DREHER TOMKIES LLP

ALERT

FOR CLIENTS AND FRIENDS OF DREHER TOMKIES LLP

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FTC CLAIMS "HIDDEN" UPFRONT FEES AND OTHER VIOLATIONS WITH ONLINE MARKETPLACE LENDING PLATFORM

On April 25th, the Federal Trade Commission ("FTC") filed a lawsuit against an online marketplace loan provider alleging that the company engaged in unfair and deceptive acts or practices and violated the Gramm-Leach-Bliley Act ("GLBA") in connection with its advertising, application process and automatic payment practices. *FTC v. LendingClub Corporation,* No. 18-02454 (N.D. Cal., Apr. 25, 2018). The FTC proffered screenshots of advertising and application pages, consumer complaints, training materials for customer service representatives, internal compliance review comments and investor concerns to support the following claims.

Claim 1: Consumers Were Misled Regarding Upfront Fees

Advertisements for the platform touted that "there are no hidden fees or prepayment penalties", but the FTC alleged that the company hid the origination fee during the application process leaving consumers with the impression that they would receive the full loan amount if approved. A consumer's loan actual disbursement equaled the loan amount minus the origination fee. The FTC claimed that the origination fee disclosure was hidden both on the desktop and mobile version of the application behind obscure hyperlinks, including non-mandatory "tooltip" pop-ups, and sandwiched between lines of "below the fold" text – text that a consumer must scroll down to read. The FTC also noted that the following message was displayed after a consumer agreed to the loan: "your [loan amount, not disbursement amount] loan is on the way. What's next?" The FTC asserted no violation of the Truth-in-Lending Act ("TILA"), which requires disclosure of financed origination fees like the ones charged to consumers in this case, however.

Claim 2: Consumers Were Misled Regarding Loan Approval

After consumers submitted a loan application and received a message that their loan "is on the way", the loan remained contingent on the application attracting sufficient investor backing and passing a second credit review. The FTC zeroed in on the following email message sent by the company after the consumer's loan application received sufficient investor backing: "Hooray! Investors Have Backed Your Loan" and "your money is almost in your hands". The FTC alleged that this message is deceptive because consumers believed that their loans were approved and fully backed ("on the way") when in fact consumers could still be denied at the second credit review stage.

Claim 3: The Company Engaged In Unfair Practices Related to Automatic Payments

The FTC alleged that the company engaged in an unfair act or practice by initiating unauthorized withdrawals from consumers' bank accounts. Specifically, the FTC alleged that the company (i) charged borrowers double payments in a single month, (ii) made withdrawals from bank accounts of consumers who had paid off their loans and (ii) took money from bank accounts of consumers who communicated that they wanted to make a payment by a different payment method.

Claim 4: The Delivery of the Initial Privacy Notice Violated the GLBA

The FTC alleged that until the end of 2016, the company did not require consumers to acknowledge receipt of the initial privacy notice as a necessary step to obtain a loan. Consumers agreed only to the Terms of Use, which included a link to the company's privacy policy within what the FTC described as a "lengthy" document. The FTC claimed that consumers were not provided a clear and conspicuous privacy notice as required by the GLBA.

Company Rebuttal

The company posted a rebuttal to the FTC's complaint on its blog to provide "important missing facts from the complaint", noting that several allegations were based on matters and policies already improved upon. In regard to claim 1, the company responded that it provided TILA disclosures that included the origination fee and that all consumers must acknowledge receipt of TILA disclosures as part of the application process. The company also highlighted the "Rates & Fee" tab on its website, which explains how the loan works and discloses the origination fee. The company also stated that it used the particular version of the email message cited in the FTC's second claim in error for only 88 days. A different version of the email is regularly used. In response to claim 3, the company described its safeguards to prevent erroneous ACH withdrawals and how it remedies overpayments and overdraft fees caused by erroneous or inadvertent (such as where a borrower makes a duplicative payment by other means) ACH withdrawals. Throughout its blog post, the company provided perspective on the number of consumer complaints (regarding origination fees and unauthorized ACH

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payments) by comparing the limited number of these complaints to the overall number of complaints received and the number of transactions conducted through the platform. The company cited the small number of complaints as evidence of the lack of deception.

Comments

The FTC remarked that its "complaint is a reminder of how important it is for consumers to have accurate information from lenders, including online marketplace lenders".

This is not the FTC's first complaint challenging how information is displayed to consumers during the online loan application process. In ruling on FTC allegations that an online lender's disclosures of a promissory note were deceptive and ambiguous, a court observed that the website design discouraged consumers from reading required disclosures. *FTC v. AMG Services, Inc.*, 29 F.Supp.3d 1338 (D. Nev. May 28, 2014). The *AMG Services* opinion indicates that courts will be sensitive to how consumers interact and consume information in online and mobile loan applications. *See* Susan Manship, *Notice and Understand: Disclosures in Mobile Lending*, 68 CONSUMER FIN. L. Q. REP. 186 (2015) for further discussion of the *AMG Services* case.

Balancing the delivery of material information in a way that allows consumers to notice and understand the information while at the same time providing a customer-friendly user experience is challenging. We can help by identifying options and suggesting alternative strategies and methodologies. ❑

✧ *Mike Tomkies and Susan Manship Seaman*