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SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
Docket No. A-M-350-95T2

FRANCIS SCOTT, on behalf of herself and all
others similarly situated,

Appellant

v.

MAYFLOWER HOME
IMPROVEMENT CORP.,
BANK ATLANTIC, et al

Defendants

Civil Action

On Appeal From
Superior Court of New Jersey

Law Division: Passaic County

Sat Below:

Hon. Frank M. Donato, I.S.C.

BRIEF
FOR
AMICUS CURIAE

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STATEMENT OF AMICUS CURIAE

LSNJ, as amicus curiae, does not submit any further statements **as** to the facts or proceedings and relies on the record below.

BACKGROUND- A PORTRAIT OF THE TYPICAL HOME REPAIR SCAM.

1. The initial transaction.

This case involves the pervasive and complex practice of home repair equity financing schemes, sometimes referred to as "equi; skimming". Over the past decade, home repair fraud has become a growing concern among Legal Services consumer attorneys as the number and frequency of such cases has increased. In the recent past, equity skimming has been the focus of numerous studies, countless articles, and lawsuits nationwide, as well as the subject of congressional hearings. The Boston Sunday Globe reported that a study commissioned by American Association of Retired Persons, (AARP) and conducted by the National Consumer Law Center (**NCLC**) in Boston revealed that two major events precipitated the upswing of home repair scams;

"government deregulation of banking services and a shift by banks toward more creative - once considered too risky - forms of finance" Boston Sunday Globe, "Home Equity Lenders Under Fire in Cities across the U.S.", **May 26, 1991** p-B-10.

Equity scams were portrayed in a **series of** articles published by **the Boston Globe**:

The pattern in all the cases is similar . . . a homeowner is approached by a home-improvement company with an offer of easy credit for much **needed** repairs; the homeowner signs a loan application proffered by the contractor or a mortgage broker; the resulting mortgage turns out to carry an unusually high interest rate, financial and legal fees; when the homeowner falls behind on payments, he or she loses the home. Boston **Globe**, "Home Equity Lenders Under Fire Across US," May 26, 1991, pg. B-1, B-10.

Typically, a home repair contractor or salesperson targets a particular neighborhood or home, aiming at equity-rich, cash-poor communities in which traditional financing is unavailable or unobtainable. Generally the homeowners are low-income, elderly and minority. A salesperson or contractor will canvass a targeted neighborhood searching for houses in need of repair. The homeowner is then approached at home and induced to enter into an agreement by various methods ranging from illegal money kickback schemes to "satellite dishes, carpeting, debt consolidation or even cancer treatment." New York Times, "Fraud Growing in Push on Home-Equity Lending", October 13, 1991, pg. 16, col. 1.¹

Frequently, the home repair contract calls for repairs which are not needed. Where repairs are necessary, the contract price often is unconscionably high. At times the work is performed, sometimes in a shoddy manner; other times the work is not performed at all. Homeowners are usually given a document to sign which is represented by the home repair salesperson to be the "home repair contract." Usually this document is a financing agreement in which the homeowner unwittingly agrees to a mortgage on his or her home. The home repairs frequently start prior to the statutorily prescribed three-day waiting period², if work is done at all.

¹. Several surveys across the nation have shown this to be true. In California, for example, one scam involved satellite dishes; "water purifiers, solar heating systems, exterior stucco coating, carpets, drapes and air-conditioners were, throughout the 1980's, various baits used by scam artists." Boston Sunday Globe, "Taking the bait in LA," Jul 21, 1991, pg. 1.

². The three-day waiting period may be imposed by state or federal statutes. The state door-to-door sales act requires a 3day waiting period before the commencement of work, to allow the consumer to back out of the deal. N.J.S.A. 17:16C-61.

The federal Truth in Lending Act requires a three-day cooling off period for

In many of the schemes, the **financing** agreements are signed by the **homeowner** before he or she is told what the **finance terms will be**. The **finance terms include commissions for salespersons or contractors and tend to be at unusually high interest rates**. In numerous instances the mortgage and loan **have been assigned** to a home equity lender even before the homeowner is obligated on the agreement. Usually the finance agreement is then re-assigned to **other** lenders, frequently to traditional banks.

2. The financial institutions that buy paper from predatory lenders.

Being duped by the home repair contractor or salesperson is only the beginning. In order to fully understand the home repair equity schemes it is necessary to “follow the money”. In addition to signing a home repair contract, the homeowner also is required to sign a financing agreement or “note” and a mortgage. Often, the homeowner is unaware that he or she agreed to a mortgage against the home. Another routine deception practiced by such scam artists is to fill in the terms of the finance documents after the consumer is obligated on the note. Frequently, the resulting terms are exorbitant, containing abnormally high interest rates, and fees for financing and commissions.

The original lender is typically a second mortgage entity which may have a purchaser of the note lined up **even** before the homeowner signs **the contract**. These purchasers' are **often** “traditional” banks who may or may not be involved in the underlying fraudulent practices of the home repair contractor or the middleman lenders.

Various state and federal laws impute liability to lender assignees, even those which

contracts which result in a mortgage on a consumer's home, other than a purchase money mortgage, 15 U.S.C. section 1635 (a).

may be unaware of the equity scam, by subjecting such lenders to the same claims and defenses that could be asserted against the seller. Even without such statutory liability, lenders who habitually purchase home repair loans in effect share responsibility for the equity scams, because they support the market in which equity lenders profit. Furthermore, it is the failure of these traditional lenders to provide credit to the minority, elderly, and poor communities that sets such communities up to be victimized by the equity scams. The *Washington Monthly* summarized the effects of the equity scam on homeowners in its article, "Stealing Home":

Hundreds of thousands of homeowners have been victimized in the past decade. Tens of thousands have lost their homes; still more have seen their equity sucked out by exorbitant fees and usurious interest rates charged by predatory mortgage companies. Homeowners make ripe targets because they've spent years building up equity in their homes - and because runaway inflation in real estate values has left them sitting on equity gold mines in spite of their modest incomes. Many are targeted because they are old or illiterate. Others are vulnerable simply because they are poor and black; they have no where to go for credit because mainstream lenders-the banks and savings and loan that have made the American dream of homeownership possible-are reluctant to lend money to residents of working-class black neighborhoods. With mainstream credit cut-off homeowners desperate for cash turn to second-mortgage companies that charge 20, 30 sometimes even 40 percent annual interest. *The Washington Monthly*, June 1992, p. 23.

Ironically, banks which fail to provide conventional credit to minority and poor communities nonetheless reap large profits by purchasing loans from other lenders. A report published by the Federal Reserve Bank of Boston in October 1992 concluded that most leading Boston banks "extended business credit or bought paper from questionable lenders operating in neighborhoods that were largely unserved by the banks." Mortgage

Lending in Boston: Interpreting HMCA Data, Federal Reserve Bank of Boston, October 1992 (Report). The Report also concluded that minority and low income homeowners were the most vulnerable in the population, indicating that “black and Hispanic mortgage applicants in the Boston metropolitan area are roughly 60 percent more likely to be turned down (for credit) than whites.” Report p.2

Closer to home, a survey conducted by the New Jersey Public Advocate in 1988 entitled, “Who’s Checking? An Investigation and Analysis of the Check Cashing Industry in New Jersey, the Cashing of Government Issued Checks and the Regulatory Role of the State Department of Banking” affirmed that traditional lending institutions were inaccessible to minority communities in New Jersey. This inaccessibility included the failure to provide banking services, and the lack of physical presence of branch offices in minority and low income communities. With nowhere else to turn, low income, elderly, and minority homeowners in New Jersey fall prey to home equity scams.

This process was described by the *Wall Street* journal, which reported that conventional banks were reaping large profits by providing credit through the “back door” to persons for whom it would not give regular loans.

“Yet many of the same banks that treat such low-income residents as bad risks have often found a way to get some of their business anyway. They have often financed hard-sell, high-rate home equity lenders who solicit inner-city borrowers.”, *The Wall Street Journal*, October 21, 1991, pg 1.

“And banks, in turn, “don’t want to look under the covers” when they buy high-rate mortgages, charges Rep. Joseph P. Kennedy, a Massachusetts Democrat and member of the House Banking Committee. He adds that “the way to stop these scams is to get legitimate bankers back in the neighborhoods.

Second-mortgage firms are under the spotlight nationwide. The Justice Department recently began an investigation of possible civil-rights and other violations by banks and high-rate lenders. State attorneys general in Massachusetts, New York and Connecticut also are investigating high-rate lenders and home-improvement firms that often act as their agents initiating loans. *The Wall Street journal*, "Back-Door Loans - Some Banks' Money Flows Into Poor Areas - And Causes Anguish" 1991, pg 2, Pa 39a.

the plaintiff's class members, who in turn have claims against certain named defendants with whom the plaintiff has had no prior dealings. The plaintiff's claims may not only be **typical** of, but in fact may be identical to other class members, except that the plaintiff's claim may be against one defendant with whom the plaintiff had dealings, and several class members' claims may be exclusively against other defendants with whom the plaintiff has not had prior contacts. [NEWBERG ON CLASS ACTIONS, Section 3.18, p. 3-109; emphasis supplied]

Thus the issue on which defendant Bank Atlantic needs to prevail in order to be released from the case is whether a class action properly lies in this matter. This question can only be determined on a motion for class certification at an appropriate point in the case. The propriety of class certification is not at issue on this motion. Rather, under R. 4:32 it must be brought in timely fashion after any necessary discovery and other preparation.

It would be a great injustice to release any defendant by summary judgment where, as here, that defendant had very substantial connection with two other defendant home repair contractors who are alleged to be at the point of the home repair fraud. To release a defendant with prejudice, as did the trial court below, would permit a major miscarriage of justice. In such a case, a plaintiff could not get a key class defendant back into the case until an appeal after final **judgment, if at all.** Such a result **makes** no **sense** in-terms of either judicial administration or the public interest in halting fraudulent schemes and practices. Such releases would effectively eviscerate the class action remedy, limiting it to defendants who had direct connections with named plaintiffs, putting New jersey all by itself in comparison to both federal practice and other state jurisdictions.

The proper approach, when a defendant in a class action seeks release prior to a class

certification motion on the ground of absence of direct connection to named individual plaintiffs, is examination on the face of the pleadings, as was originally the case on this motion. Plaintiff must be accorded the opportunity to have her legal claims tested under the assumption that the facts are as she alleges. If the pleadings allege that members of the plaintiff class have claims against a defendant, that defendant must be retained. The matter can then proceed to a class certification motion, summary judgment, or trial. In these later proceedings, the issue of whether a statute of limitations is a bar (discussed in Point II of this brief) can properly be reached; the trial judge expressly did not reach or rely on this issue in reaching his decision. Decision transcript at 4.

It should be noted that summary judgment in this case was granted prior to defendant Bank Atlantic's filing of an answer to the Amended Class Action Complaint, and prior to any post-filing discovery being conducted. There is ample precedent in New Jersey for appellate reversal of trial court decisions which granted summary judgment prior to discovery being completed. Saloman v. Eli Lilly and Co., 98 N.J. 58 (1984). Saloman cautioned that the trial court should not grant a summary judgment motion when the matter is not "ripe" for such consideration, and failure to complete discovery is often such an indication. 98 N.J. at 61; See also, Velantaz v. Colgate-Palmolive Co., 109 N.J. 189 (1988); Cella v. Interstate Properties, -232 N.J. Super. 232 (App.Div. 1989); and Santos v. Hubev Corp., 236 N.J. Super. 608 (App. Div. 1994).

To conclude, it is essential to note that the ultimate legal question raised by this motion is not whether the named plaintiff has an individual claim against defendant Bank Atlantic; she makes no such assertion of a claim at any point. Rather, the central issue is

whether the plaintiff class - if it is certified - has a claim against this defendant. On the facts alleged, and indeed on the facts as they exist in the record, the plaintiff class clearly does, and amicus urges this court to let this claim go forward.

- II. DEFENDANT BANK ATLANTIC IS PROPERLY A DEFENDANT IN THE CLASS CLAIMS, BECAUSE THE FACTS AS ALLEGED SET FORTH SUBSTANTIAL LEGAL CLAIMS.
- A. Bank Atlantic can be found liable as an assignee of the home repair contractors.

As noted above, the record in this case reveals that defendant Bank Atlantic is a major holder of the finance agreements, which agreements contain countless violations of both state and federal laws and were allegedly induced by fraud. These finance agreements were a direct result of home repair contracts between members of the plaintiff class and defendant *Mayflower/Maywood*. (See Pa 5a-8a)³ The plaintiff class has been victimized by the same defendants, *Mayflower/Maywood*. The plaintiff class remedy is not only against *Mayflower/Maywood*, but extends further to the holder of the finance agreements through several theories of assignee liability. The assignee liability is provided through federal law pursuant to the Truth in Lending Act, (TILA) 15 U.S.C. sect. 1601 et. seq. and the Federal

³. The agreements entered into between the **class** members and defendants *Mayflower/Maywood* were assigned to Sterling Resources of New Jersey, Ltd. and subsequently re-assigned to defendant Bank Atlantic. Plaintiff alleges that **all** such agreements contain the language required by 16 CFR 433 and N.J.A.C. 13:45A-16.2(a)13.ii, and two such agreements are part of the record (Pa 35a-38a):

NOTICE: ANY HOLDER OF THIS CONSUMER CREDIT CONTRACT IS SUBJECT TO ALL CLAIMS AND DEFENSES WHICH THE DEBTOR COULD ASSERT AGAINST THE SELLER OF GOODS OR SERVICES OBTAINED PURSUANT HERETO OR WITH THE PROCEEDS HEREOF. RECOVERY HEREUNDER BY THE DEBTOR SHALL NOT EXCEED AMOUNTS PAID BY THE DEBTOR HEREUNDER.

Trade Commission (FTC) Preservation of Consumer Claims and Defenses Rule, 16 C.F.R. Sec. 433 (also known as the FTC Holder rule), and by state law pursuant to home repair regulations, N.J.A.C. 13:45A-162(a)13.ii.

Plaintiff's allegations in the complaint are supported by extrinsic evidence and establish the connection between defendants Bank Atlantic, Mayflower Home Improvement, Maywood, Builders, Inc., Sterling Resources of New Jersey, Ltd., the plaintiff, and the plaintiff class. Once the connection has been provided, a remedy can take several forms, including extinguishing all of the plaintiff class' existing debt, by way of declaratory and injunctive relief, primarily based upon the availability of the defense of recoupment to bar future claims by defendants. This defense may prove to be the only effective remedy class members have against losing their homes, and to preserve it defendant Bank Atlantic and other assignees must be kept in the case.

Plaintiff Frances Scott brings her class action complaint as a representative of "all persons in New Jersey who have entered into home repair contracts with defendants Maywood Builders, Inc. (May-wood) or Mayflower Home Improvement Corp. (Mayflower) which contracts were to be paid in installments." Pa 5a, par. 1. Such class members have a connection with defendant Bank Atlantic through multiple theories of assignee liability.

(1) The Federal Trade Commission Preservation of Consumers Claims and Defenses rule. 16 C.F.R. 433.2:

The FTC Holder rule imputes assignee liability to defendant Bank Atlantic Plaintiff alleges that defendant Bank Atlantic is an assignee of the contracts entered into with Mayflower/Maywood based on assignee liability imputed through the FTC Holder Rule, 16 C.F.R. section 433.2, which requires that all consumer credit contracts contain a notice

that any assignees are subject to the consumer's claims and defenses against the assignor.⁴

The following language is required to be placed on the face of the consumer credit contract

in at least ten point, bold face type:

NOTICE: ANY HOLDER OF THIS CONSUMER CREDIT CONTRACT IS SUBJECT TO ALL CLAIMS AND DEFENSES WHICH THE DEBTOR COULD ASSERT AGAINST THE SELLER OF GOODS OR SERVICES OBTAINED PURSUANT HERETO OR WITH THE PROCEEDS HEREOF.

Plaintiff alleged all of Mayflower/Maywood's agreements are subject to this clause,⁵ including those held by defendant Bank Atlantic. This fact is not only undisputed by defendant Bank Atlantic, but is also supported by extrinsic evidence in the record. Pa. 35a-38a.

(2) Bank Atlantic is subject to assignee liability by virtue of ordinary contract law.

As discussed, defendant Bank Atlantic is subject to seller-related claims pursuant to the FTC Holder Rule. Even if this were not true, defendant Bank Atlantic is subject to seller-related claims by virtue of ordinary contract law.

As noted above, the record on this motion includes contracts entered into between proposed class members **and** defendant **Mayflower/Maywood**. These contracts contain the notice required by the FTC Holder Rule in bold type directly above Bank Atlantic's signature:

⁴ This language effectively defeats any assignee's status under the Uniform Commercial Code as a holder in due course.

⁵ See, Amended Complaint, par. 5 1, Pa. 10a.

NOTICE: ANY HOLDER OF THIS CONSUMER CREDIT CONTRACT IS SUBJECT TO ALL CLAIMS AND DEFENSES WHICH THE DEBTOR COULD ASSERT AGAINST THE SELLER OF GOODS OR SERVICES OBTAINED PURSUANT HERETO OR WITH THE PROCEEDS HEREOF. RECOVERY HEREUNDER BY THE DEBTOR SHALL NOT EXCEED AMOUNTS PAID BY THE DEBTOR HEREUNDER.

Again, these facts are not in dispute. The terms of the contract govern the relationship between the parties: Bank Atlantic agreed to subject itself to seller-related claims and defenses when it purchased the note. It now seeks protection from the specific terms to which it agreed to be bound, contrary to basic contract law. See, Hempstead Bank v. Babcock, 115 Misc. 2d 97, 453 N.Y.S.2d 557 (Sup. Ct. 1982); De La Fuente v. Home Savings Ass'n, 669 S.W.2d 137 (Tex.Ct.App. 1984) rev'd in part on other grounds, 733 S.W. 2d 134.

Indeed, even in cases where the transaction was not governed by the FTC Holder Rule, courts have held the holder subject to seller-related claims and defenses if the agreement contains the FTC Holder Rule notice. Gray v. Atlantic Permanent Savings & Loan Ass'n. Inc., 49 B.R. 540 (E3anik.E.D. Va. 1985); Boden v. Atlantic Federal Savings & Loan Ass'n, 396 So.2d 827 (Fla. Dist. Ct. App. 1981).

(3) Bank Atlantic is subject to assignee liability based on New Jersey regulations on home repair contracts. N.J.A.C. 13:45A-16.2(a)13.ii.

New Jersey Consumer Fraud regulations, N.J.A.C. 13:45A-16.2 (a)13.ii, require that disclosures of the preservation of buyers' claims and defenses be made on all home repair contracts and in fact such disclosure was made in this case. See, POINT IIA(2) above. Failure to provide this disclosure would have been a violation of the New Jersey Consumer Fraud Act, N.J.S.A. 56:8-1 et. seq.

(4) **Bank Atlantic is subject to assignee liability based upon the Truth in Lending Act, 15 U.S.C.A. sections 1635 and 1641.**

Pursuant to section 1641 of the Truth in Lending Act, (TILA), assignees are fully subject to TILA rescission.⁶ While it is true that assignees are only liable for TILA statutory damages' for violations which are apparent on the face of the document, pursuant to 15 U.S.C. sec. 1641 (a), assignees are subject to rescission in the same manner and to the same extent as the original creditor under 15 U.S.C. sec. 1641 (c). Section 1641 (c) explicitly provides:

Any consumer who has the right to rescind a transaction under section 1635 of this title may rescind the transaction as against any assignee of the obligation. 16 U.S.C. sec. 1641 (c).
Emphasis supplied.

If this were **not true**, TILA rescission would be virtually useless to consumers due to the rise of the secondary mortgage market, as typified in this case. This reality was recognized by Congress when it amended the TILA to clarify that rescission is effective and available against assignees:

[w]ithout **such protection for the consumer, the right of rescission would provide little or no effective remedy.** *Truth in Lending Simplification and Reform Act: Report of the Committee on Banking, Housing and Urban Affairs, U.S. Senate to accompany, S. 108; S. Rep. N. 73 1980 'U.S. Code Cong. and Admin. News 281, 296.*

⁶ 15 U.S.C. section 1635 contains the right of rescission, which is available "in the case of any consumer credit transaction. . . in which a security interest. . . is or will be retained or acquired in any property which is used as the principal dwelling of the person to whom credit is extended." 15 U.S.C. section 1635(a).

⁷. However, as previously noted, assignees are subject to such claims pursuant to the FTC Holder Rule. See Point II A(1) above.

B. Statutes of limitations do not bar plaintiff's claims.

The lower court declined to reach the issue of whether the plaintiff's claims are time barred, although it indicated its inclination:

The defense has offered as part of its motion for summary judgment the fact that all of the plaintiff's claims, whether it be for fraud, common law fraud, consumer fraud, any of **the** theories of cause of action, truth-in-lending act, they're all barred by the statute of limitations. And I think there might **be** argument -there might be merit to that argument.

I-the plaintiff is offering this concept of recoupment as an affirmative claim, but I tend to agree with the defendant that recoupment is not an affirmative claim, that it's a defense.

Although this issue was not reached by the lower court, it is important for the reviewing court to be aware of the compelling-arguments as to why no statute of limitations would bar various key claims of plaintiff and her class.

(1) Recoupment.

For any plaintiff class member whose legal claims pursuant to the **TILA** may be time barred by the statute of limitations, recoupment in the form of a reduction of the amount owed is still available. The **concept** of recoupment has been reviewed by the New Jersey Supreme Court:

The federal rule of recoupment has been explored by the United States Supreme Court in a line of tax cases. In Bull v. United States, 295 U.S. 247, 55 S.Ct. 695, 79 L.Ed. 1421

91934), the Court found that a decedent's estate could demand that an excess tax payment be credited against a later claim, although the statute of limitations barred an independent action to recover the excess payment. The Court explained:

[R]ecoupment is in the nature of a defense arising out of some feature of the transaction upon which the plaintiff's action is grounded. Such a defense is never barred by the statute of limitations so long as the main action itself is timely. [citations omitted].

Inherent in the concept of recoupment is the notion of fundamental fairness. Beneficial Finance Co. of Atl. City v. Swaggerty, 86 N.J. 602.

In distinguishing the recoupment defense from setoff, the court in Beneficial, supra., reasoned, "[R]ecoupment is distinguishable from setoff in that the latter involves an affirmative recovery on a claim that may be independent of the transaction upon which the plaintiff's claim is based. While recoupment may be utilized only to reduce or extinguish the plaintiff's recovery, setoff may be awarded for any amount to which the defendant is entitled." Beneficial, supra., citing, Gibbons v. Kosuga, 121 N.J.Super. 252, 257 (Law. Div. 1972); Household Fin. Corp. v. Pugh, Minn., 288 N.W.2d 701, 704 (Sup.Ct.1980).

Further, to hold that a plaintiff cannot assert recoupment as an affirmative action is procedurally at odds with most cases. Nearly all recoupment defenses are asserted as a counterclaim, where although also a defendant, the counterclaimant asserts the defense as an affirmative claim.

Specifically with respect to the recoupment defense, what is actually sought is declaratory relief from the claims asserted against the plaintiff and class members. Plaintiff's amended complaint seeks a variety of declaratory relief:

Declaring all notes, contracts and mortgages entered into by

plaintiff, class members and defendants to be void.

Plaintiff, on behalf of herself and class members also demand the foregoing by way of recoupment. (e.g. Pa 16a).

The New Jersey statute creating the right to declaratory relief appears at N.J.S.A. 2A:16-51 et seq., with the following statement of purpose:

This article is declared to be remedial. Its purpose is to settle and afford relief from uncertainty and insecurity with respect to rights, status and other legal relations. It shall be liberally construed and administered, and shall be so interpreted and construed as to effectuate its general purpose- N.J.S.A. 2A:16-5 1. Emphasis supplied.

A declaratory judgment may be either affirmative or negative in **form and effect, and shall** have the **force** and effect of a final judgment. 2A: 16-59.

Plaintiff and her class may pursue affirmative declaratory relief to establish the availability of the recoupment defense in these cases. Indeed, from the perspective of judicial administration, such a route is preferable to resolving hundreds and perhaps thousands, of collection actions. As long as any of the defendants may pursue collection of plaintiff's and her class' notes and mortgages, declaratory relief is an essential and useful remedy.

(2) Equitable tolling of Truth in Lending Act claims.

Many courts have held that TILA claims, otherwise time barred by a statute of limitations, are subject to equitable tolling. Tolling has been allowed in cases where the TILA disclosures were fraudulently concealed, such as the facts alleged in this case.

The Sixth Circuit has held that fraudulent concealment of a TILA violation tolls the statute of limitations and extends the time in which a consumer may raise the TILA claim.

Jones v. Transohio Savings Bank, 747 F.2d 1037 (6th Cir. 1984).

The Ninth Circuit also recognized the fraudulent concealment doctrine in King v. California, 784 F.2d 910 (9th Cir. 1986), cert. denied, 108 S.Ct. 47 (Oct. 5, 1987). The King Court ruled that the statute of limitations may be suspended by the doctrine of equitable tolling “until the borrower discovers or had reasonable opportunity to discover” the nondisclosure of the creditor’s fraudulent concealment which forms the basis of a TILA claim. See also, Boston State Deposit & Trust v. Brooks, 1993 WL 365939 (Conn.Super.Ct. 1993) and Hamilton v. Ohio Savings Bank, 637 N.E.2d 887 (Sup.Ct. Ohio 1994) cert. denied, 115 S.Ct. 905 (Jan. 17 1995), where tolling of the TILA statute of limitations was allowed when evidence was presented that the wrongdoer was involved in concealing the fraud or the wrongdoer committed a wrong in a manner that concealed itself.

(3) Discovery rule and consumer fraud cases.

Pursuant to state common law, the statute of limitations does not impose a time bar when the acts or omissions could not have been or were not discovered by the plaintiff. The so-called discovery rule provides that in an appropriate case a cause of action does not begin to accrue until the injured party discovers, or by an exercise of reasonable diligence and intelligence should have discovered that he may have a basis for an actionable claim. Lopez v. Swyer, 62 N.J. 267 (1973). “The discovery rule is essentially a rule of equity,” requiring the determination of competing interests in a case by case basis. It has been deemed too harsh to apply a rigid and automatic rule of law barring a plaintiff’s right to a claim without examining whether the individual was unaware of the cause of action or had reason to know of the cause of action. “It is also unjust to compel a defense to a suit long

after alleged injuries have taken place.” Lopez, supra. G2 N.J. at 274, 275.

Before a finding can be made of whether plaintiffs and her class’ claims are time barred by statute of limitations, the accrual date of the fraudulent acts committed in this action **must** be resolved. The extent to which any plaintiff knew or should have **known** of the fraud is left in doubt by the existing record and therefore renders summary judgment **inappropriate.**

CONCLUSION

For the foregoing reasons, LSNJ requests this Court grant leave to appeal and reverse the lower court’s decision by reinstating defendant Bank Atlantic as a party to the action.

Legal Services of New Jersey
Melville D. Miller, Jr.,
President

DATED: *December 12, 1995*

By: *Melville D. Miller, Jr.* /s/
Melville D. Miller, Jr.

Dawn K. Miller
Dawn K. Miller