

In a residential mortgage transaction subject to the Real Estate Settlement Procedures Act (12 U.S.C. 2601, et seq.) the creditor shall make good faith estimates of the disclosures required by section 226.18 before consummation, or shall deliver or place them in the mail not later than three business days after the creditor receives the consumer's written application, whichever is earlier.

(2) Redislosure required. If the annual percentage rate in the consummated transaction varies from the annual percentage rate disclosed under section 226.18(e) by more than 1/8 of 1 percentage point in a regular transaction or more than 1/4 of 1 percentage point in an irregular transaction, as defined in Section 226.22, the creditor shall disclose the changed terms no later than consummation or settlement.

(b) Certain variable-rate transactions.[fn]45a If the annual percentage rate may increase after consummation in a transaction secured by the consumer's principal dwelling with a term greater than one year, the following disclosures must be provided at the time an application form is provided or before the consumer pays a non-refundable fee, whichever is earlier:[fn]45b

(1) The booklet titled Consumer Handbook on Adjustable Rate Mortgages published by the Board and the Federal Home Loan Bank Board, or a suitable substitute.

(2) A loan program disclosure for each variable-rate program in which the consumer expresses an interest. The following disclosures, as applicable, shall be provided:

(i) The fact that the interest rate, payment, or term of the loan can change.

(ii) The index or formula used in making adjustments, and a source of information about the index or formula.

- (iii) An explanation of how the interest rate and payment will be determined, including an explanation of how the index is adjusted, such as by the addition of a margin.**
- (iv) A statement that the consumer should ask about the current margin value and current interest rate.**
- (v) The fact that the interest rate will be discounted, and a statement that the consumer should ask about the amount of the interest rate discount.**
- (vi) The frequency of interest rate and payment changes.**
- (vii) Any rules relating to changes in the index, interest rate, payment amount, and outstanding loan balance including, for example, an explanation of interest rate or payment limitations, negative amortization, and interest rate carryover.**
- (viii) An historical example, based on a \$10,000 loan amount, illustrating how payments and the loan balance would have been affected by interest rate changes implemented according to the terms of the program. The example shall be based upon index values beginning in 1977 and be updated annually until a 15-year history is shown. Thereafter, the example shall reflect the most recent 15 years of index values. The example shall reflect all significant loan program terms, such as negative amortization, interest rate carryover, interest rate discounts, and interest rate and payment limitations, that would have been affected by the index movement during the period.**
- (ix) An explanation of how the consumer may calculate the payments for the loan amount to be borrowed based on the most recent payment shown in the historical example.**
- (x) The maximum interest rate and payment for a \$10,000 loan originated at the most recent interest rate shown in the historical example assuming the maximum periodic increases in rates and payments under the program; and the initial interest rate and payment for that loan.**
- (xi) The fact that the loan program contains a demand feature.**
- (xii) The type of information that will be provided in notices of adjustments and the timing of such notices.**

(xiii) A statement that disclosure forms are available for the creditor's other variable-rate loan programs.

[fnn]45b Disclosures may be delivered or placed in the mail not later than three business days following receipt of a consumer's application when the application reaches the creditor by telephone, or through an intermediary agent or broker.

66. For purposes of Sect. 226.19(b) above, on information and belief plaintiffs' application for mortgage credit "reached" Capital One when Jacobs took plaintiffs' information for an application on January 5, 2006, when the preliminary disclosures were mailed out. The Consumer Handbook on Adjustable Rate Mortgages was not enclosed with the other preliminary disclosures plaintiffs received; it was not provided to plaintiffs - and plaintiffs did not receive it - at any other time prior to closing.

67. Capital One did not provide plaintiffs with the disclosures described in Sect. 226.19 until January 18, 2006. The booklet was included within the closing documents that plaintiffs received for signature.

68. The 1-page "3 Year-6 Month Libor ARM Adjustable Rate Mortgage Loan Program Disclosure" that Capital One did enclose in plaintiffs' preliminary disclosure package did not disclose all of the information required.

69. Capital One's loan to plaintiffs violated 4(2)(a) of the Illinois Interest Act, 815 ILCS 205/4(2)(a).

70. Plaintiffs are entitled to statutory damages as provided in Sect. 6 of the Interest Act, 815 ILCS 205/6.

WHEREFORE, plaintiffs request that the Court enter judgment in their favor and against defendant for:

- a. Statutory damages
- b. Attorney's fees, litigation expenses and costs of suit; and
- c. Such other or further relief as the Court deems proper.

Respectfully submitted,

s/Al Hofeld, Jr.
Al Hofeld, Jr.

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JURY DEMAND

Plaintiffs demand trial by jury.

s/Al Hofeld, Jr.
Al Hofeld, Jr.