

15-528

IN THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

ABIGAIL STRUBEL,

Plaintiff-Appellant,

v.

COMENITY BANK,

Defendant-Appellee,

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

**BRIEF FOR THE CONSUMER FINANCIAL PROTECTION BUREAU
AS AMICUS CURIAE**

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TABLE OF CONTENTS

TABLE OF AUTHORITIES ii

INTEREST OF AMICUS CURIAE..... 1

ARGUMENT 1

**TILA PROVIDES A CAUSE OF ACTION FOR STRUBEL TO
SEEK STATUTORY DAMAGES FOR VIOLATIONS OF 15
U.S.C. § 1637(a) AND ITS IMPLEMENTING REGULATIONS** 1

**A. Section 1640(a) Provides a Cause of Action for Strubel
 to Seek Statutory Damages for Violations of TILA’s
 Disclosure Requirements** 2

**B. Section 1640(a)’s Cause of Action Extends to Strubel’s
 Claim that Comenity Violated § 1637(a)(7) and its
 Implementing Regulations** 4

**C. Section 1666i Has No Bearing on Strubel’s Statutory
 Standing** 6

**D. Comenity Bank’s Arguments Regarding the Scope of
 § 1640(a)’s Cause of Action are Without Merit** 7

CONCLUSION 10

TABLE OF AUTHORITIES

Cases	Page(s)
<i>Abrahams v. MTA Long Island Bus</i> , 644 F.3d 110 (2d Cir. 2011)	4
<i>Alexander v. Sandoval</i> , 532 U.S. 275 (2001)	4
<i>Brown v. Payday Check Advance, Inc.</i> , 202 F.3d 987 (7th Cir.2000)	8
<i>Chabad Lubavitch of Litchfield Ctny., Inc. v.</i> <i>Litchfield Historic Dist. Comm'n</i> , 768 F.3d 183 (2d Cir. 2014), <i>cert denied</i> 135 S. Ct. 1853 (2015)	1, 6
<i>Global Crossing Telecommunications, Inc. v. Metrophones</i> <i>Telecommunications, Inc.</i> , 550 U.S. 45 (2007)	3, 4, 7
<i>Kelen v. World Fin. Network Nat'l Bank</i> , 763 F. Supp. 2d 391 (S.D.N.Y. 2011)	8
<i>Kesten v. Ocwen Loan Servicing, LLC</i> , 2012 WL 426933 (N.D. Ill. Feb. 9, 2012)	4
<i>Lexmark Int'l, Inc. v. Static Control Components, Inc.</i> , 134 S. Ct. 1377 (2014)	2
<i>Mourning v. Family Publications Serv., Inc.</i> , 411 U.S. 356 (1973)	1, 2, 9
<i>Schnall v. HSBC Bank Nevada, N.A.</i> , 2013 WL 1100769 (S.D.N.Y. Mar. 18, 2013)	8
<i>Schwartz v. HSBC Bank USA, N.A.</i> , 2013 WL 5677059 (S.D.N.Y. Oct. 18, 2013)	8

Statutes

15 U.S.C. § 1601(a) 2, 5

15 U.S.C. § 1602(z) 4, 7, 8

15 U.S.C. § 1604(a)1

15 U.S.C. § 1604(b) (2006) 9

15 U.S.C. § 1607(a) (6)1

15 U.S.C. § 1637(a) 2, 3

15 U.S.C. § 1637(a) (7)4, 5, 6, 7, 8, 9, 10

15 U.S.C. § 1640(a) *passim*

15 U.S.C. § 1666 4, 5

15 U.S.C. § 1666a 4, 5

15 U.S.C. § 1666i1, 4, 5, 6

Pub. L. No. 93-495, § 301, 88 Stat. 1500 (1974) 5

Pub. L. No. 96-221, § 615(b) (2), 94 Stat. 132 (1980) 3

Regulations

12 C.F.R. Part 1026, Supp. I 5

12 C.F.R. § 1026.6(b) (5) (iii)5, 7, 8, 9, 10

12 C.F.R. § 1026.12(c) (1) 6

Other Authorities

Truth in Lending; Revised Regulation Z,
46 Fed. Reg. 20848 (Apr. 7, 1981) 10

Fair Credit Billing, Description of Transactions,
40 Fed. Reg. 43200 (Sept. 19, 1975) 10

S. Rep. No. 96-73 (1980) 3

INTEREST OF AMICUS CURIAE

The Consumer Financial Protection Bureau (the Bureau) submits this brief in response to the Court's order of November 20, 2015, which directed the parties to file supplemental briefs addressing "the question of plaintiff's standing to bring her claims in light of 15 U.S.C. §§ 1640 and 1666i, along with any other relevant statutory provisions or principles of law." Section 1640 authorizes private actions and, in certain circumstances, an award of statutory damages against creditors who fail to comply with specified provisions of the Truth in Lending Act (TILA), 15 U.S.C. § 1601 *et seq.* Those private actions provide an important supplement to the Bureau's authority to enforce TILA. *See* 15 U.S.C. §§ 1604(a), 1607(a)(6); *see also Mourning v. Family Publications Serv., Inc.*, 411 U.S. 356, 376 (1973). The Bureau accordingly sought leave to submit this amicus brief, which this Court granted on December 4, 2015.

ARGUMENT

TILA PROVIDES A CAUSE OF ACTION FOR STRUBEL TO SEEK STATUTORY DAMAGES FOR VIOLATIONS OF 15 U.S.C. § 1637(a) AND ITS IMPLEMENTING REGULATIONS

As this Court observed last year, "the issue of [a plaintiff's] standing to pursue his [statutory] claims turns on whether his allegations place him in the class of plaintiffs that [the statute] protects." *Chabad Lubavitch of Litchfield Ctny., Inc. v. Litchfield Historic Dist. Comm'n*, 768 F.3d 183, 201 (2d Cir. 2014), *cert. denied*, 135 S. Ct. 1853 (2015). The inquiry into

whether a plaintiff has “statutory standing” does not implicate the courts’ jurisdiction, but “presents a straightforward question of statutory interpretation: Does the cause of action . . . extend to plaintiffs” like the one before the court? *Lexmark Int’l, Inc. v. Static Control Components, Inc.*, 134 S. Ct. 1377, 1388 n.4, 1399 (2014). For the reasons explained below, Strubel has “statutory standing” because § 1640(a) creates a cause of action that extends to her claims.

A. Section 1640(a) Provides a Cause of Action for Strubel to Seek Statutory Damages for Violations of TILA’s Disclosure Requirements

Congress enacted TILA in 1968 to “assure a meaningful disclosure of credit terms so that the consumer will be able to compare more readily the various credit terms available to him and avoid the uninformed use of credit.” 15 U.S.C. § 1601(a). By “imposing mandatory disclosure requirements on those who extend credit to consumers in the American market,” *Mourning*, 411 U.S. at 363, TILA “reflect[ed] a transition in congressional policy from a philosophy of ‘Let the buyer beware’ to one of ‘Let the seller disclose,’ ” *id.* at 377.

As relevant here, TILA requires creditors, “[b]efore opening any account under an open end consumer credit plan,” to disclose several items of information “to the person to whom credit is to be extended.” 15 U.S.C. § 1637(a). A creditor who fails to comply with its account-opening disclosure obligations may be subject to liability under 15 U.S.C. § 1640(a). Section 1640(a) states that, “[e]xcept as otherwise provided in this section,

any creditor who fails to comply with any requirement imposed under this part, [15 U.S.C. § 1641(f) or (g)], or part D or E of [TILA] with respect to any person is liable to such person in an amount equal to the sum of” actual damages, statutory damages, court costs, and attorneys fees.

In 1980, Congress sought “to restrict the scope of creditor civil liability for statutory penalties to only those disclosures which are of material importance in credit shopping.” S. Rep. No. 96-73, at 17 (1980). Congress therefore amended § 1640(a) to make statutory damages available only for certain TILA violations. Pub. L. No. 96-221, § 615(b)(2), 94 Stat. 132, 181 (1980). Among the disclosures that Congress deemed to be “of material importance” — and for which statutory damages remain available — are account-opening disclosures required by 15 U.S.C. § 1637(a). 15 U.S.C. § 1640(a) (“In connection with the disclosures referred to in [§§ 1637(a) and (b)] a creditor shall have a liability determined under [§§ 1640(a)(2)] only for failing to comply with the requirements of section . . . 1637(a)”).

Congress also made clear that creditors who violate TILA’s implementing regulations — known as Regulation Z, 12 C.F.R. Part 1026 — may be subject to statutory damages under § 1640(a). Because a “Congress that intends the statute to be enforced through a private cause of action intends the authoritative interpretation of the statute to be so enforced as well,” it is “meaningless to talk about a separate cause of action to enforce the regulations apart from the statute.” *Global Crossing*

Telecommunications, Inc. v. Metrophones Telecommunications, Inc., 550 U.S. 45, 59 (2007) (quoting *Alexander v. Sandoval*, 532 U.S. 275, 284 (2001)). Rather, “to violate a regulation that lawfully implements [statutory] requirements *is* to violate the statute.” *Id.* at 54; *see also* *Abrahams v. MTA Long Island Bus*, 644 F.3d 110, 118 (2d Cir. 2011).

In TILA, Congress went even further by expressly providing that Regulation Z should be treated on a par with TILA itself. Thus, 15 U.S.C. § 1602(z) makes clear that “[a]ny reference to any requirement imposed under [TILA] or any provision thereof includes reference to the regulations of the Bureau under [TILA] or the provision thereof in question.” *See Kesten v. Ocwen Loan Servicing, LLC*, 2012 WL 426933, at *4 (N.D. Ill. Feb. 9, 2012) (“A regulation carrying out the purpose of [TILA] Part B can be said to be a regulation ‘under’ Part B within the meaning of [then] § 1602(y),” and “§ 1640 provides for a private action against creditors who violate regulations under Part B”).

B. Section 1640(a)’s Cause of Action Extends to Strubel’s Claim that Comenity Violated § 1637(a)(7) and its Implementing Regulations

Section 1637(a)(7) requires creditors to include among their account-opening disclosures “[a] statement, in a form prescribed by regulations of the Bureau of the protection provided by [15 U.S.C. §§ 1666 and 1666i] to an obligor and the creditor’s responsibilities under [15 U.S.C. §§ 1666a and

1666i].” 15 U.S.C. § 1637(a)(7).¹ Thus, under § 1637(a)’s express terms, a creditor must look to the Bureau’s regulations to comply with § 1637(a)(7).

To implement § 1637(a)(7), the Bureau promulgated 12 C.F.R. § 1026.6(b)(5)(iii). That provision of Regulation Z provides that, for open-end credit plans (not secured by the consumer’s home), a “creditor shall disclose, to the extent applicable: . . . [a] statement that outlines the consumer’s rights and the creditor’s responsibilities under [12 C.F.R.] §§ 1026.12(c) [implementing § 1666i] and 1026.13 [implementing §§ 1666 and 1666a] and that is substantially similar to the statement found in Model Form G-3(A) in appendix G” to Regulation Z. 12 C.F.R. § 1026.6(b)(5)(iii). The model form, in turn, sets forth a disclosure that a creditor may use to “be deemed to be in compliance with the regulation with regard to the disclosures.” 12 C.F.R. part 1026, supp. I, comment apps. G and H-1.

Here, Strubel’s complaint unambiguously alleges that Comenity Bank (the Bank) violated § 1637(a)(7) and § 1026.6(b)(5)(iii) by failing to provide

¹ Congress added this disclosure requirement to TILA in the Fair Credit Billing Act (FCBA), which was enacted to protect consumers “against inaccurate and unfair credit billing and credit card practices.” Pub. L. No. 93-495, § 301, 88 Stat. 1500, 1511 (1974); *see also* 15 U.S.C. § 1601(a). The FCBA provisions to which the disclosure refers grant consumers the ability to dispute alleged billing errors with their creditors (§ 1666); restrict creditors’ ability to report consumers’ nonpayment of disputed amounts and to declare such amounts as delinquent (§ 1666a); and allow consumers, under certain circumstances, to hold credit card issuers responsible for claims consumers may have against merchants who accept the issuer’s credit cards (§ 1666i).

Strubel with adequate FCBA disclosures. Her single-count complaint quotes § 1637(a)(7) and alleges that “[t]he Bank’s account-opening disclosures provided to Strubel contained several omissions with respect to the obligor’s protections and the parties’ obligations.” Compl. ¶¶ 32, 34 (J.A. 21). Likewise, the complaint cites § 1026.6(b)(5) (and the predecessor regulation of the Board of Governors of the Federal Reserve System (the Board), the original agency with authority to implement TILA) and alleges that the “billing rights notice . . . that the Bank furnished Strubel . . . is not substantially similar to the Model Form G-3(A).” *Id.* ¶¶ 33, 35 (J.A. 21).

Because, as explained above, § 1640(a) authorizes statutory damages for violations of § 1637(a)(7) and its implementing regulation, Strubel falls within “the class of plaintiffs that [the statute] protects.” *Chabad Lubavitch of Litchfield Cnty.*, 768 F.3d at 201. Accordingly § 1640(a) authorizes Strubel to seek statutory damages against Comenity Bank.

C. Section 1666i Has No Bearing on Strubel’s Statutory Standing

The Court’s November 20 order also requested briefing on Strubel’s standing “in light of” 15 U.S.C. § 1666i. Section 1666i provides that, under certain circumstances, “a card issuer who has issued a credit card to a cardholder pursuant to an open end consumer credit plan shall be subject to all claims (other than tort claims) and defenses arising out of any transaction in which the credit card is used as a method of payment or extension of credit.” *See also* 12 C.F.R. § 1026.12(c)(1). Strubel alleges that

Comenity Bank failed to disclose her rights under § 1666i in the manner required under § 1637(a)(7) and § 1026.6(b)(5)(iii) of Regulation Z. See Compl. ¶¶ 38-39 (J.A. 22). She does not, however, allege a violation of § 1666i itself. For that reason, § 1666i has no bearing on Strubel's statutory standing in this case.

D. Comenity Bank's Arguments Regarding the Scope of § 1640(a)'s Cause of Action are Without Merit

In its prior brief, Comenity Bank raised several objections to Strubel's ability to seek statutory damages under § 1640(a). Comenity Br. 35-40. None of those objections has merit.

First, Comenity Bank contended (at 36-37) that § 1640(a) does not authorize statutory damages for violations of "Regulation Z or the Model Form," even if "the portions of Regulation Z upon which she bases her claims implement" TILA sections for which statutory damages are available. That argument would not defeat Strubel's standing to seek statutory damages for a violation of § 1637(a). But even as applied to claims based on Regulation Z, the Bank's argument is incorrect. As explained above (at 4), "to violate a regulation that lawfully implements [statutory] requirements *is* to violate the statute." *Global Crossing Telecommunications*, 550 U.S. at 54. That is especially true here because compliance with § 1637(a)(7) expressly requires compliance with the Bureau's regulations implementing that provision and because Congress expressly provided that Regulation Z should be treated the same as "any

requirement imposed under [TILA] or any provision thereof.” 15 U.S.C. § 1602(z).² Thus, § 1640(a) provides Strubel with a cause of action to seek statutory damages even to the extent her claims rest on a violation of § 1026.6(b)(5)(iii) of Regulation Z.

Second, Comenity Bank argues (at 38) that Strubel cannot recover statutory damages because, the Bank claims, Model Form G-3(A) adds “additional substantive requirements” that go beyond “the disclosures expressly required by sections 1666a and 1666i.” This argument appears to go not to Strubel’s standing, but to the merits of her claim that the Bank failed to provide disclosures “in a form prescribed by” Regulation Z (§ 1637(a)(7)) and in a manner that was “substantially similar” to Model Form G-3(A) (§ 1026.6(b)(5)(iii)). But to the extent the Bank contends that Strubel lacks authority under § 1640(a) even to sue for disclosure violations arising out of Regulation Z, that argument ignores § 1602(z)’s requirement

² For these reasons, the blanket statement in *Schwartz v. HSBC Bank USA, N.A.*, 2013 WL 5677059, at *7 (S.D.N.Y. Oct. 18, 2013), that “statutory damages are not available for violations of Regulation Z” is incorrect. The other cases cited by Comenity Bank (Br. 36-37) recognize that violations of Regulation Z may give rise to statutory damages under certain circumstances. *Schnall v. HSBC Bank Nevada, N.A.*, 2013 WL 1100769, at *5 (S.D.N.Y. Mar. 18, 2013) (“this ruling is not equivalent to a ‘blanket prohibition’ of statutory damages for all violations of Regulation Z”); *Kelen v. World Fin. Network Nat’l Bank*, 763 F. Supp. 2d 391, 393 (S.D.N.Y. 2011) (“Section 1640(a) says that statutory damages are available ‘only’ for violations of enumerated subsections *and rules*”) (emphasis added) (quoting *Brown v. Payday Check Advance, Inc.*, 202 F.3d 987, 991-92 (7th Cir.2000)).

that a violation of Regulation Z should be treated as a violation of TILA. It also ignores the Supreme Court's longstanding observation that § 1640 "applies both to the failure to disclose information specifically required by the statute and to the failure to abide by regulations promulgated by the [agency] to govern such disclosure." *Mourning*, 411 U.S. at 376 n.41; see *also id.* at 376 ("We have noted above that the objective sought in delegating rule making authority to an agency is to relieve Congress of the impossible burden of drafting a code explicitly covering every conceivable future problem. Congress cannot then be required to tailor civil penalty provisions so as to deal precisely with each step which the agency thereafter finds necessary.").

Finally, Comenity Bank incorrectly argues (at 39) that Strubel cannot recover statutory damages because "the Model Form was not promulgated pursuant to section 1637," but under former § 1604(b), which had required the Board to "publish model disclosure forms and clauses for common transactions to facilitate compliance with the disclosure requirements" of TILA. 15 U.S.C. § 1604(b) (2006). Model Form G-3(A), however, imposes no independent requirements on creditors; the creditor obligations at issue in this case are found in § 1637(a)(7) of TILA and in § 1026.6(b)(5)(iii) of Regulation Z. For the reasons stated above, Strubel has standing under § 1640(a) to seek statutory damages for violations of those statutory and regulatory provisions.

In any event, the Bank is incorrect in suggesting that Model Form G-3(A) does not implement § 1637(a)(7). The Board first implemented the FCBA's disclosure requirement in 1975 when it revised Regulation Z to require creditors to provide consumers with "a separate statement containing substantially the following text," which was then set forth in the body of the regulation. 40 Fed. Reg. 43200, 43204 (Sept. 19, 1975). At that time, the Board expressly stated that the regulation was designed "[t]o implement section[] 127(a)(8)" of TILA, which is where § 1637(a)(7) was then codified. *Id.* The Board revised the regulation and created Model Form G-3(A) in 1981 after Congress enacted former § 1604(b) to require the Board to make greater use of model forms and disclosures. 46 Fed. Reg. 20848, 20858-59, 20889 (Apr. 7, 1981). But Congress's general directive to create model forms does not alter the fact that Model Form G-3(A) itself implements § 1637(a)(7), any more than Congress's grant of rulemaking authority to an agency alters the fact that particular rules implement particular statutory provisions. Former § 1604(b) thus has no bearing on Strubel's standing under § 1640(a).

CONCLUSION

For the foregoing reasons, the Court should conclude that 15 U.S.C. § 1640(a) provides Strubel with a cause of action to seek statutory damages for Comenity Bank's alleged violations of 15 U.S.C. § 1637(a)(7) and 12 C.F.R. § 1026.6(b)(5)(iii).

Respectfully submitted,

Dated: December 31, 2015

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**CERTIFICATE OF COMPLIANCE WITH FEDERAL RULE OF
APPELLATE PROCEDURE 32(A)**

I hereby certify that this brief complies with the requirements of Fed.
R. App. P. 32(a)(5) and (6) because it has been prepared in 14-point
Georgia, a proportionally spaced font.

/s/ Nandan M. Joshi
Nandan M. Joshi

CERTIFICATE OF SERVICE

I hereby certify that on December 31, 2015, I electronically filed the foregoing brief with the Clerk of the Court for the United States Court of Appeals for the Second Circuit by using the appellate CM/ECF system. The participants in the case are registered CM/ECF users and service will be accomplished by the appellate CM/ECF system.

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