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In this week's SWALU, we report on an Alabama Court of Civil Appeals case absolving K-Mart and its check verification service from liability to a customer, and on an 11th Circuit Court of Appeals case finding no "required use" under RESPA in connection with a home builder's discount offer, if the home buyer would use the builder's related mortgage company.

K-Mart, Inc. and Certegy Check Services, Inc. v. James T. Stewart and Jane Stewart, __ So. 2d __, (Ala. Civ. App. 2009) (check verification service and merchant not liable to merchant's customer). Certegy provides a service to merchants regarding acceptance of customer checks. When a customer pays by check to a merchant that subscribes to Certegy's services, Certegy recommends to the merchant, based on the information available to Certegy, whether to accept the check. If Certegy recommends that the merchant accept the check, and the check is later returned unpaid, Certegy pays the amount of the check to the merchant and then proceeds against the purchaser for the amount owed.

Mrs. Stewart made a purchase at K-Mart using a check drawn on her account, and Certegy recommended that K-Mart accept the check. K-Mart accepted the check, which was then sent to K-Mart's bank, and K-Mart's bank routed the check for presentation and payment. During the process of transferring the check, the check was torn in such a way that the routing number became unreadable, and it could not be presented to the Stewarts' bank. Ultimately, the check was returned to K-Mart unpaid, and K-Mart informed Certegy that the check had been returned.

Mrs. Stewart subsequently attempted to make additional purchases via check at two other merchants that subscribe to Certegy. Those two merchants refused to accept her checks because Certegy did not recommend that they accept the check. The Stewarts then sued both K-Mart and Certegy, arguing that K-Mart and Certegy had interfered with the Stewarts' relationship with their bank and that K-Mart and Certegy's actions constituted a nuisance. Following the bench trial, the trial court found in favor of the Stewarts, awarding them \$500 against K-Mart and \$14,500 against Certegy.

On appeal, the Court of Civil Appeals reversed the trial court's judgment. The Court found that the Stewarts failed to prove that K-Mart and Certegy interfered with the Stewarts' relationship with their bank. During the period that Certegy "flagged" the Stewarts' account on its system, the Stewarts were able to transact business through their checking account, were able to deposit funds into their account, and were permitted to withdraw funds from their account. The Stewarts did not present any evidence that the bank refused to pay the checks that were presented to it. Thus, the Court found that K-Mart and Certegy's actions did not rise to the level necessary to support a claim of intentional interference with the Stewarts' relationship with their bank.

The Court also found that the Stewarts failed to prove that K-Mart and Certegy's actions constituted a nuisance. Mr. Stewart testified that he had not had a check rejected by a merchant and that he had not lost the use and enjoyment of his checking account. Furthermore, Ms. Stewart only testified regarding three separate acts on which she based her nuisance claim. The Court held that three acts were not sufficiently recurring to constitute a nuisance.

John R. Yeatman and Eleanor E. Yeatman v. D.R. Horton, Inc. and DHI Mortgage Co., __ F.3d __ (11th Cir. 2009) (Arrangement between home builder and its related mortgage company did not constitute "required use" under RESPA.) John and Eleanor Yeatman entered into a contract with builder D.R. Horton to purchase a home, using mortgage financing provided by DHI Mortgage Co., an affiliate of D.R. Horton. The contract gave the Yeatmans the option of having D.R. Horton pay a portion of the Yeatmans' closing costs if the Yeatmans used DHI Mortgage to procure financing. The contract specified that the Yeatmans were not required to use DHI Mortgage as a condition to the purchase of the home.

The Yeatmans later attempted to bring a class action against both D.R. Horton and DHI Mortgage, claiming that the companies expressly conditioned the Yeatmans' purchase of the home to their use of DHI Mortgage to finance the home and that D.R. Horton manipulated the price of the home such that the Yeatmans would pay several thousand dollars more if they elected to use a separate mortgage lender. The Yeatmans argued that this was a "required use" that violated the Real Estate Settlement Procedures Act (RESPA) and various HUD requirements.

The district court dismissed the Yeatmans' lawsuit, and the Eleventh Circuit affirmed the dismissal. Both courts found that the mere offering of an option of a discount on closing costs did not violate RESPA or HUD regulations that prohibit arrangements where consumers are required to use a particular service in order to purchase another service or product. In particular, the Yeatmans did not allege that D.R. Horton threatened to charge more for the home if the Yeatmans did not use DHI Mortgage. The Yeatmans faced the same price for the home if they used another lender. Additionally, the district court found that the "pressure" of a discount did not amount to a "required use" that would violate RESPA.



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