UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

KIM WILLIAMS, on behalf of herself and all others similarly situated,	:	CIVIL ACTION NO. 97-CV-4518
Plaintiffs,	:	
v.	:	
	:	JURY TRIAL DEMANDED
EMPIRE FUNDING CORPORATION, FREDMONT BUILDERS, INC., STANLEY RABNER, TMI FINANCIAL, INC., EFC SERVICING, LLC and FIRST BANK, N.A., Trustee,	:	
Defendants.	:	

REVISED SECOND AMENDED COMPLAINT - CLASS ACTION

I. Background and Nature of the Action

1. This is a consumer class action brought on behalf of persons victimized by a deceptive two (2) contract sales and home improvement financing scheme that uniformly deprived class members of the ability to reject or rescind the transaction, and tricked them into tolerating and paying for substandard, incomplete and deceptively portrayed home improvement goods and services and financing that was marketed as a critical component of the home improvement services. The overarching scheme, which did not vary materially among any of the approximately 350 class members, was implemented by defendants Fredmont Builders, Inc.

("Fredmont") and Empire Funding Corporation ("Empire") and their affiliates.

2. Throughout the Class Period (defined below), Fredmont, with Empire's knowledge and approval, employed an initial "work order" home improvement contract ("Work Order Contract") as part of an application for consumers to participate in a government program that would provide funding for necessary home improvements. The initial Work Order Contract, as well as a second "Home Improvement Installment Contract" generated by Empire and typically presented after the work had already been started and representations made to the consumers, contained confusing and contradictory language which violated the consumers' rights to adequate disclosure and rights to rescind their transactions under the federal Truth in Lending Act, 15 U.S.C. § 1601, et seq. ("TILA") and state unfair and deceptive acts and practices laws. Further, certain of the defendants' attempts to collect on the debts arising from the scheme, including a variety of form collection letters mailed to the homeowners, violated the homeowners' rights under the Pennsylvania Debt Collection Practices regulations, 37 Pa. Code Ch. 303, and the federal Fair Debt Collection Practices Act, 15 U.S.C. § 1692 et seq. ("FDCPA").

3. The practices of Empire's dealer, Fredmont, are characteristic of the deceptive marketing and home improvement financing scheme. Fredmont routinely targeted unsophisticated, low to middle-income and senior citizen homeowners, including plaintiff. Working as a dealer for Empire, Fredmont often used false and misleading advertisements, fliers and high-pressure in-home sales solicitations to obtain from plaintiff and other Class members overreaching home improvement contracts secured by so-called "secondary mortgages" that were sold and assigned to Empire. Empire engages in "subprime lending," which includes extending

loans to persons with lesser creditworthiness, often the low-income and the elderly.

4. A consistent pattern, practice or course of conduct of the deceptive marketing scheme with respect to many of the Class members was the misleading implication or outright misrepresentation that the home improvement program and financing were directed, sponsored, promoted or funded by government agencies such as FHA, HUD and others. Typically, Fredmont either would approach consumers in their homes with fliers deceptively labeled "Public Notice" and would then present business cards with the confusing business name of "Neighborhood Updating Necessity Construction." During the in-home sales presentation, Fredmont would state or imply that government funds had been made available for necessary home repairs or remodeling; that the work would be performed at a fair and affordable cost; that all construction would be guaranteed; that the work would be financed either through the government or through a loan; and that no payment would be required until the customer was completely satisfied.

5. Afterwards, with respect to many of the Class members, Fredmont would not perform the construction work that was promised or would perform the work in an unsatisfactory and shoddy manner. Due to fear, lack of knowledge, the absence of funds and the misleading standard form contracts, plaintiff and members of the Class have been forced to continue paying on these contracts, or to forgo other remedies, rather than risking the loss of their personal residences.

6. Empire was aware of Fredmont's use of the Work Order Contract. Empire also had received numerous complaints regarding the practices or the substandard work of Fredmont. Nonetheless, Empire continued to conduct business with and purchase contracts from Fredmont.

The fact that Empire paid face value for many of the Fredmont originated loans and controlled the underwriting of those loans is further evidence of the agency relationship between Fredmont and Empire. Upon information and belief, the practices of Empire and Fredmont are under investigation by various law enforcement offices, including state attorney general offices. See, e.g., Commonwealth of Pennsylvania v. Fredmont Builders, Inc., No. CD 97-6571 (C.P. Allegheny County, filed May 1, 1997).

7. Plaintiff, on behalf of herself and all others similarly situated, seeks damages, as well as declaratory and injunctive relief, to remedy defendants' actions and conduct in violation of the aforementioned federal laws, as well as the Pennsylvania Unfair Trade Practices and Consumer Protection Law, 73 P.S. § 201-1 et seq. ("UTPCPL"), similar consumer protection laws in other states and state tort law.

II. Jurisdiction And Venue

8. This Court has jurisdiction over this action pursuant to 28 U.S.C. §§ 1331, 1337 and 1367.

9. Venue lies in this district pursuant to 28 U.S.C. § 1391(b).

III. Parties

10. Plaintiff Kim Williams is an individual homeowner who resides at 5543 Pentridge Street, Philadelphia, Pennsylvania 19143.

11. Defendant Empire Funding Corporation ("Empire") is a corporation doing business at 9737 Great Hills Trail, Austin, Texas. At times material to the claims herein, Empire conducted regional operations for the Pennsylvania, Ohio and West Virginia territory in part through a branch office located in Pittsburgh, Pennsylvania. The manager of that office, Arthur

Cipriani, was responsible, at least in part, for supervising and approving the practices of Fredmont as a dealer for Empire. At no time during the Class Period did Mr. Cipriani instruct or direct Fredmont to refrain from engaging in the practices described herein. See Deposition of Arthur R. Cipriani, March 3, 1998 ("Cipriani Deposition"), at pp. 46, 48, 83. Portions of the Cipriani Deposition are set forth below.

12. Defendant Fredmont Builders, Inc. ("Fredmont") is a Pennsylvania corporation with headquarters at 1034 Franklin Avenue, Pittsburgh, Pennsylvania 15221. Fredmont has defaulted in this action and plaintiff has obtained a default judgment against Fredmont. By letter dated January 27, 1993, Fredmont was approved by Empire as one of Empire's dealer/contractors in connection with the solicitation, marketing, placement and closing of home improvement loans assigned to and financed by Empire under the FHA Title I Property Improvement Loan Program.

13. Defendant Stanley Rabner is the president of Fredmont. His last known address is 1065 Lyndhurst Avenue, Pittsburgh, Pennsylvania 15221. Defendant Rabner has defaulted in this action and plaintiff has obtained a default judgment against him. Defendant Rabner is a person within the meaning of the UTPCPL. On information and belief, Rabner actively participated in the design and implementation of the deceptive home improvement financing scheme described herein and directed Fredmont's employees, including Kenneth Butch, Jeffrey Kruman, Cosimo Cravotta, Edward J. Fenster and others to engage in the practices complained of below.

14. Defendant TMI Financial, Inc. ("TMI"), an affiliate of Empire, is a corporation with offices at 9737 Great Hills Trail, Austin, Texas.

15. Defendant EFC Servicing, LLC ("EFC"), a subsidiary of Empire, is a corporation doing business at 9737 Great Hills Trail, Austin, Texas.

16. Defendant First Bank, N.A. ("First Bank"), is a corporation doing business at 601 Second Avenue South, Minneapolis, MN 55402, which serves as trustee for a pool of mortgage loans that includes a loan made to plaintiff.

17. Defendants Empire, TMI, EFC and First Bank are hereinafter referred to collectively as the "Empire Defendants."

IV. Class Action Allegations

18. Plaintiff brings this action individually and as a class action, pursuant to Rules 23(a) and 23(b)(2) and (3) of the Federal Rules of Civil Procedure, on behalf of the following Class:

> All persons who, from January 1993 through October 16, 1997 (the "Class Period"), were subjected to a two (2) contract sales and financing scheme for the purchase of home repair and/or remodeling goods and services from Fredmont in which they first signed a standard form work order contract ("Work Order Contract") in the form of Exhibit A or B hereto and, thereafter, signed a second "Home Improvement Installment Contract" in the form of Exhibit C hereto, which was assigned by Fredmont to defendants Empire, TMI, EFC or First Bank. Excluded from the Class are the defendants and all officers and directors of defendants.

19. The Class includes the following overlapping Subclasses:

(a) **Subclass A:** All Class Members who received telephone calls, letters or other communications from Empire, TMI or EFC in violation of the FDCPA, UTPCPL or similar consumer protection laws in other states or state tort law (the "Unfair Collection Practices Subclass").

(b) **Subclass B:** All Class Members to whom Fredmont, in writing or orally, misrepresented, or made statements causing a likelihood of confusion or of misunderstanding as to the source of funds, sponsorship, affiliation, approval, or certification for its home improvement services (the "Government Affiliation Subclass").

(c) **Subclass C:** All Class Members who received from Fredmont repairs, improvements or replacement goods and services that were substandard, misdescribed, incomplete and/or otherwise inferior to the good and workmanlike standard orally promised and agreed upon in writing (the "Defective Work Subclass").

20. The members of the Class and Subclasses are so numerous that joinder of all members is impracticable. The approximate number of Class Members is between 300 and 400. The Class Members and the members of Subclass A will be readily identifiable from defendants' records. The members of Subclasses B and C will also be readily identifiable.

21. Plaintiff Williams' claims are typical of the claims of the members of the Class and Subclasses. The losses to plaintiff Williams were caused by the same courses of conduct that give rise to the claims of other members of the Class and Subclasses.

22. Plaintiff will fairly and adequately protect the interest of the Class and Subclasses. Plaintiff has no conflict of interest with other members of the Class and Subclasses. Plaintiff has

retained experienced counsel qualified in class action litigation who are competent to assert the interests of the Class and Subclasses.

23. Defendants have acted or refused to act on grounds generally applicable to the Class, as they have engaged in conduct giving rise to the right to rescind the Home Improvement Installment Contracts under federal and state laws. Accordingly, pursuant to Rule 23(b)(2), final declaratory or injunctive relief of rescission or declaratory relief that Class Members have the right to rescind, is appropriate with respect to the Class as a whole.

24. In addition, there are many questions of law or fact common to the class including whether defendants engaged in a deceptive two (2) contract sales and financing scheme and whether that scheme is violative of state and federal consumer laws. These common questions of law and fact, among others, predominate over questions which may affect only individual members of the Class or Subclasses.

25. Among the predominating questions of law and fact common to the members of the Class are:

(a) Whether the two (2) contract sales and financing scheme uniformly utilized and advanced by defendants constitutes a violation of the TILA and/or an unfair and deceptive act, practice and course of conduct in violation of state statutory and common law, giving Class members a right to damages or equitable relief from defendants.

(b) Whether defendants Empire, TMI, EFC and First Bank are liable to the members of the Class for equitable and monetary relief for defendant Fredmont's actions by virtue of the uniform contractual provision required to be included in each contract pursuant to the rules of the Federal Trade Commission (known as the "FTC Holder Rule"), 16 C.F.R. §

433.2, and stating:

> **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.**

(c) Whether Defendants Empire, TMI, EFC and First Bank are also liable to the members of the Class by virtue of the defaults of defendants Fredmont and Rabner.

(d) Whether defendants have violated the TILA and engaged in an unfair and deceptive practice the effect of which was to confuse consumers as to their right to rescind the transaction by including in all of the contracts the following inconsistent provisions:

(i) The provisions of Fredmont's first Work Order Contract:

> **You, the Buyer, may cancel this transaction at any time prior to midnight of the third business day after the date of this transaction. See the attached notice of cancellation form for an explanation of this right.**

* * * *

NOTICE OF CANCELLATION

> **You may cancel this transaction, without any penalty or obligation, within three business days from the above date. If you cancel, any property traded in, any payments made by you under the contract or sale, and any negotiable instrument executed by you will be returned within ten business days following receipt by the seller of your cancellation notice, and any security interest arising out of the transaction will be cancelled.**
>
> **If you cancel, you must make available to the seller at your residence in substantially as good condition as when received, any goods delivered to you under this contract or**

sale; or you may, if you wish, comply with the instructions of the seller regarding the return shipment of the goods at the seller's expense and risk.

If you do make the goods available to the seller and the seller does not pick them up within twenty days of the date of your notice of cancellation, you may retain or dispose of the goods without any further obligation. If you fail to make the goods available to the seller, or if you agree to return the goods to the seller and fail to do so, then you remain liable for performance of all obligations under the contract.

To cancel this transaction, mail or deliver a signed and dated copy of this cancellation or any other written notice, or send a telegram, to Fredmont Builders, Inc., 37 N. Bank Street, Easton, PA 18042, no later than midnight of _____.

(ii) The provisions on page 1 of the second Home Improvement Installment Contract, required by Empire and presented to consumers days or weeks after the first Work Order Contract had been signed and typically after Fredmont had "spiked" (started) the work:

CANCELLATION AND LIQUIDATED DAMAGES. I may cancel this Contract, without cost or obligation, within 3 business days of the date of this Contract as explained on the attached "Notice of Right to Cancel". You may cancel this Contract without cost or obligation, other than to return my down payment to me, only if you are unable to get financing approved for me on the terms disclosed above through Empire Funding Corp. ("Empire"), to whom you will assign this Contract. If financing is available through Empire, but at a higher cost to me, you will provide me with new contract documents disclosing the higher cost, and I will have the option of accepting or rejecting them. If I accept, I will again have the right to cancel that contract, without cost or obligation, within 3 business days of the date of that contact. If I have not cancelled this or any subsequent Contract within the applicable 3 business days period and I refuse to accept delivery of the goods or performance of the services comprising the Home Improvement, or I refuse to permit you to construct the Home Improvement, in addition to any other remedy you

may have under this Contract or applicable law, I agree that you shall be entitled to liquidated damages in the amount of 10% of the Cash Price of the Home Improvement shown below. Despite this provision, you agree that I am still entitled to offer defenses in mitigation of damages, and I can pursue any rights of action or defenses that arise out of this Contract.

and

(iii) The provisions on page 3 of the second Home Improvement Installment Contract:

BUYER'S RIGHT TO CANCEL

YOU, THE BUYER, MAY CANCEL THIS TRANSACTION AT ANY TIME PRIOR TO MIDNIGHT OF THE THIRD BUSINESS DAY AFTER THE DATE OF THIS TRANSACTION. SEE THE ATTACHED NOTICE OF CANCELLATION FORM FOR AN EXPLANATION OF THIS RIGHT.

NOTICE TO BUYER: * * * * YOU MAY RESCIND THIS CONTRACT, SUBJECT TO LIABILITY FOR ANY LIQUIDATED DAMAGE PROVISION THEREOF AUTHORIZED BY LAW, NOT LATER THAN FIVE (5) P.M. ON THE BUSINESS DAY FOLLOWING THE DATE THEREOF BY GIVING WRITTEN NOTICE OF RESCISSION TO THE CONTRACTOR AT HIS PLACE OF BUSINESS GIVEN IN THE CONTRACT, BUT IF YOU RESCIND AFTER FIVE (5) P.M. ON THE BUSINESS DAY FOLLOWING, YOU ARE STILL ENTITLED TO OFFER DEFENSES IN MITIGATION OF DAMAGES AND TO PURSUE ANY RIGHTS OF ACTIONS OR DEFENSES THAT ARISE OUT OF THE TRANSACTION.

(e) Whether defendants engaged in a common scheme, conspiracy or course of conduct or whether defendants Empire, TMI, EFC and First Bank recklessly disregarded the

facts and rendered knowing and substantial assistance to Fredmont so as to enable, aid and abet Fredmont's violations of state and federal consumer protection laws.

(f) Whether defendants are liable for breach of contract including breach of the duty of good faith and fair dealing.

(h) Whether members of the Class have sustained damages by reason of defendants' wrongful conduct and, if so, the proper measure of damages.

(i) Whether plaintiff Williams and members of the Class are entitled to injunctive or declaratory relief in the form of rescission and/or quiet title, or in the alternative, declaratory relief that such Class Members who entered into transactions after October 17, 1994 have the right to rescind under the TILA.

26. Among the questions of law and fact common to the members of the Subclasses are:

Subclass A

(a) whether defendants violated the FDCPA by sending form letters to the members of the Subclass, on or after October 17, 1996, that violated or otherwise failed to contain the notices required by the FDCPA;

(b) whether defendants violated the UTPCPL or other state collection practices laws by utilizing improper form collection letters or other improper collection tactics;

(c) whether members of the Subclass have sustained damages as a result of defendants' conduct and, if so, the proper measure of damages; and

(d) whether plaintiff Williams and the Subclass are entitled to injunctive relief.

Subclass B

(a) whether Fredmont misrepresented or created a likelihood of confusion or of misunderstanding as to the government affiliation with the home improvement services;

(b) whether these actions took place with the knowledge, approval or willful blindness of the Empire Defendants;

(c) whether the Empire Defendants are liable for Fredmont's violations pursuant to the uniform contractual provision in each Home Improvement Installment Contract required by a federal regulation known as the FTC Holder Rule; and

(d) whether members of the Subclass have suffered an "ascertainable loss" as a result of defendants' conduct and, if so, the proper measure of damages.

Subclass C

(a) whether Fredmont provided to members of the Subclass substandard, misdescribed, incomplete or otherwise inferior home improvement goods and services in violation of state statutory, tort and contract laws;

(b) whether these actions took place with the knowledge, approval or willful blindness of the Empire Defendants;

(c) whether the Empire Defendants are liable for Fredmont's violations pursuant to the uniform contractual provision required by federal regulation known as the FTC Holder Rule; and

(d) whether members of the Subclass have suffered an "ascertainable loss" as a result of defendants' conduct and, if so, the proper measure of damages.

27. A class action is superior to all other available methods for the fair and efficient

adjudication of this controversy because such treatment will permit a large number of similarly situated persons to prosecute their common claims in a single forum simultaneously, efficiently and without the unnecessary duplication of evidence, effort and expense that numerous individual actions would engender. Class treatment also will permit the adjudication of relatively small claims by members of the Class and the Subclasses who could not otherwise afford to litigate individually such claims against sizeable corporate defendants.

28. Plaintiff knows of no difficulty to be encountered in the management of the action that would preclude maintenance as a class action.

Specific Substantive Allegations

29. In or about 1993, if not earlier, Fredmont became a dealer for the solicitation, placement and closing of FHA Title I Home Improvement Installment Contracts for Empire and its affiliates. As a dealer for Empire, Fredmont was required by Empire to follow Empire's loan solicitation and approval standards, to conform with applicable FHA and HUD guidelines, to submit lists of its canvassers and salesmen, to verify its financial wherewithal to meet its obligations to customers as a dealer-contractor, to provide Empire with examples of its home improvement advertisements, and to submit to biannual reviews and verifications by Empire of Fredmont's compliance with the requirements of Empire and applicable state and federal consumer and home improvement financing laws.

30. In particular, throughout the Class Period, applicable regulations promulgated by the Department of Housing and Urban Development ("HUD"), pursuant to Title I of the National Housing Act, required Empire to visit Fredmont's "places of business at least once in every six months to review its Title I performance and compliance." 24 C.F.R. § 201.27. The regulations

also required Empire to terminate any dealer, including Fredmont, who failed to "satisfactorily perform its contractual obligations to borrowers or comply otherwise with Title I program requirements, or when the dealer [was] unresponsive to the lender's supervision and monitoring requirements." Id. In essence, HUD's regulations created a self-regulatory framework that imposed a duty on lenders such as Empire to ensure the compliance of their dealer-contractors with applicable federal and state consumer protection laws.

31. In fulfilling this duty upon initially approving and thereafter reapproving Fredmont as one of its dealers, Empire received and approved Fredmont's Work Order Contract (Exhibit A hereto) as an acceptable form of contract and marketing device. Arthur Cipriani, Empire's Pittsburgh branch manager, testified under oath as follows:

> Q. Was there a policy or practice that you had while at Empire as to what the work order, what the significance of the work order was?
>
> [Objection to form deleted]
>
> A. I don't quite understand what you're saying. In other words, did I know what a work order was?
> Q. Yes. What was it?
> A. Well, it was a dealer, they had, you know, that was another form to be approved when you signed up as a dealer, and every year their contract, we had to get a copy of that. Their name's on it, their address and, you know, then there was a place where they had the detail for their detailed description, the customer signed it.
>
> * * * *
>
> Q. Right, but that's something Empire would approve, that dealer contract, correct?
> A. Yes. That's because this was provided by each individual dealer, they had their name and address on it.
> Q. Right, but in the application process, you would get a form of – a version of their work order form and approve it, correct?
> A. That's correct.

Cipriani Deposition at pp. 55-57. Throughout the Class Period, Empire was aware and approved of Fredmont's uniform use of the Work Order Contract for each member of the Class. Empire was also aware, or should have been aware, of Fredmont's marketing techniques and actions as an Empire dealer/contractor.

32. Fredmont's marketing followed a consistent pattern throughout the Class Period. Fredmont canvassers would target a low-income area such as Chester, Pennsylvania and, often, would distribute brightly colored flyers substantially in the form of Exhibit E hereto. The flyers deceptively and misleadingly represented that the dealer was affiliated with a government program that would provide funding for necessary home improvements to homeowners in the area. Fredmont salespeople would go door-to-door making presentations often claiming government sponsorship of the home-improvement program. The salespeople would write down on the Work Order Contract the work the homeowner would want pursuant to the government program. They would also obtain recent pay stubs and other credit-related data, often based on the representation that such information was required to qualify the homeowner for the program.

33. The uniform Work Order Contract thus became the hook in defendants' common scheme and course of conduct. Although initially portrayed as merely part of an application subject to approval by another authority, Fredmont later used the Work Order Contract as a device to coerce and trick homeowners into accepting the financing as later presented or paying the "cash price" and reimbursing Fredmont for all its costs, "plus Contractor's loss of profits." Empire knew or should have known of Fredmont's actions but took no steps to prevent Fredmont from so acting. Of course, the homeowners targeted by Fredmont uniformly were unable to pay

the "cash price" and had little choice but to accept the later presented Home Improvement Installment Contract.

34. In particular, Fredmont's Work Order Contract form, used with all of the members of the Class at the initial sales-application meeting, provided, in pertinent part, as follows:

> The owner will pay the contractor for the work, the cash price of $_____ Dollars [sic] as follows:
>
> **DOWN PAYMENT OF $[typically zero] BALANCE OF $_____ DUE UPON COMPLETION OF THE WORK. A LOAN CAN BE ARRANGED FOR THE "OWNER" (WHETHER ONE OR MORE PERSONS) FOR APPROXIMATELY $_____ A MONTH FOR _____ MONTHS AT _____% APR.**
>
> The Contractor shall perform and complete the work in a good and workmanlike manner. Work not written above but performed by the Contractor for the Owner shall be paid for by the Owner on a labor plus materials basis, priced by the Contractor in accordance with its pricing policies. If the Owner stops the Contractor from beginning the work after the end of any cancellation period which the Owner has under Federal, State or local law and/or regulations or ordinances, the Owner will be liable to and pay the Contractor for all costs and expenses incurred by it arising out of or in connection with the work, including but not limited to the execution of this Contract, preparations and purchases made for the work, plus Contractor's loss of profits. The Contractor may, at any time, sell, assign or transfer its rights and/or

> duties under this contract and any monies paid or to be paid hereunder.

(Emphasis added).

37. Typically, no down payments were required from the members of the Class in connection with the two (2) contract sales and financing scheme.

38. In addition, the cancellation period provided by the first Work Order Contract typically expired **before** the class member was advised that he or she had qualified for the government sponsored funding for the work.

39. Shortly thereafter, the homeowner would receive a conditional commitment letter sent by Empire or one of its affiliates advising that the funding had been approved for the homeowner. Empire would also send a copy to Fredmont.

40. The Empire Defendants knew of and took no steps to prevent Fredmont's pattern, practice and course of dealing to start work on a customer's home almost immediately after the conditional commitment letter was received by the homeowner. For example, Arthur Cipriani testified under oath in that respect as follows:

> Q. With regard to the commitment letter, when would the commitment letter be sent out to the customer in the process?
> A. When?
> Q. Yes.
> A. Once the loan was approved by me, then my girls type up the commitment letter and send it out.
>
> * * * *
>
> Q. After that, then the home improvement installment sales contract would be taken out to the customer to be competed and signed?
>
> [objection to form deleted]

A. You're saying at that point, no. In other words we would send out a contract. I mean, a preapproval letter or commitment. It's a synomyous [sic] term. That would be sent out to the customer and the dealer. At that point, the dealer, he could go out and start installing his job. Now, I don't know at what point they got any document signed. That's the only thing I can tell you. I don't know what point other than they would bring the documents in. Once they had a completion signed. Okay. So, you know, I mean, I couldn't say it was one day into it, into them doing the job, or two days or they got them all signed at the end. I really don't know.

Q. So it was after the approval or commitment letter went out that you permitted the contractor to start the job, correct?

A. Yes. Because, you know, he knew he had the approval on that deal that he could go ahead, and that was his commitment, that he could go ahead and start installing the job.

Q. That was the standard practice for Empire; is that right?

[objection to form deleted]

A. Yes. It was standard with any lender.

Q. It was uniform, just as soon as the commitment letter went out?

A. Commitment letter went out, and the dealer got his copy, and he knew he could go ahead and start his work.

Q. Did you ever give any dealer an instruction not to start the job until the rescission period had expired on the home improvement financing contract?

A. No. I mean, they would get the – that's all with the dealer, the rescission, because the dealer had the mortgage documents, and that was another form I didn't mention that he had the rescission. Each party to the loan had to sign a separate rescission form.

* * * *

Cipriani Deposition at pp. 44-47.

Q. When that commitment letter went out, it was okay, in your mind, as Empire person for the dealer to start the job, correct?

[Objection to form deleted]

A. Well, in other words, what I said is the dealer could start the job because he got his approval. That's common sense. He knows the loan has been approved. He's going to start his job.
Q. Right, right. Did you ever give any instruction to any dealer not to start the job until the rescission period for the loan had expired?
A. No.

Cipriani Deposition at p. 48.

* * * *

Q. So if a dealer started work before the installment sales contract was signed by the borrower, that would be considered improper, right?
A. For the installment sales, yes. Right.
Q. Because they wouldn't have a right to rescind?
A. Right. That's correct, yes.

Cipriani Deposition, at pp. 161-162.

41. The Empire Defendants also knew, or recklessly disregarded the fact, that it was Fredmont's pattern, practice and course of dealing to present, after the work was underway, a large package of financing and related documents for the Class Member to sign at his or her home. See Cipriani Deposition at p. 45 above. Among this stack of complicated forms was (i) the form of Home Improvement Installment Contract Empire required Fredmont to use; (ii) a form of "Collateral Mortgage" Empire required; (iii) another "right to cancel" notice; (iv) a credit application form; (v) a form of HUD notice; (vi) a settlement sheet; and (vii) a certificate of completion.

42. In many instances, Fredmont personnel would insist that the customers sign all of the documents during the Fredmont representative's visit, even though the work had not yet been completed. For example, Kenneth Butch, a Fredmont employee during the Class Period, testified

under oath in the course of a deposition in this case on March 4, 1998 (the "Butch Deposition") as follows:

> Q. Did you include in the package that you took out to people completion certification?
> A. Completion, yes.
> Q. Was that included in all your packages?
> A. Yes.
> Q. Would you have the home owners sign the package of documents even if the work was not completed yet?
> A. Yes.
> Q. What about if the work hadn't started yet, would you also have them sign the whole package of documents?
> A. Yes.

Butch Deposition, at pp. 27-28. Mr. Butch also testified that no lender had ever instructed him that it was improper to have the loan documents signed by the home owner after the work had commenced:

> Q. Did you ever, you yourself, ever receive any instructions from any of the lenders that indicated in words or substance that they would consider it improper to have the loan package of documents signed by the home owner after the work had already started?
> A. No.
> Q. So no lender ever told you there was anything wrong with that?
>
> [Objection to form deleted]
>
> A. Not that I would recall, no.
> Q. Had you had any discussions with any of the lender representatives about the proper timing for having these documents signed?
> A. No, not that I recall.

Butch Deposition, at pp. 30-31. Regardless of whether any individual Class Member was persuaded or cajoled into signing the certificate of completion before the work was, in fact,

completed, all Class Members were confronted with Fredmont's contention that the initial Work Order Contract obligated the Class Member to either sign the package of funding documents, obtain alternative financing or pay cash to Fredmont under the Work Order Contract.

43. The experience of representative plaintiff Kim Williams is typical in this regard, and in all other respects pertinent to the Class claims and all Subclass claims.

44. On or about May 25, 1995, a man who identified himself as "Lucky" came to the home of plaintiff Williams and stated that he was part of a government program making funds available for home improvements and that plaintiff Williams might be eligible for such funds.

45. Lucky, who is believed to be the former Fredmont employee named Cosimo J. Cravotta, asked about plaintiff's income and to see her pay stubs. He then had plaintiff sign the Work Order Contract with Fredmont, a copy of which is attached hereto as Exhibit A.

46. When plaintiff asked about the language in the contract referring to a loan, Lucky told her to disregard it because she was applying for a grant.

47. Shortly thereafter, plaintiff showed the papers to her employer. Her employer advised her that the transaction appeared to be irregular and she should not go through with it.

48. On that advice, plaintiff sent notice to Fredmont that she was not interested in pursuing the transaction.

49. On or about May 30, 1995, Lucky contacted plaintiff and asked why she had cancelled. He again insisted that her repairs would be funded by a grant and not a loan, and convinced her to sign a new Work Order Contract, dated May 30, 1995, a copy of which is attached hereto as Exhibit B.

50. At or about the same time, plaintiff received a copy of a conditional commitment letter from Empire.

51. Shortly thereafter, a man who identified himself as Fred Barlow and other men came to plaintiff's home to make repairs.

52. During the time the work was being done, a representative of Fredmont asked plaintiff to sign a large stack of papers so the men from Fredmont could be paid. Included in the stack was a Home Improvement Installment Contract, a copy of which is attached hereto as Exhibit C.

53. Also included in the stack of papers was a form Collateral Mortgage.

54. The Fredmont representatives impressed upon plaintiff that work had been performed and that she had to sign the papers for the government funding or pay for the work with cash, which plaintiff did not have.

55. The representations made by the Fredmont representatives throughout the transaction were intentionally false and plaintiff was deceived into signing two (2) contracts obligating her to pay for home improvements. In essence, plaintiff and all members of the Class had no reasonable opportunity to reject or rescind the transaction upon receiving the stack of documents, as the second contract stage was presented as a sign or pay cash option.

56. The Home Improvement Installment Contract and the Collateral Mortgage were immediately assigned to defendant Empire or TMI, as servicer for defendant First Bank.

57. The work done by Fredmont soon proved to be defective in many ways. For example, the window installation was never completely finished. To this day, the windows are not properly installed. The kitchen cabinets fell and separated from the wall. The kitchen sink

plumbing was leaking underneath, causing substantial damage to the floor and supporting beams and resulting in rot and odors. The molding around the kitchen countertop was not properly installed and began to fall down. The bottom of a storm door broke off and was not properly replaced. A back door was removed and never replaced. After making a number of payments, plaintiff stopped paying and sought legal advice.

58. At various times, plaintiff was informed that her loan was being serviced by defendant TMI. At other times she was informed that it was being serviced by defendant Empire or defendant EFC.

59. Defendants Empire, TMI, EFC and First Bank are either debt collectors or creditors within the meaning of the Pennsylvania Debt Collection Practices regulations, 37 Pa. Code Ch. 303. To the extent the servicing of the loan was transferred to TMI, EFC, or Empire after the loan was in default, those defendants were also collection agents subject to the FDCPA.

60. Representatives of defendants Empire, EFC and TMI conducted a campaign of telephone calls and letters to convince plaintiff to pay.

61. These calls included numerous calls to plaintiff's place of employment, including multiple calls per day, calls to plaintiff's home late at night, and deceptive letters. As a result, plaintiff lost two days of work, felt it necessary to change her phone number, and suffered other damages.

62. Letters sent to plaintiff, and to members of the Class, by defendants Empire, EFC and TMI after they became subject to the FDCPA failed to contain notices required by that Act and deceptively claimed that defendants would take action that they did not intend to take or that

they could not legally take. In addition, several of the letters violated the requirements of the Pennsylvania Loan Interest and Protection Law, 41 P.S. § 101 et seq. by, among other things, accelerating the loan without notice.

63. The letters and telephone calls demanded charges that plaintiff did not owe, and made unfair, deceptive and misleading representations about the alleged debt. Many of the letters and calls were initiated by Empire after it had knowledge that plaintiff was represented by counsel. Calls to her place of employment continued even after Empire knew she was not to receive calls at her job.

64. On April 3, 1997, plaintiff, through her counsel, sent notice to defendant Empire that she was rescinding the transaction due to the failure to make numerous material disclosures under the TILA, including proper notice of the right to cancel the transaction. A copy of the notice of rescission is attached hereto as Exhibit D.

65. Defendants received the plaintiff's notice of rescission on or about April 15, 1997, but none of the defendants took the necessary steps to comply with their obligations under the UTPCPL or the TILA after a valid rescission.

66. Despite notice of her representation by counsel, representatives of defendant Empire continued to call plaintiff's home numerous times after April 15, 1997, at hours very early in the morning and late at night.

67. Pursuant to the Home Improvement Installment Contract attached hereto as Exhibit C and the FTC Holder Rule, any holder thereof is subject to all claims and defenses which the plaintiff could assert against defendant Fredmont, up to the amount of the contract.

Accordingly, the Empire Defendants are, as a matter of law and contractual agreement, subject to all of the claims that Class Members have against Fredmont, up to the amount of each contract.

68. But for Empire continuing to fund loans originated by Fredmont, plaintiff and members of the Class would not have been injured as set forth herein. As such, the Empire Defendants have aided, abetted, acquiesced in and rendered material assistance to defendant Fredmont in furtherance of the fraudulent scheme and course of conduct alleged, while knowingly, recklessly or negligently disregarding that Fredmont had engaged in and was engaging in the misleading sales practices described above. In particular, the Empire Defendants approved of Fredmont's Work Order Contract and provided Fredmont with various Empire forms and documents used as part of the two (2) contract scheme. The Empire Defendants also continued to underwrite, purchase, acquire, service or accept assignments through and from Fredmont of contracts with other members of the Class and demand payment after receiving complaints from Fredmont customers. As a result, the Empire Defendants knowingly breached their self-regulatory duties and have failed to honor their contractual obligations under the FTC Holder Rule and provision.

VI . Claims

Count One - Truth in Lending Act

69. Plaintiff repeats and realleges the above paragraphs as if fully set forth herein.

70. Defendants' actions, and actions for which defendants are responsible as assignees, were in violation of the TILA.

71. As a result of these violations, plaintiff Williams and members of the Class who entered into transactions after October 17, 1994 are entitled to declaratory and injunctive relief to

effectuate their right to rescind the transactions.

72. As a result of defendants' violations of the TILA, plaintiff Williams is entitled to statutory damages, actual damages, attorney's fees and costs.

Count Two - Fair Debt Collection Practices Act

73. Plaintiff repeats and realleges the above paragraphs as if fully set forth herein.

74. The actions of Empire, TMI and EFC described above violated the FDCPA.

75. As a result of those violations, each defendant is liable to plaintiff for actual damages and is liable to plaintiff and each member of Subclass A who received improper collection notices or was subject to improper collection activities after October 17, 1996 for statutory damages in the amount of $1,000 each, actual damages, attorney's fees and costs.

Count Three - Unfair and Deceptive Acts and Practices

76. Plaintiff repeats and realleges the above paragraphs as if fully set forth herein.

77. Plaintiff and the members of the Class entered into the transactions described above and purchased goods and services primarily for personal, family or household purposes.

78. The acts described above constitute unfair methods of competition and unfair or deceptive acts or practices, as defined by the UTPCPL, 73 P.S. §§ 201-2(4) and 201-3, as well as similar laws of other states, in connection with the purchase of home construction and repair services and goods and the entering into of standard form contracts in that they involved:

(a) Employing the deceptive two contract marketing scheme described above.

(b) Intentionally, knowingly, recklessly or negligently misrepresenting to members of Subclass B that the home repair program was sponsored by or affiliated with the government, constituting an unfair and deceptive act or practice as defined by 73 P.S. §§ 201-3

and 201-2(4) (ii) and (iii), and similar laws of other states, in that it caused the likelihood of confusion or misunderstanding as to the source, sponsorship, approval, or certification of the goods and services that were being provided and as to the defendants' affiliation, connection or association with, or certification by another, namely, the United States government. Further, the representations that the repairs would be funded or assisted by government sponsored programs, when in fact the repairs were to be financed by a loan to the homeowner, violated 73 P.S. § 201-2(4) (ix) and similar laws of other states. Additionally, the representation that the home improvement program had the sponsorship and approval by the United States government when, in fact, there was no such approval or sponsorship, also violated 73 P.S. § 201-2(4) (v) and similar laws of other states.

(c) Intentionally, knowingly, recklessly or negligently making repairs, improvements or replacements on real property of members of Subclass C of a quality inferior to and below the standard of that agreed upon in writing in violation of 73 P.S. § 201-2(4)(xvi) and the similar laws of other states.

(d) Intentionally, knowingly, recklessly or negligently attempting to collect from members of Subclass A a debt in violation of the Pennsylvania Debt Collection Practices regulations, 37 Pa. Code Chapter 303.

(e) Intentionally, knowingly, recklessly or negligently depriving plaintiff and the members of the Class of their rights to cancel the transactions.

(f) Intentionally, knowingly, recklessly or negligently engaging in the fraudulent or deceptive conduct described throughout this Complaint, including per se violations of other state and federal statutes, which created a likelihood of confusion or of

misunderstanding in violation of 73 P.S. § 201-2(4) (xxi) and the similar laws of other states.

79. As a result of the violations of the UTPCPL and the similar laws of other states, plaintiff and the Class have suffered ascertainable losses entitling them to an award of treble damages and attorneys' fees pursuant to 73 P.S. § 201-9.2 and damages and fees pursuant to the similar laws of other states.

Count Four - Breach of Contract

80. Plaintiff repeats and realleges the above paragraphs as if fully set forth herein.

81. The standard form contracts and all similar form contracts used by defendants contain language required by the FTC Holder Rule, an express covenant that any holder of the consumer credit contract shall be liable for all claims the consumer has against the seller, up to the amount of the contract. The Empire Defendants have breached and failed to abide by that provision.

82. In addition, each of the contracts contain an implied covenant that defendants named herein will deal with their customers fairly and in good faith in performing the obligations required under the contract. Defendants breached that implied covenant of good faith and fair dealing with respect to members of the Class by failing to rescind, failing to respond to complaints about workmanship and failing to assume responsibility for defects in workmanship and complying with plaintiff's rescission demand.

83. All defendants named herein also breached the contracts with respect to members of the Class by failing to complete or perform the promised home repairs.

84. As a consequence of defendants' breaches of implied and express contractual terms, plaintiff and members of the Class have sustained damages.

Count Five - Unjust Enrichment / Money Had and Received

85. Plaintiff repeats and realleges the above paragraphs as if fully set forth herein.

86. Defendants have been unjustly enriched at the expense of plaintiff and the Class by collecting money to which they are not entitled.

87. Plaintiff and the members of the Class are each entitled to recover such money.

Count Six - Promissory Estoppel

88. Plaintiff repeats and realleges the above paragraphs as if fully set forth herein.

89. Fredmont routinely promised to provide home improvement goods and services at promised prices which they did not provide to plaintiff and members of Subclass C. Fredmont deceptively presented ambiguous contracts that did not conform to oral promises and misled plaintiff and members of Subclass C as to the performance of those promises. Defendants breached those oral promises and failed to perform.

90. As a result, plaintiff and members of the Class have suffered substantial damages.

Count Seven - Breach of Fiduciary Duty / Unconscionability

91. Plaintiff repeats and realleges the above paragraphs as if fully set forth herein.

92. Each of the defendants sued herein had and has a special relationship with the plaintiff and Class members with whom they respectively contracted. Each defendant had superior knowledge and induced plaintiff and members of the Class to repose trust and confidence in each defendant. Each defendant therefore owed the fiduciary duties of candor, full disclosure and loyalty to plaintiff and members of the Class. Each defendant breached that duty and acted unconscionably.

93. As a result of each defendants' breach of their fiduciary duties to plaintiff and each Class member, plaintiff and the Class have suffered damages.

Count Eight - Fraudulent Misrepresentation
As Against Fredmont and Rabner Only

94. Plaintiff repeats and realleges the above paragraphs as if fully set forth herein.

95. Defendants Fredmont and Rabner either on their own or through their agents, principals, dealers or affiliates intentionally, or with reckless disregard for the truth, made representations of material fact, including:

(a) To members of Subclass B, that the home improvement program was sponsored by or affiliated with the government or was otherwise beneficial because of a connection with the government;

(b) To members of Subclass C, that the home improvements would be performed in a good and workmanlike manner to those members' satisfaction when, in fact, they were not;

(c) That the home improvement repairs would be of reasonable quality and workmanship when, in fact, they were not; and

(d) That the home improvements would be installed to plaintiff's complete satisfaction when, in fact, they were not.

96. Defendants Fredmont and Rabner made these misrepresentations as part of a conspiracy to defraud. Plaintiff and the Class relied upon those defendants' fraudulent misrepresentations of material facts, which were calculated to, and did, deceive plaintiff and the members of the Class, resulting in serious injury to plaintiff and the members of the Class.

Count Nine - Negligent Misrepresentation

97. Plaintiff repeats and realleges the above paragraphs as if fully set forth herein.

98. Defendants either on their own or through their agents, assignees, principals, dealers or affiliates, where it was reasonably foreseeable that Class members would act or refrain from acting in reliance on the representations, negligently made misrepresentations of and omitted to state material facts, including:

(a) The representation that Class Members were not free to rescind or reject the transaction without obligation or cost within three (3) days after receiving the Home Improvement Installment Contract;

(b) To members of Subclass B, that the home improvement program was sponsored by or affiliated with the government or was otherwise special because of a connection with the government;

(c) To members of Subclass C, that the home improvements would be performed in a good and workmanlike manner to those members' satisfaction when, in fact, they were not;

(d) To members of Subclass C, that the home improvements would be of reasonable quality and workmanship when, in fact, they were not;

(e) To members of Subclass C, that the home improvements would be installed to plaintiff's complete satisfaction when, in fact, they were not; and

(f) To members of Subclass A, that certain collection action would be taken when, in fact, no such action was intended to be taken.

99. These misstatements and omissions of material facts were calculated to induce acceptance by plaintiff and the members of the Class.

100. As a result of defendants' negligent misstatements and omissions of material facts plaintiff and members of the Class have suffered serious injury.

VII . Jury Trial Demand

101. Plaintiff demands trial by jury as to all issues so triable.

VIII. Prayer for relief

WHEREFORE, plaintiff, individually and on behalf of the Class and Subclasses, requests the following relief:

(a) An order certifying the proposed Class, together with the appropriate Subclasses, under Rule 23 of the Federal Rules of Civil Procedure and appointing plaintiff and her counsel to represent the Class and Subclasses;

(b) An order granting rescission or rescissory damages or restitution, entering declaratory relief and voiding any and all liens, judgments or other encumbrances obtained by defendants, their agents or assigns against the property of plaintiffs or members of the Class;

(c) In the alternative, an order declaring that all Class members who entered into transactions on or after October 17, 1994 have the right to rescind under the TILA;

(d) An order enjoining defendants from continuing to engage in the fraudulent practices described in this Complaint;

(e) Statutory damages under TILA for the named plaintiff, together with attorney's fees and costs;

(f) Statutory damages under FDCPA for members of Subclass A, together

with attorney's fees and costs;

(g) Treble damages for defendants' violations of the UTPCPL;

(h) Compensatory damages;

(i) Consequential damages;

(j) General damages for all injuries resulting from the breaches of contract, unjust enrichment, promissory estoppel, breaches of fiduciary duty, fraudulent misrepresentation and negligent misrepresentation described in this Complaint for the appropriate Subclasses;

(k) Punitive damages;

(l) Costs and disbursements of the action;

(m) Reasonable attorneys' fees; and

(n) Such other relief at law or equity as this Court may deem just and proper.

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