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CFPB Amicus Brief Emphasizes Strength of Truth In Lending Act Anti-Evasion Precedent



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The Consumer Financial Protection Bureau ("CFPB") yesterday filed an amicus brief in *Franklin Savings Bank v. Bordick*, a case before the Supreme Court of Maine.

In that case, the borrowers took out a loan that they used to finance the short-sale of their residential property. The loan was characterized as a "commercial loan" and provided for payments to be made over a four-year period, with a balloon payment due at the end of those four years. The borrowers made the payments for four years but could not make the balloon payment and defaulted, and the bank sued. Because the bank characterized the loan as "commercial" in purpose, instead of being made for "personal, family, or household purposes," the borrowers did not receive consumer disclosures required by the Truth In Lending Act and Regulation Z (both "TILA"), and the loan also was made regardless of their ability to pay (*i.e.*, TILA would have required the loan terms to reflect the borrowers' actual ability to pay the loan). During the trial phase of the case, the court agreed that because the loan was made as a commercial loan, the borrowers could not claim protections under TILA.

The CFPB argues in the amicus brief that the "trial court erred in concluding that TILA does not apply whenever a contract labels a loan 'commercial' for three reasons," including that the loan in question was clearly made primarily for a "personal, family or household purpose"; that it is necessary for the court to determine whether there is a "covered purpose" for the loan under TILA due to the status of the borrowers, regardless of how the loan was labeled; and that "allowing creditors to evade TILA merely by stamping the loan documents with the term 'commercial' is at odds with the statute's remedial purpose." Referencing several cases as precedent and usual practice during supervision, the CFPB explains that courts regularly apply a five-factor test that is described in TILA's Official Commentary to determine whether the true purpose of a loan to finance an acquisition is commercial. Those factors are: the relationship of the borrower's

primary occupation to the acquisition; the degree to which the borrowers will personally manage the acquisition; the ratio of income from the acquisition to the total income of the borrower; the size of the transaction; and the borrower's statement of purposes for the loan. In conclusion, the CFPB urged the court to protect the borrowers, and Maine consumers generally, by adopting a "substance-over-form approach to determining TILA coverage is necessary to effectuate TILA's consumer-oriented purposes" and ensuring that TILA's consumer protection requirements cannot be readily evaded by simply labeling a loan as "commercial."
