

OCT 27 2006

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U.S. BKCY. APP. PANEL
OF THE NINTH CIRCUIT**

ORDERED PUBLISHED

**UNITED STATES BANKRUPTCY APPELLATE PANEL
OF THE NINTH CIRCUIT**

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In re:)	BAP No.	NV-05-1420-MaMoS
)		
BOBBY FERRELL, JR.,)	Bk. No.	S-03-11408-BAM
)		
Debtor.)	Adv. No.	S-03-01199-BAM
)		
_____)		
KATHLEEN MCDONALD, Chapter 13)		
Trustee,)		
)		
Appellant,)		
)		
v.)		
)		
CHECKS-N-ADVANCE, INC.,)		
)		
Appellee.)		
_____)		

O P I N I O N

Argued and Submitted on May 18, 2006
at Las Vegas, Nevada

Filed - October 27, 2006

Appeal from the United States Bankruptcy Court
for the District of Nevada

Honorable Bruce A. Markell, Bankruptcy Judge, Presiding.

Before: MARLAR, MONTALI, and SMITH, Bankruptcy Judges.

1 MARLAR, Bankruptcy Judge:

2

3

INTRODUCTION

4

5 Prepetition, the chapter 13¹ debtor had obtained a "payday"
6 loan for \$345, and he did not repay it. In his bankruptcy case,
7 the trustee filed a creditor's proof of claim for the loan,
8 objected to the claim, and counterclaimed for damages and
9 attorney's fees due to the creditor's alleged violations of the
10 federal Truth in Lending Act ("TILA") and state consumer
11 protection statutes. The creditor defaulted in the adversary
12 proceeding and the bankruptcy court entered a default judgment
13 disallowing the claim. However, based on its construction of
14 TILA, the bankruptcy court also denied the "prevailing" trustee's
15 demand for statutory damages of \$90, actual damages, and
16 attorney's fees and costs (in the range of \$7,000).

17 On appeal, the trustee argues that the bankruptcy court
18 misinterpreted the law and failed to compensate her under federal
19 or state law, or as a private attorney general. We conclude that
20 the bankruptcy court did not err, and AFFIRM.

21

22

FACTS

23

24 On June 27, 2002, Bobby Ferrell, Jr. ("Debtor") borrowed
25 \$300 on a "payday loan" from Checks-N-Advance, Inc. ("C-N-A"). He

26

27 ¹ Unless otherwise indicated, all section, chapter, and code
28 references are to the Bankruptcy Code, 11 U.S.C. §§ 101-1330, as
promulgated before its amendment by the Bankruptcy Abuse
Prevention and Consumer Protection Act of 2005, Pub. L. 109-8, 119
Stat. 23 (2005), and rule references are to the Federal Rules of
Bankruptcy Procedure, Rules 1001-9036.

1 executed a Consumer Loan Agreement ("Agreement") in which he
2 agreed to repay, in one week's time, the \$300 plus \$45 interest
3 (an annual percentage rate of 782.143%). He failed to repay the
4 loan.

5 6 Procedural History

7 8 A. From Claim to Default

9
10 Debtor filed a voluntary chapter 13 petition on February 7,
11 2003. In an odd procedural twist, the chapter 13 trustee
12 ("Trustee") then filed a proof of claim for an unsecured
13 nonpriority debt in the amount of \$345 on behalf of C-N-A.
14 Thereafter, Trustee objected to the claim she had just filed, and
15 filed an adversary proceeding and counterclaim² against C-N-A.

16 Trustee alleged multiple violations of TILA, 15 U.S.C.
17 §§ 1601 et seq. and its implementing regulations, 12 C.F.R.
18 §§ 226.1 et seq. ("Regulation Z"), as well as state consumer loan
19 regulation Nevada Revised Statute ("NRS") § 604.164.3. She sought
20 actual damages and statutory damages under TILA, as well as
21 attorney's fees and costs, the latter under both TILA and NRS
22 § 604.164.3. Trustee offered to prove that her "reasonable"
23 attorney's fees were approximately \$7,000. See Tr. of Proceedings
24 5:16-24, Sept. 21, 2005.

25 C-N-A failed to answer, and Trustee filed an application for
26 the entry of a default judgment, in which she requested judgment

27
28 ² Rule 3007 provides that "[i]f an objection to a claim is
joined with a demand for relief of the kind specified in Rule
7001, it becomes an adversary proceeding." Rule 7001(1) provides
that a proceeding to recover money is an "adversary proceeding."

1 for only statutory damages in the amount of \$90 (twice the amount
2 of any finance charge pursuant to 15 U.S.C. § 1640(a)(2)), and
3 attorney's fees, in an amount to be determined postjudgment.

4 C-N-A did not respond to the application.

5 On October 4, 2004, the bankruptcy court entered its
6 decision and order on Trustee's application. Taking the
7 allegations of the complaint as true, the court found that
8 C-N-A had violated the specified provisions of TILA. However, it
9 interpreted the TILA remedy provision as only allowing damages for
10 a violation of certain enumerated provisions that did not include
11 the sections cited by Trustee. Therefore, it held that statutory
12 damages of \$90 were not available to Trustee.

13 Because Trustee failed to enforce liability against C-N-A for
14 statutory damages and attorney's fees, which was the only remedy
15 sought in the application for default judgment, the bankruptcy
16 court denied the application without prejudice, giving Trustee the
17 opportunity to request an evidentiary hearing on her claim for
18 actual damages.

19 Trustee immediately moved for reconsideration, challenging
20 the bankruptcy court's legal conclusion that statutory damages
21 were not available. Trustee maintained that statutory damages
22 were also available for violations of Regulation Z, or awardable
23 to her as a prevailing party on the counterclaim, because that
24 cause of action is designed to protect consumer rights under
25 federal and state laws in a collection action.

26 The bankruptcy court granted the motion for reconsideration
27 pending the filing of an amended application for default judgment.
28 Trustee then filed the amended application in which she also

1 raised a new state civil action for attorney's fees for an alleged
2 "unfair trade practice" by C-N-A. Again, C-N-A did not respond to
3 the amended application.

4
5 **B. The Court's Decision**

6
7 On August 24, 2005, the bankruptcy court entered its decision
8 and order regarding the amended default application. Taking the
9 allegations in the complaint as true, it found that C-N-A was
10 liable³ for three violations of TILA, three violations of
11 Regulation Z, and three violations of NRS 604.164.3, a Nevada
12 statute that requires the same federal disclosures.⁴ The TILA
13 violations had been succinctly enumerated as:

- 14 a. failing to provide the required disclosures prior to
15 consummation of the transactions in violation of 15
16 U.S.C. § 1638(b) and Regulation Z, 12 C.F.R.
17 § 226.17(b).
- 18 b. failing to properly and conspicuously disclose the
19 "finance charge" in violation of 15 U.S.C. § 1632(a)
20 and Regulation Z, 12 C.F.R. § 226.17(a)(2).
- 21 c. failing to properly and conspicuously disclose the
22 annual percentage rate ("APR") in violation of 15
23 U.S.C. § 1632(a) and Regulation Z, 12 C.F.R.
24 § 226.17(a)(2).

25 See Compl. 4, July 18, 2003.

26 However, the bankruptcy court still concluded that Trustee
27 was not entitled to statutory damages for these violations, but

28

29 ³ C-N-A's liability is not under review, since it has filed
30 neither an appeal or a cross-appeal.

31 ⁴ Former NRS § 604.164.3 (now NRS § 604A.410(2)(g))
32 provided:

33 3. Disclosures required for a similar transaction
34 by the federal Truth in Lending Act.

35 NRS § 604.164 (2003).

1 that she would be given an opportunity to prove any actual damages
2 at an evidentiary hearing. It also denied Trustee's request for
3 attorney's fees pending proof of any actual damages.

4
5 **C. The Evidentiary Hearing and Judgment**

6
7 Prior to the evidentiary hearing, Trustee filed a brief on
8 damages in which she agreed that Ninth Circuit law would not allow
9 actual damages unless she was able to show Debtor's "detrimental
10 reliance" on the violating conduct. She further conceded that
11 "[a]s Plaintiff [Trustee] was not the actual borrower, and no
12 evidence was taken because this involves a default judgement
13 [sic], Plaintiff cannot prove reliance, under the Ninth Circuit
14 standard." Trustee's Brief 2:9-11, Sept. 14, 2005 (emphasis
15 supplied). Trustee then argued for a change in the law, which she
16 believed was erroneous, and she also requested actual damages in
17 the amount of the overcharge (the \$45 in interest), plus her
18 attorney's fees and costs of approximately \$7,000.⁵

19 Following a hearing, at which Trustee made the same
20 concessions and also made an offer of proof of attorney's fees in
21 the approximate amount of \$7,000, the bankruptcy court entered an
22 order, on September 22, 2005, that incorporated its previous
23 findings and orders. It ordered that the amended application for
24 default judgment was (1) granted to the extent of sustaining
25 Trustee's objection to C-N-A's proof of claim and disallowing the
26
27
28

⁵ This entire case is, in reality, about whether a plaintiff in a default action should be awarded \$7,000 in fees for a wrongly-disclosed \$45 finance charge.

1 \$345 claim⁶; and (2) denied, to the extent that Trustee asked for
2 statutory damages, actual damages, attorney's fees or any other
3 form of relief. This appeal followed.⁷
4

5 **ISSUES**
6

- 7 1. Whether statutory damages were awardable under TILA for
8 C-N-A's disclosure violations.
9
- 10 2. Whether Trustee had to show Debtor's "detrimental
11 reliance" in order to prove actual damages for
12 C-N-A's disclosure violations.
13
- 14 3. Whether C-N-A's default, in regards to the state law
15 claim, entitled Trustee to attorney's fees under Nevada
16 law.
17
- 18 4. Whether Trustee was entitled to attorney's fees for
19 prevailing on the counterclaim, which resulted in the
20

21 ⁶ The panel wonders why all this expense and procedural time
22 was necessary to disallow a claim that the creditor itself never
23 filed!

24 ⁷ Trustee filed a timely notice of appeal of the September
25 22, 2005 order. The BAP Clerk's Office notified Trustee that the
26 order did not meet the separate document requirement and ordered
27 that requirement deemed waived unless the bankruptcy court entered
28 a separate judgment within 14 days. On February 3, 2006, the
bankruptcy court entered a separate final judgment which contained
the same rulings. See Bankers Trust Co. v. Mallis, 435 U.S. 381,
384 (1978). Trustee did not file a notice of appeal from the
February 3, 2006 judgment. The panel has jurisdiction over the
appeal of the September 22, 2005 order, notwithstanding either a
violation of the separate document rule or a lack of an amended
notice of appeal. See Stainton v. Lee (In re Stainton), 139 B.R.
232, 233 n.1 (9th Cir. BAP 1992).

1 disallowance of C-N-A's proof of claim.

2
3 **STANDARD OF REVIEW**

4
5 The panel reviews the bankruptcy court's conclusions of law,
6 including statutory construction, de novo. White v. City of
7 Santee (In re White), 186 B.R. 700, 703 (9th Cir. BAP 1995).

8 When a decision on an award of attorney's fees involves a
9 question of law, we will not disturb the bankruptcy court's
10 determination unless it erroneously applied the law. See Dawson
11 v. Wash. Mut. Bank, F.A. (In re Dawson), 390 F.3d 1139, 1145 (9th
12 Cir. 2004) ("Bankruptcy court's award of attorney fees is reviewed
13 for abuse of discretion or erroneous application of the law.").

14
15 **DISCUSSION**

16
17 **A. Statutory Damages: TILA and Regulation Z**

18
19 **1. Background of TILA**

20
21 TILA was enacted in 1968 as Title I (Consumer Credit Cost
22 Disclosure) of the federal Consumer Credit Protection Act, Pub. L.
23 90-321, 82 Stat. 146 (1968), and has been amended several times.

24 TILA's stated purpose is:

25 to assure a meaningful disclosure of credit terms so
26 that the consumer will be able to compare more readily the
27 various credit terms available to him and avoid the
28 uninformed use of credit, and to protect the consumer
against inaccurate and unfair credit billing and credit
card practices.

1 15 U.S.C. § 1601(a) (2000).

2 TILA applies to payday loans, which are classified as
3 "closed-end" credit, "a type of loan that requires a single
4 payment or succession of payments (also known as [an]
5 'installment' loan)." Thomas A. Wilson, The Availability of
6 Statutory Damages Under TILA to Remedy the Sharp Practice of
7 Payday Lenders, 7 N.C. BANKING INST. 339, 344 (Apr. 2003); see also
8 Brown v. Payday Check Advance, Inc., 202 F.3d 987, 991 (7th Cir.
9 2000) (payday loans fall under 15 U.S.C. § 1638, "which addresses
10 all consumer loans other than open-end credit plans"), cert.
11 denied, 531 U.S. 820 (2000); Regulation Z, 12 C.F.R. § 226.2(a)
12 (10) (defining "closed-end credit" transactions).

13 Under the authority of TILA, the Federal Reserve Board
14 ("Board") promulgated Regulation Z & Supp. I (Official Staff
15 Interpretations). TILA and Regulation Z are liberally construed
16 in favor of the consumer, and must "be absolutely complied with
17 and strictly enforced." Jackson v. Grant, 890 F.2d 118, 120 (9th
18 Cir. 1989) (quoting Mars v. Spartanburg Chrysler Plymouth, Inc.,
19 713 F.2d 65, 67 (4th Cir. 1983)).

20

21 **2. Types of Available Remedies**

22

23 These statutes and regulations require a seller/creditor to
24 make certain disclosures to protect the consumer. TILA provides
25 remedies to consumers in the form of statutory and actual damages,
26 even for minor violations of TILA. Jackson, 890 F.2d at 120; 15
27 U.S.C. § 1640 (civil liability). A plaintiff may recover
28 statutory damages whether or not actual damages are proven. So.

1 Discount Co. of Ga. v. Whitley (In re Whitley), 772 F.2d 815, 817
2 (11th Cir. 1985) (holding that statutory damages must be imposed
3 regardless of the trial court's belief that no actual damages
4 resulted). If the creditor is liable for damages, then reasonable
5 attorney's fees and costs are also awardable to the plaintiff.
6 See 15 U.S.C. § 1640 (a) (3).⁸

7 8 **3. The Bankruptcy Court's Decision**

9
10 Here, the bankruptcy court found three violations of TILA and
11 Regulation Z. C-N-A failed to clearly and conspicuously disclose
12 the "finance charge" and "annual percentage rate," in violation of
13 15 U.S.C. § 1632(a) and Regulation Z, 12 C.F.R. § 226.17(a) (2).
14 These were disclosure "form" violations. (See Appendix for
15 details.)

16 C-N-A also failed to provide the required disclosures prior
17 to consummation of the transaction, in violation of 15 U.S.C.
18 § 1638(b) and Regulation Z, 12 C.F.R. § 226.17(b). This was a
19 disclosure "timing" violation. (See Appendix for details.)

20 The bankruptcy court determined that these sections of TILA
21 and Regulation Z did not support an award of statutory damages
22 based on the plain terms of § 1640(a) (2) (A), which provides, in
23 relevant part:

24 **§ 1640. Civil liability**

- 25 (a) Individual or class action for damages; amount
26 of award; factors determining amount of award

27
28 ⁸ This section provides for, "in the case of any successful
action to enforce the foregoing liability or in any action in
which a person is determined to have a right of rescission under
section 1635 of this title, [an award of] the costs of the action,
together with a reasonable attorney's fee as determined by the
court; . . ." 15 U.S.C. § 1640(a) (3).

1 Except as otherwise provided in this section, any
2 creditor who fails to comply with any requirement
3 imposed under this part,^[9] including any requirement
4 under section 1635 of this title, or part D or E of
5 this subchapter with respect to any person is liable
6 to such person in an amount equal to the sum of-

7 (1) any actual damage sustained by such person
8 as a result of the failure;

9 (2) (A) (I) in the case of an individual action
10 twice the amount of any finance charge
11 in connection with the transaction

12

13 In connection with the disclosures referred
14 to in section 1638 of this title, a creditor shall
15 have a liability determined under paragraph (2) only
16 for failing to comply with the requirements of
17 section 1635 of this title, or of paragraph (2)
18 (insofar as it requires a disclosure of the "amount
19 financed"), (3), (4), (5), (6), or (9) of section
20 1638(a) of this title, or for failing to comply with
21 disclosure requirements under State law for any term
22 which the Board has determined to be substantially
23 the same in meaning under section 1610(a) (2) of this
24 title as any of the terms referred to in any of those
25 paragraphs of section 1638(a) of this title. . . .

26 15 U.S.C. § 1640(a) (emphasis supplied).

27 C-N-A was found to have violated §§ 1632(a) and 1638(b) (1).
28 Neither is included among the enumerated subsections for which
statutory damages are available under § 1640(a) (2) (A). In
addition, no other subsections contain a damages remedy for a
violation of those two subsections. Compare 15 U.S.C. § 1639(j)
(deeming a violation of mortgage lending disclosures a failure
under 15 U.S.C. § 1635), and 15 U.S.C. § 1640(a) (4) (providing
damages in the case of a material failure to comply with any
requirement under section 1639).

The bankruptcy court therefore determined that these sections
of TILA and Regulation Z did not support an award of statutory

⁹ "[T]his part" means Part B of TILA, "Credit Transactions,"
which contains 19 sections, §§ 1631 to 1649.

1 damages based on the plain terms of § 1640(a)(2). The bankruptcy
2 court relied on the reasoning of the Seventh Circuit's Brown
3 decision. In Brown, the plaintiff was denied statutory damages
4 for disclosure violations under 15 U.S.C. § 1632, § 1638(a)(8) and
5 § 1638(b)(1), none of which is on the list of violations eligible
6 for statutory damages in § 1640(a). Brown, 202 F.3d at 991.
7 Brown concluded that § 1640(a) contained a "closed list" of
8 eligible violations because it used the word "only" in the final
9 sentence of the opening paragraph. Id.

10 The Sixth Circuit concurred with the Seventh Circuit's
11 statutory construction in holding that a violation of § 1638(b)(1)
12 did not warrant statutory damages under § 1640(a). See Baker v.
13 Sunny Chevrolet, Inc., 349 F.3d 862, 867-68 (6th Cir. 2003), cert.
14 denied, 542 U.S. 937 (2004).

15 These are the only circuit courts which have so far addressed
16 the issue under TILA. Most district courts in other circuits
17 follow Brown's reasoning, and there is no Ninth Circuit opinion
18 covering the subject. Trustee contends that the bankruptcy court
19 erred in adopting Brown rather than the more expansive
20 interpretation of TILA presented in Lozada v. Dale Baker
21 Oldsmobile, Inc., 145 F. Supp. 2d 878 (W.D. Mich. 2001). She
22 raises several arguments which she believes were more aptly
23 resolved by Lozada.

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1") (emphasis deleted; internal quotation marks omitted).
2 Section 1640 plainly limits the recovery of statutory damages to
3 specific violations of the disclosure requirements of § 1638(a).¹⁰
4 The limiting language of § 1638(a) was added to TILA in 1980 (but
5 was not fully effective until 1982¹¹) in order to "restrict the
6 scope of creditor civil liability for statutory penalties to only
7 those disclosures which are of material importance in credit
8 shopping," and not various "technical" violations. S. Rep. No.
9 368, 96th Cong., 2d Sess. 17, 31, reprinted in 1980 U.S.C.C.A.N.
10 236, 267 ("Truth in Lending Simplification and Reform Act," Pub.
11 L. No. 96-221, § 615(b), 94 Stat. 168, 181 (1980)). In other

12
13 ¹⁰ These sections include:

- 14 (2) (A) The "amount financed", using that term, which
15 shall be the amount of credit of which the
16 consumer has actual use. . . .
17 (B) In conjunction with the disclosure of the amount
18 financed, a creditor shall provide a statement
19 of the consumer's right to obtain, upon a
20 written request, a written itemization of the
21 amount financed. . . .
22 (3) The "finance charge", not itemized, using that term.
23 (4) The finance charge expressed as an "annual percentage
24 rate", using that term. . . .
25 (5) The sum of the amount financed and the finance
26 charge, which shall be termed the "total of
27 payments".
28 (6) The number, amount, and due dates or periods of
payments scheduled to repay the total of payments.
. . . .
(9) Where the credit is secured, a statement that a
security interest has been taken in (A) the property
which is purchased as part of the credit transaction,
or (B) property not purchased as part of the credit
transaction identified by item or type.

15 U.S.C. § 1638(a).

¹¹ See Dixey v. Idaho First Nat'l Bank, 677 F.2d 749, 752
(9th Cir. 1982).

1 words, the provision was added to preclude statutory damages for
2 merely technical violations of TILA. See id., 1980 U.S.C.C.A.N.
3 at 252.

4
5 **(b) § 1632(a)**
6

7 We now turn to each of the TILA violations for which C-N-A
8 was found to have been liable. First, we look at the requirement
9 to conspicuously disclose the finance charge.

10 The requirement that certain terms be displayed "more
11 conspicuously" is not contained in § 1638(a). For statutory
12 damages to apply it must be.

13 Section 1632(a), requiring a creditor to disclose the terms
14 "finance charge" and "annual percentage rate" more conspicuously
15 than other terms, was also added by the same 1980 amendments.
16 Prior to the amendments, a "clearly and conspicuously" requirement
17 was only found in Regulation Z. See 12 C.F.R. § 226.17(a)(1).

18 Congress could have included the new § 1632 in the closed
19 list in § 1640(a), but it did not. We should not presume that
20 Congress meant to allow statutory damages for failure to comply
21 with the "more conspicuously" standard when it omitted such a
22 provision.¹²

23 Relying on Dixey, Trustee argues that Ninth Circuit law would
24 support statutory damages for not disclosing the terms "finance
25 charge" and "annual percentage rate" more conspicuously. In
26 Dixey, the Ninth Circuit reversed a district court's denial of

27
28 ¹² But see Johnson v. Tele-Cash, Inc., 82 F. Supp. 2d 264
(D. Del. 1999) (presuming that Congress meant to treat a violation
of § 1632(a) as a violation of § 1683(a)(3) and (a)(4)), aff'd in
part and rev'd in part on other grounds, 225 F.3d 366 (3rd Cir.
2000).

1 statutory damages for a bank's failure to emphasize, "more
2 conspicuously," the terms "finance charge" and "annual percentage
3 rate," in compliance with Regulation Z, 12 C.F.R. § 226.6(a)
4 (1981).¹³ Dixey, 677 F.2d at 751. The Ninth Circuit held that
5 these failures were significant and serious violations which
6 warranted damages under the provisions of the former act.
7 However, and importantly, when Dixey was being decided, the 1980
8 amendments had not yet taken effect.

9 In dicta, the Ninth Circuit discussed the amendments (now
10 applicable to this case) in regards to disclosure of these terms
11 and stated:

12 Suits to impose penalties for minor violations may no
13 longer arise, as the amendments became fully effective on
14 April 1, 1982. It should be noted, however, that under the
15 amended Act, the finance charge and annual percentage rate
16 are among the material terms affecting credit shopping and
protected by civil liability. [] More importantly, the
amendments also incorporate the requirement that the
"annual percentage rate" and "finance charge" be more
conspicuous in . . . § 1632(a)

17 Dixey, 677 F.2d at 753.

18 While this statement shows some possible support for
19 Trustee's position that the Ninth Circuit would consider § 1632(a)
20 as "incorporated" into the civil liability of § 1640(a)(2), Dixey
21 did not so hold, nor did it undertake an analysis of the amended
22 § 1640. Therefore, we do not believe that Dixey, or other pre-
23 amendment case law, controls our decision here.

24 Trustee has also cited courts in other jurisdictions which
25 routinely granted statutory fees for "more conspicuously" or
26 "clearly and conspicuously" violations. These cases are also
27 unpersuasive. In Malfa v. Household Bank, F.S.B., 825 F. Supp.
28 1018 (S.D. Fla. 1993), aff'd, 50 F.3d 1037 (11th Cir. 1995)

¹³ The present 12 C.F.R. § 226.6(a), governing disclosures in open-end credit transactions, does not contain the "more conspicuously" language.

1 (Table), the issue was whether a violation of § 1632's "more
2 conspicuously" requirement warranted rescission under TILA's
3 provisions, after the statute of limitations had run on an action
4 for damages. Id. at 1023. The district court found that there
5 was no material violation of the disclosure requirements. It
6 stated that such a "technical" violation would give rise to a
7 civil penalty, but "would not warrant the harsh sanction of
8 rescission." Id. at 1021.

9 In another case cited by Trustee, Leathers v. Peoria Toyota-
10 Volvo, 824 F. Supp. 155 (C.D. Ill. 1993), a car dealer failed to
11 comply with the disclosure requirements regarding its security
12 interest in an automobile, pursuant to § 1638(a)(9) and Regulation
13 Z ("clearly and conspicuously" requirement). Since subsection
14 (a)(9) is included on the list of violations for which statutory
15 damages are available, it was not surprising that the court
16 awarded damages under § 1640(a)(2). The violations in this case
17 do not include such a violation as in Leathers, and thus that case
18 is distinguishable.

19 In United Fed. Savs. & Loan Ass'n of Ill. v. Cook (In re
20 Cook), 76 B.R. 661 (Bankr. C.D. Ill. 1987), the lender failed to
21 disclose its security interest "clearly and conspicuously"
22 pursuant to Regulation Z, 12 C.F.R. § 226.17(a)(1), and the court
23 awarded statutory damages. The court did not discuss § 1632(a),
24 § 1638(a)(9), nor any other authority for awarding damages.
25 Cook is questionable on this point, both in light of the Seventh
26 Circuit's decision in Brown, and in its lack of analysis for the
27 conclusion drawn.

28

(c) § 1638(b)

1
2
3 Next, C-N-A was found to have failed to provide the required
4 disclosures prior to consummation of the transaction, in violation
5 of 15 U.S.C. § 1638(b)(1) and Regulation Z, 12 C.F.R. § 226.17(b).
6 Trustee contends that a violation of this timing requirement for
7 disclosures constituted a complete failure to make the substantive
8 disclosures required by § 1638(a), including those for which
9 statutory damages are expressly available. Therefore, she
10 maintains that statutory damages should also be available for
11 violations of § 1638(b)(1). As the Lozada court stated:
12 “§ 1638(a) disclosures may not be said to be made unless and until
13 they are made in compliance with § 1638(b)(1).” Lozada, 145 F.
14 Supp. 2d at 889.

15 This argument is similar to the inclusion argument advanced
16 for the § 1632(a) violation, viz., that a violation of § 1638(b)
17 (1) necessarily results in a violation of § 1638(a)(3)-(6). We
18 find Brown’s reasoning persuasive in rejecting this argument.
19 There, the Seventh Circuit held that such an interpretation would
20 essentially rewrite the statute and allow all candidates for
21 statutory damages to come in through the “back door”:

22 [A]ccording to plaintiffs, any violation of § 1632(a)
23 . . . or § 1638(b)(1) also violates § 1638(a)(3) (which
24 requires the lender to disclose the finance charge),
25 § 1638(a)(4) (which requires the lender to express the
26 finance charge as an annual percentage rate), and so on.
27 Because § 1638(a)(3) and (a)(4) are on the list of
28 violations eligible for statutory damages, plaintiffs say
that they must prevail. Yet accepting this argument would
destroy the point of § 1640(a). What sense would it make
to omit § 1632, § 1638(a)(1), (a)(2) (in part), (a)(7),
(a)(8), (a)(10), (a)(11), (a)(12), and all of § 1638(b),
(c), and (d) from the candidates for statutory damages if
they came in through the back door on the theory that all

1 formal shortcomings infect the disclosures of the items
2 that are on the list? Congress included some and excluded
3 others; plaintiffs want us to turn this into universal
inclusion, which would rewrite rather than interpret
§ 1640(a).

4 Brown, 202 F.3d at 991; accord Baker, 349 F.3d at 873 (concurring
5 op.)

6 Section 1638(a) tells the lender what has to be disclosed,
7 while § 1638(b) tells the lender how and when to disclose it.
8 Congress structured these requirements separately. The plain
9 language of § 1640(a) excepts violations of the form and timing
10 requirements from statutory damages. This language in the 1980
11 amendment to TILA was intended "to curtail damages awards for
12 picky and inconsequential formal errors." Brown, 202 F.3d at 991
13 (citing the Truth in Lending Simplification and Reform Act, Pub.
14 L. 96-221, 94 Stat. 132, 168 (1980)). Judge Easterbrook observed
15 in Brown that "[i]t would hardly be appropriate to undo Congress'
16 decision by reading matters of form into the substantive
17 provisions for which statutory damages are authorized." Id.

18 Trustee's assertion that Lozada, a Michigan district court
19 case, should govern is unpersuasive, especially in light of the
20 fact that its own Sixth Circuit has chosen not to follow its
21 holding. In Baker, the defendants, following Lozada, argued that
22 a violation of § 1638(b)'s form and timing disclosures should not
23 be an independent violation, but rather it should be read to apply
24 to each subsection of § 1638(a), thereby implicating statutory
25 damages for those relevant subsections. The Sixth Circuit
26 concluded that § 1638(b) was a separate requirement, meaning that
27 the § 1638(a) enumerated items might be disclosed and yet not be
28 in the form required by the Regulation Z and § 1638(b)(1), which

1 is not subject to an action for statutory damages but, rather, one
2 for actual damages. Baker, 349 F.3d at 869.

3 Trustee also posits the alternative holding of Lozada, viz.,
4 that the 1638(b)(1) form and timing requirements are not
5 "disclosures" and, therefore, to the extent that § 1640(a)(2)
6 limits statutory damages to certain disclosure violations of
7 § 1638(a), such restriction is inapplicable to § 1638(b).
8 According to this construction, a violation of § 1638(b)(1) would
9 fall within the "general rule" that a creditor who violates TILA
10 is liable for statutory damages. See Lozada, 145 F. Supp. at 888.

11 Again, we reject this argument in favor of the statute's
12 plain language. Section 1640(a) refers to "disclosures referred
13 to in section 1638," not "subsection(s) ___ of § 1638." It then
14 limits statutory damages "only for failing to comply with" the
15 enumerated subsections. Clearly, Congress purposely omitted
16 § 1638(b) from the enumerated list.

17 The cases cited by Trustee as supporting Lozada are not
18 persuasive. Walters v. First State Bank, 134 F. Supp. 2d 778
19 (W.D. Va. 2001) merely followed Lozada in awarding statutory
20 damages for a violation of a form and timing violation under 15
21 U.S.C. § 1638(b)(1) and Regulation Z. Id. at 782. Walters has
22 not been clearly adopted on that point by any other court. See,
23 e.g., Floyd v. Sec. Fin. Corp. of Nev., 181 F. Supp. 2d 1137,
24 1141-42 (D. Nev. 2001) (following Walters as to liability, but
25 with no discussion of damages); Kilbourn v. Candy Ford-Mercury,
26 Inc., 209 F.R.D. 121, 125-28 (W.D. Mich. 2002) (agreeing with
27 Walters that a violation occurred under similar facts, but
28 rejecting the customer's claim for statutory damages).

1 . . . shall be more conspicuous than any other disclosure
2" This regulation implements the provision in § 1632(a)
3 which states: "The terms 'annual percentage rate' and 'finance
4 charge' shall be disclosed more conspicuously than other terms . .
5 . ." 15 U.S.C. § 1632(a).

6 Regulation Z is the implementing regulation for TILA.
7 Congress expressly delegated to the Board the authority to
8 prescribe regulations containing "such classifications,
9 differentiations, or other provisions," as, in its judgment, "are
10 necessary or proper to effectuate the purposes of [TILA], to
11 prevent circumvention or evasion thereof, or to facilitate
12 compliance therewith." 15 U.S.C. § 1604(a). Conflicts between
13 Regulation Z and TILA sometimes arise. One case illustrates the
14 interplay of TILA and Regulation Z.

15 In Household Credit Servs., Inc. v. Pfennig, 541 U.S. 232
16 (2004), the issue was whether the overlimit charge was included in
17 the term "finance charge," under § 1605(a), and thus subject to
18 the disclosure requirements for finance charges in § 1637(a). The
19 creditor, noting that Regulation Z, 12 C.F.R. § 226.4(c)(2),
20 expressly excluded such a charge, believed its compliance with the
21 regulation sufficed for disclosure purposes.

22 The Supreme Court held that § 1605(a) was ambiguous regarding
23 an overlimit fee, and that Regulation Z "filled the gap" by
24 "setting forth a clear, easy to apply (and easy to enforce) rule
25 that highlights the charges the Board determined to be most
26 relevant to a consumer's credit decisions." Household Credit, 541
27 U.S. at 239, 245. Since the creditor had followed the regulation,
28 the Court held it was not liable for relief under TILA.

1 The Court's reasoning was based on its healthy respect for
2 the expansive authority delegated to the Board by Congress to
3 enact appropriate regulations to advance the meaningful disclosure
4 purposes of TILA. Id. at 235. The Board's authority to issue
5 "binding regulations" was undisputed. Id. at 238. The Court
6 concluded that in the case of a genuine conflict between TILA and
7 Regulation Z, then "courts, as well as the agency, 'must give
8 effect to the unambiguously expressed intent of Congress.'" Id.
9 at 239 (citation omitted). However, if there is an explicit "gap"
10 in the statute, then "the agency's regulation is to be 'given
11 controlling weight unless [it is] arbitrary, capricious, or
12 manifestly contrary to the statute.'" Id. (citation omitted).

13 Thus, as this case illustrates, violations of either
14 Regulation Z or its corresponding TILA disclosure provisions will
15 warrant damages in accordance with 15 U.S.C. § 1640(a)(2). Here,
16 we do not need to reach the question of whether a violation of
17 Regulation Z warrants statutory damages because there have been no
18 allegations made that the violations of TILA and its corresponding
19 regulations were inconsistent. Therefore, Trustee's argument for
20 civil liability based on Regulation Z is simply misplaced.¹⁵

21 In summary, we hold that the violations by C-N-A did not fall
22 within the provisions available for statutory damages, and the
23 bankruptcy court correctly declined to award them. On this issue,
24 we affirm the bankruptcy court.

25
26

27 ¹⁵ To the extent that the Supreme Court held, under pre-1980
28 law, that noncompliance with a regulation, standing alone,
warranted a civil penalty, it was not inconsistent with Household
Credit. In Mourning v. Family Pubs. Serv., Inc., 411 U.S. 356
(1973), the subject requirement was found only in the regulation,
and the Court held that the regulation "relieve[d] Congress of the
impossible burden of drafting a code explicitly covering every
conceivable future problem." Id. at 376.

1 **B. Actual Damages**

2
3 Section 1640(a) (1) of TILA also provides for any actual
4 damages sustained by a person as a result of a creditor's failure
5 to comply with any requirement imposed under Part B.

6 The Ninth Circuit has adopted the majority rule that
7 "detrimental reliance" must be demonstrated in order to recover
8 actual damages for a TILA disclosure violation. Gold Country
9 Lenders v. Smith (In re Smith), 289 F.3d 1155, 1157 (9th Cir.
10 2002). In bankruptcy court, Trustee conceded that she could not
11 prove detrimental reliance. Nonetheless, on appeal, Trustee
12 maintains that the panel is not bound by Smith because it was a
13 "short . . . pro se" appeal that was "wrongly decided." Opening
14 Brief 12, Feb. 21, 2006.

15 We disagree. We are bound by Ninth Circuit precedent. Wells
16 Fargo Bank, N.A. v. Guy F. Atkinson Co. of Cal. (In re Guy F.
17 Atkinson Co. of Cal.), 242 B.R. 497, 502 n.9 (9th Cir. BAP 1999).
18 Therefore, we reject this argument outright and affirm the
19 bankruptcy court's ruling that actual damages were not proven in
20 this case.

21
22 **C. Attorney's Fees Under Nevada Law**

23
24 Trustee contends that she was entitled to an award of her
25 attorney's fees under Nevada law for prevailing on her claim
26 against C-N-A for its violations of TILA, or as a double recovery
27 under Nevada's own consumer protection laws.

28 The bankruptcy court held that C-N-A did indeed violate the

1 disclosure statutes and regulations, but that these violations
2 were not of a type warranting statutory damages, nor had Trustee
3 proven actual damages. For that reason it denied Trustee's state
4 law claim for statutory damages, actual damages, or attorney's
5 fees.

6 Trustee's complaint alleged that C-N-A had violated NRS
7 604.164.3, which lists the requirements for a written loan
8 agreement as including "[d]isclosures required for a similar
9 transaction by the Federal Truth in Lending Act."¹⁶ Apparently, at
10 the time of the violation, this chapter did not contain a civil
11 remedy section, and Trustee did not cite to one.¹⁷

12 Nonetheless, Trustee also contended that she prevailed under
13 TILA and therefore should have been awarded damages and attorney's
14 fees under NRS § 41.600. This statute provides, inter alia, that
15 if a victim of consumer fraud prevails in an action for a
16 deceptive trade practice, as that term is defined in NRS
17 §§ 598.0915 to 598.0925, then the court shall award the plaintiff:
18 (a) any damages sustained; and (b) costs and reasonable attorney's
19 fees. See NRS §§ 41.600(1), (2)(e), & (3).

20 Section 41.600 does not define a "consumer fraud" action as
21 one under NRS § 604.164 (or even the new NRS § 604A.410). The one
22 "consumer fraud" action cited by Trustee is that brought by a
23 victim of a "deceptive trade practice as defined in" NRS
24 § 598.0923 as a violation of "a state or federal statute or
25

26 ¹⁶ These laws were repealed and renumbered, effective July 1,
27 2005. The new NRS § 604A.410(2)(g) similarly provides that the
28 written loan agreement must include: "(g) Any other disclosures
required under the Truth in Lending Act and Regulation Z or under
any other applicable federal or state statute or regulation."

¹⁷ The 2005 law contains a new section, NRS § 604A.930
entitled "Civil action," which provides that a customer may bring
a civil action if a person violates the disclosure provisions of
NRS § 604A.410 (formerly NRS § 604.164).

1 regulation relating to the sale or lease of goods or services.”
2 NRS § 598.0923(3).

3 Trustee’s state law claims are unfounded. First, in order to
4 recover under state law for a violation of TILA, Trustee would
5 have to prove that she was the prevailing party in a civil action
6 for either statutory or actual damages, pursuant to the provision
7 for civil liability, 15 U.S.C. § 1640(a). See NRS § 41.600(3).
8 She failed to do that. Trustee did not assert an independent
9 basis for, or standing to bring, a civil action under NRS
10 § 604.164, the only statute cited in her complaint. Although in
11 her amended application she made a request for the entry of
12 default on a "state law claim" under NRS § 41.600 and NRS
13 § 598.0923(3), this request was improper.

14 Second, in order to recover under state law for a violation
15 of state law, Trustee would have had to plead the appropriate
16 statute in her original complaint. A default judgment is not
17 conformable to the pleadings. See Fed. R. Bankr. P. 7054/Fed. R.
18 Civ. P. 54(c) (“A judgment by default shall not be different in
19 kind from or exceed in amount that prayed for in the demand for
20 judgment. Except as to a party against whom a judgment is entered
21 by default, every final judgment shall grant the relief to which
22 the party in whose favor it is rendered is entitled, even if the
23 party has not demanded such relief in the party’s pleadings.”)
24 (emphasis added). See also Fed. R. Bankr. P. 7015/Fed. R. Civ. P.
25 15(b) (allowing amendments to conform to the evidence adduced at
26 trial).

27 Thus, we do not need to address whether federal law would
28 allow a double damage recovery, or whether the Nevada laws cited

1 by Trustee would grant attorney's fees to a party who prevails
2 under the federal TILA statute, although we presume these
3 arguments to be correct. See, e.g., 15 U.S.C. § 1610 (providing
4 that TILA does not preempt consistent state consumer protection
5 laws regarding closed-end loan disclosures). Since Trustee failed
6 to make a threshold showing of any statutory or actual damages, or
7 of any other basis for monetary relief, or for such an award or
8 recovery on any independent ground, we can find no error in the
9 bankruptcy court's decision not to allow a monetary recovery to
10 Trustee pursuant to Nevada law. We will therefore affirm the
11 bankruptcy court on that issue.

12 13 **D. Attorney's Fees for the Claim Objection**

14
15 Trustee alternatively contends that she was entitled to
16 attorney's fees as a "private attorney general" because the
17 granting of her claim objection was "the equivalent of a
18 successful counterclaim." Opening Brief 10. This argument is
19 also misplaced.

20 Federal courts follow the "American Rule" for awarding
21 attorney's fees, which is that "the prevailing party may not
22 recover attorney's fees as costs or otherwise." Alyeska Pipeline
23 Serv. Co. v. Wilderness Society, 421 U.S. 240, 245 (1975). There
24 are certain recognized exceptions, including bad faith, common
25 benefit, or the vindication of important statutory rights of all
26 citizens, commonly known as a "private attorney general." Id. at
27 246.

28 TILA is the very exception. It is a "prophylactic" fee-

1 shifting statute which "creates a system of 'private attorneys
2 general' to aid its enforcement. In order to penalize non-
3 complying creditors and to deter future violations, the private
4 attorneys general may recover the statutory penalties even if they
5 have not sustained any actual damages or even if the creditors are
6 guilty of only minute deviations from the requirements of [the]
7 TILA and implementing Regulation Z." Johnson, 82 F. Supp. 2d at
8 275; see also Riggs v. Gov't Emp. Fin. Corp., 623 F.2d 68, 73 (9th
9 Cir. 1980) ("The scheme of the statute . . . is to create a
10 species of 'private attorney general' to participate prominently
11 in enforcement.") (citation omitted).

12 15 U.S.C. § 1640 provides for, "in the case of any successful
13 action to enforce the foregoing liability [damages] or in any
14 action in which a person is determined to have a right of
15 rescission under section 1635 of this title, the costs of the
16 action, together with a reasonable attorney's fee as determined by
17 the court; . . ." 15 U.S.C. § 1640(a)(3).

18 In this case, Trustee should not be allowed to make an "end
19 run" for attorney's fees in the claim objection litigation when
20 she did not obtain damages and, thus, attorney's fees under TILA.
21 Nor is a trustee's successful objection to a proof of claim
22 compensable by an award of fees. We would also question the
23 practice of a trustee's filing of a proof of claim for a non-
24 appearing creditor, objecting to the claim, having the objection
25 proceed unopposed, and then seeking a fee award for the "success"
26 of the "litigation."

27 Finally, as the Bankruptcy Code is silent on the subject of
28 whether a "prevailing party" on a claim objection is entitled to

1 fees, the "American Rule" applies.¹⁸

2

3

CONCLUSION

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Trustee did not establish her entitlement to statutory damages, actual damages, or attorney's fees under federal or state law, based on C-N-A's violations of TILA. The bankruptcy court's default judgment is therefore **AFFIRMED**.

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¹⁸ In addition, as a policy matter, we are concerned as to what value there is for the estate when Trustee charges \$7,000 in administrative expense to rid the estate of a \$345 claim, which was filed by Trustee and then eliminated through default? Indeed, the \$90 statutory fee under TILA is only double the amount of interest. We therefore cannot subscribe to such a "cottage industry" of fighting alleged TILA offenses.

27

28

1 **APPENDIX**

2
3 **Disclosure and Timing Violations:**
4 **Statutes and Regulations**

5
6 **Section 1632(a) provides:**

7 **§ 1632. Form of disclosure; additional information**

8 **(a) Information clearly and conspicuously disclosed;**
9 **"annual percentage rate" and "finance charge"; order**
10 **of disclosures and use of different terminology**

11 Information required by this subchapter shall be
12 disclosed clearly and conspicuously, in accordance
13 with regulations of the Board. The terms "annual
14 percentage rate" and "finance charge" shall be
15 disclosed more conspicuously than other terms, data,
16 or information provided in connection with a
17 transaction, except information relating to the
18 identity of the creditor. Except as provided in
19 subsection (c) of this section, regulations of the
20 Board need not require that disclosures pursuant to
21 this subchapter be made in the order set forth in
22 this subchapter and, except as otherwise provided,
23 may permit the use of terminology different from that
24 employed in this subchapter if it conveys
25 substantially the same meaning.

26 15 U.S.C. § 1632(a).

27
28 **Section 1638(b) provides:**

29 **§ 1638. Transactions other than under an open end credit**
30 **plan**

31

32 **(b) Form and timing of disclosures; residential**
33 **mortgage transaction requirements**

34 (1) Except as otherwise provided in this part, the
35 disclosures required under subsection (a) of
36 this section shall be made before the credit
37 is extended. Except for the disclosures
38 required by subsection (a)(1) of this section,
39 all disclosures required under subsection (a)
40 of this section and any disclosure provided
41 for in subsection (b), (c), or (d) of section
42 1605 of this title shall be conspicuously
43 segregated from all other terms, data, or
44 information provided in connection with a
45 transaction, including any computations or
46 itemization.

1 15 U.S.C. § 1638(b) (1).

2

3 **Regulation Z provides, in pertinent part:**

4 § 226.17 General disclosure requirements.

5 (a) Form of disclosures.

6

7 (2) The terms finance charge and annual percentage
8 rate, when required to be disclosed under
9 § 226.18(d) and (e) together with a corresponding
10 amount or percentage rate, shall be more
11 conspicuous than any other disclosure, except the
12 creditor's identity under § 226.18(a).

11

12 (b) Time of disclosures. The creditor shall make
13 disclosures before consummation of the transaction. In
14 certain residential mortgage transactions, special
15 timing requirements are set forth in § 226.19(a). In
16 certain variable-rate transactions, special timing
17 requirements for variable-rate disclosures are set
18 forth in § 226.19(b) and § 226.20(c). In certain
19 transactions involving mail or telephone orders or a
20 series of sales, the timing of disclosures may be
21 delayed in accordance with paragraphs (g) and (h) of
22 this section.

18 12 C.F.R. § 226.17(a) and (b).

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