

# NCLC REPORTS

## Deceptive Practices and Warranties Edition

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### Developments and Ideas For the Practice of Consumer Law

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- Practice tips: selecting and using a forensic document examiner
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#### Federal Record Retention Requirements: Boring or Invaluable?

Advocates often skip over the record retention requirements imposed on businesses by federal consumer protection statutes because on the surface they appear to have little utility to consumers. Knowing these requirements can, however, help the advocate pinpoint discovery requests, and rebut a creditor's or dealer's claim that the documents no longer exist.

Statutory remedies may be available for violations of the record retention requirements. In addition, where the business fails to retain required information, ask the court to apply an inference that the evidence that is missing would have been unfavorable to the business.<sup>1</sup> In some jurisdictions, courts can go beyond this and exclude related evidence<sup>2</sup> or even dismiss the action.<sup>3</sup>

#### Evidence Required to Show Truth in Lending Compliance

A creditor must retain evidence of compliance with Truth in Lending Regulation Z (with the exception of certain advertising requirements) for two years after the date disclosures are required to be made or action is required to be taken.<sup>4</sup>

TIL defines creditor as the originating creditor and not an assignee or arranger. In a typical vehicle sale, the dealer enters into an installment sales contract with the consumer, and then assigns it to an assignee such as GMAC. In that case, the dealer is the creditor who must retain the records. In a mortgage loan, the original creditor must retain the records, not

the broker, an assignee, or servicer. For credit card transactions, the card issuer retains the disclosures, not a debt buyer.

The creditor must keep copies not only of all disclosures, but also other documentation proving compliance—e.g., so that the numbers disclosed can be matched against the actual contract terms, and against the actual security interest taken. The Regulation requires retention of “evidence of compliance” and not just of the disclosure forms themselves.

For example, a creditor must retain evidence that it properly handled adverse credit reports when a consumer raises a billing dispute.<sup>5</sup> In a mortgage transaction, a HUD-1 statement can be used in lieu of an itemization of the amount financed. It thus follows that to retain evidence showing compliance with this option, the creditor will have to retain the HUD-1 form for two years. (In addition, as discussed in the next section, RESPA requires the creditor or the entity to which the loan is assigned to retain the HUD-1 for five years.)

Effective April 1, 2011, creditors must keep records of all payments to loan brokers and must retain the agreements with the brokers as to compensation, to show compliance with mortgage steering regulations.<sup>6</sup> Credit cards and other open-end credit require account opening disclosures, periodic disclosures, change-of-term disclosures, penalty rate disclosures, and other disclosures. Each of these disclosures must be retained for two years.

If a credit card interest rate is increased, the card issuer must re-evaluate the rate every six months.<sup>7</sup> A card issuer is also required to consider an applicant's ability to pay and must maintain reasonable policies and procedures to consider ability to pay. Similarly, TIL imposes ability to pay requirements for “higher rate” mortgage loans. Evidence of compliance with all of these (and all other) TIL requirements must be retained for two years.

There is little or no precedent as to private remedies for violations of this provision. But an argument can be made that where a provision provides for statutory damages and fees, and the creditor does not retain evidence of compliance with that provision, statutory damages and fees should be available for that violation as well.

#### RESPA Retention Requirements re Mortgage Terms and Escrow Account Information

RESPA requires the lender to retain each completed HUD-1 and any related documents for five years after settlement. If the lender sells the mortgage and does not service it, then the lender must transfer its copy of the HUD-1

<sup>1</sup> See, e.g., *Beers v. Bayliner Marine Corp.*, 675 A.2d 829 (Conn. 1996); *Holmes v. Amerex Rent-A-Car*, 710 A.2d 846 (D.C. 1998); *Stender v. Vincent*, 992 P.2d 50 (Haw. 2000); *Schneider v. G. Guillams, Inc.*, 976 S.W.2d 522 (Mo. Ct. App. 1998); *Kurczy v. St. Joseph Veterans Ass'n*, 820 A.2d 929, 946–947 (R.I. 2003); *Tancrelle v. Friendly Ice Cream Corp.*, 756 A.2d 744 (R.I. 2000).

<sup>2</sup> *Copenhagen Reinsurance Co. v. Champion Home Builders Co.*, 872 So. 2d 848 (Ala. Civ. App. 2003) (barring plaintiff from attempting to prove that fire was caused by any parts of manufactured home other than those that plaintiff preserved); *Fletcher v. Dorchester Mut. Ins. Co.*, 773 N.E.2d 420 (Mass. 2002); *Nally v. Volkswagen of Am., Inc.*, 539 N.E.2d 1017 (Mass. 1989) (expert carried out destructive tests and failed to preserve evidence). *But cf. Farrell v. Connetti Trailer Sales, Inc.*, 727 A.2d 183 (R.I. 1999) (plaintiffs' level of culpability means that a negative inference is more appropriate).

<sup>3</sup> *Silvestri v. Gen. Motors Corp.*, 271 F.3d 583 (4th Cir. 2001).

<sup>4</sup> 12 C.F.R. § 226.25.

<sup>5</sup> Official Staff Commentary to Reg. B § 226.25(a)-1.

<sup>6</sup> Official Staff Commentary to Reg. B § 226.25(a)-5.

<sup>7</sup> Reg. Z § 226.59(c).

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to the new owner or servicer, who must retain the form for the remainder of the five-year period.<sup>8</sup>

Loan originators must retain for at least three years documentation of any reasons for providing a new “GFE.”<sup>9</sup> A GFE is a good faith estimate of mortgage terms provided to a borrower prior to closing; a new GFE changes those terms.

RESPA allows the settlement service provider to use an average price for a settlement charge, if the provider retains all documentation used to calculate the average charge for a particular class of transactions for at least three years after any settlement where the charge was used.<sup>10</sup> RESPA also has requirements concerning settlement charges to entities affiliated with the lender, including various disclosures. Anyone who must provide documents pursuant to these requirements must retain copies for five years after execution.<sup>11</sup>

Servicers are required to maintain records related to escrow accounts in a retrievable format for a period of at least five years after the servicer last serviced the account.<sup>12</sup> Regulation X specifies that borrowers may obtain this information by sending a qualified written request.<sup>13</sup> Failure to supply this requested information results in a RESPA claim for actual damages and attorney fees, and, where there is a pattern, statutory damages.<sup>14</sup> Private remedies for failure to comply with other RESPA document retention requirements are unclear as RESPA has limited private remedies.

### Documents Relating to Credit Approval

Equal Credit Opportunity Act (ECOA) Regulation B requires creditors to retain for twenty-five months a copy of a number of documents relating to a consumer’s credit application.<sup>15</sup> Creditor is defined to include anyone who regularly extends or *arranges* for the extension of credit, or any *assignee* of the original creditor who participates in the decision to extend credit.<sup>16</sup> The record retention requirement thus may apply both to a car dealer and the lender to whom the car paper is assigned. In a mortgage transaction, it should apply to a broker or table-funded lender as well as any assignee who participates in the underwriting.

Among the items the ECOA requires the creditor to retain are:

- Any application form the creditor receives;
- Any other information used to evaluate the application that is not returned to the applicant upon request; and
- Evidence of the notification to the applicant of the action taken and the reasons for adverse actions.

The creditor also must retain the text of any pre-screened solicitation, the criteria the creditor used to select potential recipients of the solicitation, and any correspondence related to complaints about the solicitation.<sup>17</sup> The creditor must retain the criteria as to who is sent a solicitation and as to who will actually be offered credit.<sup>18</sup>

All of this information can be kept electronically if the creditor can regenerate all pertinent information in a timely manner.<sup>19</sup> A creditor violating the ECOA record retention requirements can be held liable for declaratory and injunctive relief, actual and punitive damages, and attorney fees.<sup>20</sup>

### Mortgage Assistance, Debt Settlement, and Telemarketing

Effective December 29, 2010, a new FTC Mortgage Assistance Relief Services (MARS) rule requires that loan modification, foreclosure rescue, and other mortgage assistance entities keep for two years all contracts with consumers, all written communications with consumers prior to the contract, consumer files, sales scripts, training materials and marketing materials, and other evidence relating to rule compliance.<sup>21</sup> There is no private remedy under the MARS rule.

The FTC’s Telemarketing Rule requires telemarketers to retain for two years:

- All substantially different advertising, brochures, telemarketing scripts, and promotional materials;
- Information about prize recipients;
- The name and address of each consumer purchasing goods, the goods purchased, and the date and amount paid for the goods; and
- The names, job titles, and most recent addresses and telephone numbers for all current and former employees involved in telephone sales.<sup>22</sup>

While the rule generally applies just to telemarketers that initiate telephone calls with the consumer, in the case of debt relief services (such as debt settlement companies) the rule also applies where the consumer initiates the telephone call in response to an advertising or direct mail solicitation by the debt relief company. The private right of action under this FTC rule only applies where damages exceed \$50,000.<sup>23</sup>

### Auto Title Documents, Odometer Statements

Federal Odometer Act regulations require auto “dealers” and “distributors” to retain for five years at their primary place of business a copy of certain title transfer documents.<sup>24</sup> A dealer is anyone who has sold at least five cars during the previous year to those purchasing other than for resale.<sup>25</sup> A distributor is anyone that has sold at least five cars during the previous year for resale,<sup>26</sup> and thus may include insurance companies selling salvage vehicles and auto lenders selling repossessed cars.

Dealers and distributors must each retain a copy of each odometer statement and power of attorney they receive and issue, in an order that permits systematic retrieval.<sup>27</sup> Since the odometer statement in a used car transfer appears on the title, power of attorney, or a reassignment form, the business must retain, for every used car transfer, a copy of the document evidencing the vehicle’s transfer to the business and also from the business to a transferee.

<sup>8</sup> 24 C.F.R. § 3500.10(e).

<sup>9</sup> 24 C.F.R. § 3500.7(f).

<sup>10</sup> 24 C.F.R. § 3500.8(b)(v).

<sup>11</sup> 24 C.F.R. § 3500.15(d).

<sup>12</sup> Reg. X, 24 C.F.R. § 3500.17(1)(2).

<sup>13</sup> Reg. X, 24 C.F.R. § 3500.17(1)(4).

<sup>14</sup> See NCLC’s Cost of Credit § 12.2.1.11 (3d ed. 2009 and 2010 Supp.).

<sup>15</sup> 12 C.F.R. § 202.12.

<sup>16</sup> 12 C.F.R. § 202.2(j).

<sup>17</sup> 12 C.F.R. § 202.12(b)(7).

<sup>18</sup> Official Staff Commentary to Reg. B § 202.12(b)(7)-2.

<sup>19</sup> Official Staff Commentary to Reg. B § 202.12(b).

<sup>20</sup> 15 U.S.C. § 1691. See NCLC, Credit Discrimination § 11.7 (5<sup>th</sup> ed. 2009 and Supp.).

<sup>21</sup> 75 Fed. Reg. 75,143 (Dec. 1, 2010), *promulgating* 16 C.F.R. § 322.9.

<sup>22</sup> 16 C.F.R. § 310.5.

<sup>23</sup> See NCLC’s Unfair and Deceptive Acts and Practices § 9.6.4.9.2 (7<sup>th</sup> ed. 2008 and 2010 Supp.).

<sup>24</sup> 49 C.F.R. § 580.8.

<sup>25</sup> 49 U.S.C. § 32702(2).

<sup>26</sup> 49 U.S.C. § 32702(3).

<sup>27</sup> 49 C.F.R. § 580.8(a), (c).