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Consumer Lending Update

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DECEPTIVE DISCLOSURES PERMANENTLY BAR LENDER FROM FUTURE CONSUMER LENDING

Last year, the Ninth Circuit affirmed a district court judgment holding that an online payday lender violated Section 5 of the Federal Trade Commission Act (FTC Act). *FTC v. AMG Capital Mgmt., LLC*, 910 F.3d 417 (9th Cir. 2018). FTC Act Section 5 prohibits unfair or deceptive acts or practices in or affecting commerce. The FTC filed a lawsuit against Scott A. Tucker and his many companies alleging that Tucker and his companies violated Section 5 because the terms disclosed in the Loan Note (a type of promissory note often used to document installment loans) did not reflect the terms the lender actually enforced.

Tucker controlled a consortium of companies that offered high-interest, short-term loans. Between 2008 and 2012, Tucker's businesses originated more than five million payday loans, each generally disbursing between $150 and $800 at triple-digit interest rates. The loans were exclusively available through various websites with names like "500FastCash, "OneClickCash" and "Ameriloan." Potential borrowers would enter their personal, employment and financial information into an electronic application. Approved borrowers were directed to hyperlinked disclosure documents. These hyperlinked documents included the Loan Note and the essential terms of the loan as mandated by TILA. Borrowers could open the Loan Note and read through its terms, but they could also ignore the document, electronically sign their names, and click a big green button that said: **"I AGREE Send Me My Cash!"** The top third of the Loan Note included the federal TILA box, which disclosed the amount financed, finance charge, total of payments, and APR. The amount financed was the amount borrowed, and the finance charge was equal to 30 percent of the borrowed amount. But the fine print below the TILA box was essential to understanding the loan's terms. This densely packed text set out two alternative payment scenarios: (1) the "decline-to-renew" option; and (2) the "renewal" option.

Borrowers who wanted to decline to renew had to navigate through an online customer-service portal, affirmatively choose to change the scheduled payment and agree to pay the total balance at least three business days before the next scheduled payment. The borrower had to take affirmative action within a specified time frame if the borrower hoped to pay only the amount listed as the total of payments.

ALDRICH & BONNEFIN
Professional Law Corporation

The Banking & Business Law Firm
www.ablawyers.com 949.474.1944
18500 Von Karman Ave., Suite 300, Irvine, California 92612

Authors: Janet M. Bonnefin, Esq., Robert K. Olsen, Esq. and Stephanie A. Shea, Esq.

By contrast, the “renewal” option would end up costing a borrower significantly more and renewing the loan did not require a borrower to take any affirmative action at all. Renewing the loan was the default payment schedule. On the third line below the TILA box, the Loan Note read: “If renewal is accepted you will pay the finance charge . . . only.” And with each “renewal,” the borrower would “accrue new finance charges” – that is, an additional 30-percent premium.

The FTC alleged that Tucker violated FTC Act Section 5 because the terms disclosed in the Loan Note did not reflect the terms that Tucker actually enforced. Tucker argued that the Loan Note was not deceptive because it was “technically accurate.” The Ninth Circuit explained that the FTC Act’s consumer-friendly standard does not require only technical accuracy and affirmed the district court order. Scott A. Tucker is permanently enjoined from engaging in consumer lending and was ordered to pay $1.27 billion in equitable relief to the FTC.