IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF WISCONSIN

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CHAD M. HAUSCHILDT and
YVONNE E. HAUSCHILDT,

Plaintiffs,

v.

BENEFICIAL WISCONSIN, INC.,

Defendant.

OPINION AND
ORDER

03-C-0235-C

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This is a civil action for monetary, injunctive and equitable relief. Plaintiffs Chad and Yvonne Hauschildt assert the following claims against defendant Beneficial Wisconsin, Inc.: (1) violations of various provisions of the Wisconsin Consumer Act; (2) violations of Wis. Stat. § 100.18; (3) violations of 15 U.S.C. § 1639 of the Truth in Lending Act; (4) breach of contract; (5) unjust enrichment; and (6) conversion. They contend that these claims arise from a consumer loan under which defendant refinanced plaintiffs' home mortgage and other consumer debt. This court has federal question jurisdiction over the Truth in Lending Act claims pursuant to 28 U.S.C. § 1331 and supplemental jurisdiction over the remaining claims pursuant to 28 U.S.C. § 1367.

Presently before the court is defendant's motion to dismiss plaintiffs' claims for violations of Wis. Stat. § 100.18, 15 U.S.C. § 1639, breach of contract and conversion (counts two, three, four and six) for failure to state a claim on which relief can be granted. Fed. R. Civ. P. 12(b)(6). (Plaintiffs identify each legal theory with a different count number, but in several instances make several claims within one count. As a general matter, each count should contain only one claim. 2 West's Fed. Forms, District Courts - Civil §1557 (4th ed.)).

In count two, plaintiffs assert two claims that defendant violated Wis. Stat. §100.18. Defendant challenged these claims, but their arguments are unavailing because they depend upon requirements for pleading that Wisconsin law does not require. Plaintiffs have asserted four distinct Truth in Lending Act claims in count 3. I will dismiss the first three claims set out in count 3 because they are barred by the one-year statute of limitations. The fourth claim in count three will not be dismissed because it is an action for rescission governed by a three-year statute of limitation. In addition, I will dismiss count four because plaintiffs have failed to state a breach of contract claim; plaintiffs do not allege that defendant violated any express terms of the agreement, but merely recast the unconscionability claim that they made in count one. Finally, defendant argues that plaintiffs have failed to state a claim for conversion in count six because they did not allege that defendant acted with a lack of consent or lawful authority or that defendant exercised dominion over a specific and

identifiable quantity of currency. I conclude that the allegations of the complaint are sufficient with respect to either of these elements and therefore, I will not dismiss plaintiffs' conversion claim.

A. Wis. Stat. §100.18

Wis. Stat. § 100.18(1) provides in relevant part that:

> No person, firm, corporation or association, or agent or employee thereof . . . with intent to induce the public in any manner to enter into any contract or obligation relating to the purchase, sale, hire, use or lease of any real estate, merchandise, securities, employment or service, shall make . . . [a] statement or representation of any kind to the public . . . which is untrue, deceptive or misleading.

"Any person suffering pecuniary loss because of a violation of this section by any other person . . . shall recover such pecuniary loss, together with costs." Wis. Stat. §100.18(11)(b)(2). Plaintiffs contend that defendant violated Wis. Stat. § 100.18 by "charging plaintiffs an unconscionable 'loan discount fee' or 'points' on the loan dated November 29, 2001, which was untrue, deceptive, and misleading." Although the charging of fees is not an act covered by this provision, "[t]he sufficiency of a complaint is measured by the facts alleged, not by the plaintiff's theory of recovery." Borne v. Gonstead Advanced Techniques, Inc., 2003 WI App 235, ¶ 11, ___ Wis.2d ___, ___, 667 N.W.2d 709, 712.

Plaintiffs clarify their claim in their response brief. It appears that they actually have

two distinct claims of misrepresentation under Wis. Stat. §100.18. First, plaintiffs point out that they alleged that defendant had told them that it would charge them a total of $11,383.48 for the loan discount fee but actually charged them $11,391.48. Second, plaintiffs note that they alleged that defendant's use of the phrases "loan discount fee" and "points" implies incorrectly that the charge was imposed to reduce the interest rate on the loan. Finally, plaintiffs note their allegation that defendant sold them credit life and disability insurance at rates exceeding the limit imposed by a different statutory provision. (This third allegation does not give rise to a claim under Wis. Stat. §100.18, which applies only to untrue or misleading statements or representations. Plaintiffs have not alleged that defendant made any statement about the applicable rates.)

Defendant contends that plaintiffs have failed to allege specifically that they sustained a monetary loss as a result of any violation of §100.18. In response, plaintiffs argue that they made a general assertion applicable to all of their claims that "[a]s a result of the acts alleged above, [they] have suffered and are entitled to recover damages." Cursory as this statement is, it is sufficient to satisfy the requirement that a plaintiff allege that a defendant's violation caused the plaintiff a monetary loss. See Production Credit Association of West Central Wisconsin v. Vodak, 150 Wis. 2d 294, 309, 441 N.W.2d 338 (Ct. App. 1989) (holding that plaintiffs stated negligent misrepresentation claim by alleging that they had suffered damages as "direct and prominent (sic) result of said

misrepresentations"). A complaint is to be liberally construed and "will be dismissed only if it appears certain that no relief can be granted under any set of facts that the plaintiffs might prove in support of their allegations." Scott v. Savers Property and Casualty Insurance Co., 2003 WI 60, ¶5, 262 Wis.2d 127, 134, 663 N.W.2d 715, 719.

Defendant contends also that "plaintiffs have not based their cause of action upon false advertising, but instead upon [defendant's] alleged use of [the terms] 'loan discount fee' or 'points' on the loan." Defendant overlooks plaintiffs' claim that defendant misrepresented the amount that would be charged for the loan discount fee. If such a misrepresentation were made, it is actionable under Wis. Stat. §100.18.

Defendant denies that its use of the phrases "loan discount fee" and "points" could constitute false advertising. However, Wis. Stat. § 100.18 protects borrowers from any statement or representation that is untrue, deceptive or misleading. In its reply brief, defendant argues that plaintiff has not alleged that defendant made any assertion, representation or statement. Defendant ignores the possibility that its use of a particular title, such as "loan discount fee," is a representation. I conclude that plaintiffs have asserted two claims under Wis. Stat. §100.18. Defendant's motion will be denied with respect to count two.

B. Truth in Lending Act Claims

Plaintiffs contend that defendant violated the Truth in Lending Act by

> (a) Failing to provide Plaintiffs with the specific disclosures and warnings required under 15 U.S.C. §§ 1639(a)(1)(A) and (B) not less than three business days before the closing of their mortgage loan as required under 15 U.S.C. § 1639(b)(1);
>
> (b) Failing to provide Plaintiffs with a disclosure of the annual percentage rate and regular monthly payment amount required under 15 U.S.C. § 1639(a)(2) not less than three business days prior to the consummation of the mortgage loan as required under 15 U.S.C. § 1639(b)(1);
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> (c) Including an unlawful payment penalty clause in the parties contract, in violation of 15 U.S.C. § 1639(c); and
>
> (d) Failing to honor Plaintiffs' valid request for rescission.

Defendant argues that plaintiffs' claims are barred by the one-year statute of limitations provided in 15 U.S.C. §1640(e) because the parties formed the contract on November 29, 2001, and plaintiffs did not file their complaint until May 9, 2003. Plaintiffs deny that their claims are time-barred, arguing that they seek rescission of the contract and the right to rescission extends for three years. 15 U.S.C. § 1635(f) ("right of rescission shall expire three years after the date of consummation of the transaction . . . .").

Plaintiffs' first three claims under the Truth in Lending Act are not based on the right of rescission and therefore, are barred by the statute of limitations. See 15 U.S.C. §1640(e). The first two are claims that defendant failed to make certain disclosures "not less than three business days before the closing of their mortgage." The statute of limitations for these

claims ran on November 26, 2002, one year after the three days prior to contract formation. Plaintiffs' third Truth in Lending Act claim is that the loan contract provided an illegal prepayment penalty clause. For this claim, the statute of limitations ran on November 29, 2002, one year after the parties entered into the contract. Because none of these claims was brought until May 9, 2003, they must be dismissed. See 15 U.S.C. § 1640(e).

Plaintiffs' final Truth in Lending Act claim is that defendant failed to comply with their valid demand for rescission. If, as plaintiffs allege, defendant did not make the material disclosures required by 15 U.S.C. §1635(a), plaintiffs' right to rescission will not expire until November 29, 2004. 15 U.S.C. § 1635(f). Because plaintiffs brought this rescission action within three years from the time the loan agreement was made, this claim is not time-barred and will not be dismissed. Basham v. Finance America Corp., 583 F.2d 918, 928 n.17 (7th Cir. 1978) (one-year statute of limitations does not apply to rescission actions). Defendant appears to concede as much in its reply brief and argues only that the relief available to plaintiffs may be limited. The nature of damages available to a claimant is not a basis for dismissal unless no remedy is available. Wangen v. Ford Motor Co., 97 Wis. 2d 260, 308, 294 N.W.2d 437, 462 (1980).

C. Breach of Contract

Plaintiffs have also alleged that defendant breached the loan contract. They argue that all the laws of the state of Wisconsin are incorporated into the contract and that in violation of the state law prohibiting unconscionable contract terms, defendant charged and collected an unconscionable loan discount fee and life insurance premium. (Plaintiffs have also stated a separate unconscionability claim in count one of the complaint, which defendant has not challenged in this motion.) Defendant argues that plaintiffs have failed to allege that defendant breached any of the contract terms, that the breach was material or that it caused plaintiffs any damage.

Plaintiffs' allegations do not make out a breach of contract claim. Plaintiffs allege that their contract with defendant is governed by Wisconsin law, under which "[t]he existing law of the land is a part of every contract and must be read into it." City of Milwaukee v. Raulf, 164 Wis. 172, 184, 159 N.W. 819, 823 (1916). Wisconsin law provides that if a court determines that a contract or any provision thereof is unconscionable, the court may refuse to enforce it. Wis. Stat. § 425.107; Deminsky v. Arlington Plastics Machinery, 2003 WI 15, ¶ 27, 259 Wis.2d 587, 657 N.W.2d 411. See also 8 Williston on Contracts §18:1 (4th ed.). Because a party breaches a contract only when it materially fails to comply with its duty to perform under the contract, St. Francis S & L Association v. Hearthside Homes, Inc., 65 Wis. 2d 74, 78-79, 221 N.W.2d 840, 843 (1974), unenforceable contract provisions cannot be the basis for a claim of breach.

Plaintiffs appear to rely on Raulf for the proposition that state law incorporates into every contract an independent contractual obligation to refrain from including unconscionable terms. However, in Raulf,164 Wis. at 184, 159 N.W. at 823, the court held that although contracts incorporate the law of the land, a violation of law is distinguishable from a contractual breach. Id. ("The penalty is imposed, not for the breach of a contractual obligation, but for the violation of the terms of the ordinance."). The law governing the contract dictates the manner, sufficiency and conditions of performance, but does not materially alter the substantial obligations of the parties. Ritterbusch v. Sexmith, 256 Wis. 507, 514, 41 N.W.2d 611, 615 (1950) (quoting Restatement of Conflict of Laws §358 cmt. b).

"The sufficiency of a complaint is measured by the facts alleged, not by the plaintiff's theory of recovery." Borne, 2003 WI App at ¶ 11. Although plaintiffs' factual allegation under count four would be sufficient to make out an unconscionability claim pursuant to Wis. Stat. § 425.107, plaintiffs have stated this claim expressly under count one. Therefore, count four will be dismissed.

## D. Conversion

"Conversion is any distinct act of dominion wrongfully exerted over another's personal property in denial of or inconsistent with his rights therein, such as a tortious

taking of another's chattels, or any wrongful exercise or assumption of authority, personally or by procurement, over another's goods, depriving him of possession, permanently or for an indefinite time." Heuer v. Wiese, 265 Wis. 6, 8, 60 N.W.2d 385, 386 (1953) (citations omitted). Plaintiffs have attempted to state a claim for conversion by alleging that defendant charged and collected an unconscionable and unlawful loan discount fee and credit life insurance premium in contravention of plaintiffs' possessory interest in the money they paid. Their allegations raise the question whether a "conversion" claim can be based on an interference with an intangible interest, such as money owed, or whether it is limited to interference with possession of tangible objects.

As a threshold matter, defendant argues that plaintiffs have not made out a claim of conversion because they have not alleged that defendant controlled their money "without their consent and/or without lawful authority." Although plaintiffs consented to the fees at the time they entered the contract, they have specifically alleged that both fees were "illegal." Because a conversion claim may be based on *either* non-consensual or illegal interferences with property rights, Donovan v. Barkhausen Oil Co., 200 Wis. 194, 198, 227 N.W. 940, 942 (1929), defendant's argument does not support dismissal of the conversion claim.

Relying on Maryland Staffing Services, Inc. v. Manpower, Inc., 936 F. Supp. 1494, 1507 (E.D. Wis. 1996) for the proposition that a claimant may not maintain an action for

conversion of a right to money under Wisconsin law unless a specific quantity of currency is identified, defendant argues that plaintiffs have failed to state a claim because they "assert only an intangible right to money and fail to attach that intangible right to any tangible thing capable of being wrongfully controlled . . . [and] such general allegations of overcharge are insufficient for a claim of conversion." In Maryland Staffing, the court cited an opinion of the Wisconsin Court of Appeals defining conversion as a "wrongful or unauthorized exercise of dominion or control over chattel." Id. (citing Farm Credit Bank of St. Paul v. F & A Dairy, 165 Wis. 2d 360, 371, 477 N.W.2d 357 (Ct. App. 1991)). It reasoned that because chattel means something tangible, an action for conversion will not lie for the assertion of an intangible right, such as a right to money, unless the right could be attached to something identifiable and tangible, such as a quantity of currency. Id. Under this view, a claim for conversion of money by overcharging for insurance would not go forward.

After the court in Maryland Staffing extracted this holding from the language in Farm Credit Bank, the Wisconsin Court of Appeals clarified its earlier holding. Acknowledging that it had described a conversion as a wrongful dominion over chattel in Farm Credit Bank, the court held that "[t]he thing that the defendant diverts to his or her own use need not . . . be a chattel; money may also be converted." Methodist Manor of Waukesha, Inc. v. Martin, 255 Wis. 2d 707, 712, 647 N.W.2d 409, 412 (Ct. App. 2002) (citing Regas v. Helios, 176 Wis. 56, 59, 186 N.W. 165, 166 (1922) ("Although it has been sometimes held

that money is not the subject of conversion, it is not the rule in this state.")). In Methodist Manor, the claimant did not allege the conversion of a specific amount of money, but instead claimed that certain monthly Social Security payments plus other payments from unknown sources or portions thereof had wrongfully been converted by the defendant. 255 Wis. 2d at 710; 647 N.W.2d at 411. Because federal courts should defer to state courts for interpretation of state law, City of Chicago v. Morales, 527 U.S. 41, 61 (1999); Gresham v. Peterson, 225 F.3d 899, 908 (7th Cir. 2000), it is appropriate to apply the standard employed in Methodist Manor, rather than the rule stated in Maryland Staffing. Accordingly, I conclude that plaintiffs' failure to identify a specific and identifiable quantity of currency as the subject of their conversion claim will not prevent their claim from going forward. Defendant's motion will be denied with respect to count six.

ORDER

IT IS ORDERED that defendant Beneficial Wisconsin, Inc.'s motion to dismiss for failure to state a claim is GRANTED with respect to plaintiffs Chad and Yvonne Hauschildt's first three Truth in Lending Act claims listed under count three and the breach of contract claim in count four. Defendant's motion to dismiss is DENIED with respect to

plaintiffs' claims set out in counts two and six and the rescission claim set out in count three.

Entered this 17th day of December, 2003.

BY THE COURT:
BARBARA B. CRABB
District Judge