

1
2
3
4
5
6
7
8 UNITED STATES DISTRICT COURT
9 WESTERN DISTRICT OF WASHINGTON
10 AT TACOMA

11 ROGER J. DEMING,

12 Plaintiff,

13 v.

14 FIRST FRANKLIN, A DIVISION OF
15 NATIONAL CITY BANK; MERRILL
16 LYNCH & CO., INC.; and BANK OF
17 AMERICA CORPORATION;

18 Defendants.

CASE NO. C09-5418 RJB

ORDER GRANTING
DEFENDANTS' MOTION FOR
SUMMARY JUDGMENT AND
DENYING PLAINTIFF'S MOTION
FOR SUMMARY JUDGMENT

19 This matter comes before the Court on cross motions for summary judgment. Dkt. 74 and
20 79. The Court has considered the pleadings in support of and in opposition to the motions and
21 the record herein.

22 **PROCEDURAL HISTORY**

23 On July 10, 2009, Plaintiff Roger Deming filed a complaint against the Defendants First
24 Franklin, Merrill Lynch, and Bank of America alleging that the Defendants' mortgage lending
settlement practices violated the Washington State Consumer Loan Act, RCW 31.04, and the

ORDER GRANTING DEFENDANTS' MOTION
FOR SUMMARY JUDGMENT AND DENYING
PLAINTIFF'S MOTION FOR SUMMARY
JUDGMENT- 1

1 Washington Consumer Protection Act (CPA), RCW 19.86. Dkt. 1. On December 4, 2009, the
2 Plaintiff filed an amended complaint which alleged the Defendants violated the CPA, committed
3 fraud through concealment, negligence, and breach of contract. Dkt. 23.

4 On March 31, 2010, the Court denied Defendants' Fed. R. Civ. P 12(b)(6) motion to
5 dismiss the amended complaint. Dkt. 31. On April 23, 2010, the Court granted Defendants'
6 motion for reconsideration, dismissing Plaintiff's CPA claim. Dkt. 44. The Court held that
7 Plaintiff's claims arising under the Washington Consumer Protection Act were preempted by the
8 National Banking Act (NBA) and implementing regulations. Dkt. 44 pp. 5-7. See *Martinez v.*
9 *Wells Fargo Home Mortgage, Inc.*, 598 F.3d 549 (9th Cir. 2010)(California Unfair Competition
10 Law preempted by the NBA).

11 On September 8, 2011, the Court granted Plaintiff's unopposed motion to file a second
12 amended complaint. Dkt. 57. This complaint removed the dismissed CPA claim and included
13 additional causes of action. Dkt. 55. The second amended complaint states as causes of action:
14 (1) fraud through concealment, (2) negligence, (3) negligence as a matter of law, (4) breach of
15 contract, and (5) unjust enrichment. Dkt. 58. The complaint states that the action arises from
16 First Franklin's residential mortgage lending settlement practices. Dkt. 58 pp. 1. Plaintiff
17 specifically contests the administration and compliance review fees charged by First Franklin as
18 part of two mortgages obtained by Plaintiff in December 2006. Dkt. 58 pp. 3. Plaintiff claims
19 that these fees are unlawful under Washington Consumer Loan Act, RCW 31.04.105, and
20 implementing regulations, or in the alternative, that Plaintiff received no value in exchange for
21 the fees due to their illegality. Dkt. 58 pp. 3-6. Merrill Lynch and Bank of America are named
22 Defendants as successors-in-interest to First Franklin. Dkt. 58 pp. 6.

1 **FIRST FRANKLIN MOTGAGE SETTLEMENT PRACTICES**

2 In December 2006 Plaintiff and his then wife Robyn applied for financing to purchase a
3 home located at 5443 Anton Court SE, Olympia, Washington 98501. Dkt. 81-2 pp. 2-7. On
4 December 13, 2006, Plaintiff and his wife executed an Adjustable Rate Note payable to First
5 Franklin in the original principal sum of \$202,400.00 (senior loan) and a Fixed Rate Note
6 payable to First Franklin in the original principal sum of \$50,600.00 (junior loan). Dkt. 81-3 pp.
7 2-13. Both notes were secured by Deeds of Trust on the Property in favor of First Franklin. Dkt.
8 81-4 and 81-5. Plaintiff defaulted on the loan payments. Dkt. 81-1 pp. 6-7.

9 In connection with the senior loan, First Franklin received out of the close of escrow a
10 \$795 administrative fee and a \$15 compliance review fee. In connection with the junior loan,
11 First Franklin received out of the close of escrow a \$350 administrative fee and a \$15
12 compliance review fee. Dkt. 81-2 pp. 2-7. The administrative fees covered tasks performed by
13 First Franklin associated with funding the loan, such as underwriting and generating and
14 reviewing loan documentation. Dkt. 81-6. The compliance review fees covered a payment to
15 Mavent, Inc., a third party company that provided compliance review software to lenders. *Id.*
16 Mavent reviewed First Franklin loans for compliance with applicable state and federal laws. *Id.*

17 Defendants Merrill Lynch and Bank of America are successors-in-interest to First
18 Franklin. Dkt. 81-7 pp. 2-4.

19 It is assessment of these administrative and compliance review fees that form the basis of
20 this suit. Plaintiff asserts that these fees were collected in violation of the Washington Consumer
21 Loan Act and its implementing regulations and thus, the Defendants are liable for fraud through
22 concealment, negligence, breach of contract, and unjust enrichment.

23 Both Plaintiff and Defendants move for summary judgment.

1 248. The mere existence of a scintilla of evidence in support of the party's position is
2 insufficient to establish a genuine dispute; there must be evidence on which a jury could
3 reasonably find for the party. *Id.* at 252.

4 WASHINGTON CONSUMER LOAN ACT

5 The Consumer Loan Act (CLA) was enacted by the Washington legislature in 1991. See
6 RCW 31.04.005 through 31.04.902. Recognizing that borrowers with poor credit ratings have a
7 difficult time obtaining loans at allowable rates, the legislature enacted the CLA to “authorize
8 higher interest rates for certain types of loans, subject to the conditions and limitations contained
9 in this chapter in order to ensure credit availability.” RCW 31.04.005; *Bell v. Muller*, 129 Wn.
10 App. 177, 186-87, 118 P.3d 405, 410 (2005), *review denied*, 158 Wn.2d 1002, 143 P.3d 828
11 (2006). A person licensed under the CLA may lend money at a rate that would otherwise violate
12 Washington's usury statute, up to a rate that does not exceed 25 percent per annum, so long as
13 they are licensed under the CLA. RCW 31.04.105(1).31.04.025 sets forth the specific loans to
14 which the CLA applies. At the time of Plaintiff's loans, it provided:

15 Each loan made to a resident of this state by a licensee is subject to the
16 authority and restrictions of this chapter . . . This chapter shall not apply to
17 any person doing business under and as permitted by any law of this state or
18 of the United States relating to banks, savings banks, trust companies, savings
19 and loan or building and loan associations, or credit unions [.]

18 On June 21, 2011, the statute was amended to read:

19 (1) Each loan made to a resident of this state by a licensee, or persons
20 subject to this chapter, is subject to the authority and restrictions of this
21 chapter . . .

21 (2)(a) This chapter does not apply to the following:

22 ***

23 (2) Any person doing business under, and as permitted by, any law of this
24 state or of the United States relating to banks, savings banks, trust companies,
savings and loan or building and loan associations, or credit unions.

1 RCW 31.04.025.

2 The Department of Financial Institutions (DFI) adopted regulations to implement the
3 CLA. WAC 208-620-560, which was in effect at the time of Plaintiffs' loans, stated:

4 What restrictions are there for charging fees on junior lien loans other than the
loan origination fee when acting as a lender or correspondent lender?

5 * * *

6 (7) Administrative fees. A licensee may not collect a document
preparation fee, a processing fee or a courier fee unless paid to an unrelated
7 third party and agreed to in advance by the borrower.

8 Effective January 23, 2009, the regulation was amended to read:

9 What fees are not allowed under the Consumer Loan Act?

10 * * *

11 (6) Administrative fees. On nonmortgages, junior lien and first lien mortgages
by licensees who are not 'creditors' under the Depository Institutions
Deregulatory and Monetary Control Act, you must not collect a document
preparation fee, a processing fee, an administrative fee, an application fee, or a
12 courier fee unless paid to an unrelated third party and agreed to in writing in
advance by the borrower.

13 WAC 208-620-560(6) (2009)

14 Prior to 2005, First Franklin held a CLA license issued by the DFI. Dkt. 81-8 pp. 9. In
15 January of 2005, about two years prior to Plaintiff's loans, all outstanding stock of First Franklin
16 was purchased by National City Bank of Indiana, a national bank. Dkt. 81-7 pp. 3.
17 Concurrently, First Franklin surrendered its DFI license. Dkt. 81-8 pp. 1-13. Thus, at the time
18 Plaintiff obtained this financing in 2006, First Franklin was a wholly owned subsidiary of
19 National City Bank and did not have a DFI license.

20 In this case, it is undisputed that at the time of this mortgage loan transaction First
21 Franklin was not licensed under the CLA. At the time of Plaintiff's loans, the CLA provided:
22 "Each loan made to a resident of this state by a licensee is subject to the authority and restrictions
23 of this chapter ..." RCW 31.04.025.

1 According to the plain language of the CLA, it only applies to loans made by a licensee.
2 Licensing under the CLA is voluntary. *Bell v. Muller*, 129 Wn. App. 177, 187–88, 118 P.3d 405,
3 410 (2005), *review denied*, 158 Wn.2d 1002, 143 P.3d 828 (2006). A lender that makes loans at
4 a rate that exceeds Washington's usury statute without a license potentially violates the state's
5 usury statute, not the CLA. *Id.*

6 In this case it is undisputed that First Franklin was not licensed under the CLA at the time
7 the loans were made to Plaintiff. Only licensees are subject to the authority and restrictions of
8 the CLA. Accordingly, at the time of the execution of Plaintiff's loans, First Franklin was not
9 subject to the CLA or its implementing regulations. First Franklin was not subject to the CLA
10 regulations governing mortgage settlement fees and the common law causes of action premised
11 on a violation of the statute and its regulations cannot be maintained.

12 In acknowledgement of this analysis, Plaintiff argues that the loan transaction is subject
13 to the CLA as amended in 2011. In July of this year, RCW 31.04.025 was amended to provide
14 that its provisions apply to “[e]ach loan made to a resident of this state by a licensee, *or persons*
15 *subject to this chapter ...*”

16 Plaintiff asserts that this language brings First Franklin within the scope of the CLA.
17 This argument lacks merit. First, there is nothing in this language that provides that First
18 Franklin is a “person subject to this chapter.” Second, Plaintiff seeks retroactive application of
19 the statute. Retroactive application of an amendment is proper only under certain circumstances.
20 A statute applies prospectively unless it is curative or remedial in nature or unless the legislature
21 provides for retroactive application. *Densley v. Department of Ret. Sys.*, 162 Wn.2d 210, 223,
22 173 P.3d 885 (2007); *Loeffelholz v. University of Washington*, 162 Wn.App. 360, 368, 253 P.3d
23 483 (2011). A remedial statute is one which relates to practice, procedures, and remedies.

1 *Loeffelholz*, at 368; *State v. McClendon*, 131 Wn.2d 853, 861, 935 P.2d 1334 (1997). A curative
2 amendment is one that clarifies or technically corrects an ambiguous statute. *Loeffelholz*, at 368-
3 69; *Washington State Farm Bureau Fed'n v. Gregoire*, 162 Wn.2d 284, 303, 174 P.3d 1142
4 (2007). The amendment to RCW 31.04.025 was neither remedial nor curative. Further, a statute
5 which creates a new right of action applies prospectively only. *Loeffelholz*, at 369; *Johnston v.*
6 *Beneficial Mgmt. Corp. of America*, 85 Wn.2d 637, 641, 538 P.2d 510 (1975).

7 Here, Plaintiff attempts to assert a cause of action premised on an amendment to a statute
8 that previously imposed no duty on these Defendants. The rules of retroactivity prohibit such
9 construction of the statute.

10 The First Franklin loans are not subject to the CLA and Plaintiff cannot premise a cause
11 of action for violation of the Act or its implementing regulations.

12 An additional basis for dismissal of Plaintiff's claims is the specific exemption of banks
13 subject to federal regulation from operation of the CLA. At the time of the Franklin loans, RCW
14 provided:

15 ***This chapter shall not apply to any person doing business under and as permitted by***
16 ***any law of this state or of the United States relating to banks***, savings banks, trust
companies, savings and loan or building and loan associations, or credit unions [.]

17 RCW 31.04.025 (emphasis added). This exemption remains in the statute as amended. See
18 RCW 31.04.025(2)(a).

19 At the time of Plaintiff's loans, First Franklin was a wholly owned subsidiary of a
20 national bank, National City Bank. As a national bank, National City Bank was federally
21 regulated by Office of the Comptroller of the Currency (OCC). Dkt. 81-9. As a wholly owned
22 subsidiary of a bank, First Franklin was therefore subject to OCC governance, not to the CLA or
23 regulations of the DFI. See, *Watters v. Wachovia Bank, N.A.*, 550 U.S. 1 (2007)(Wachovia's

1 mortgage business, whether conducted by the bank itself or through the bank's operating
2 subsidiary, is subject to OCC's superintendence, and not to the licensing, reporting, and visitorial
3 regimes of the several states in which the subsidiary operates). The Franklin loans were subject
4 to OCC governance and exempt from operation of the CLA. Plaintiff cannot premise causes of
5 action on a violation of the CLA or its regulations.¹

6 CONCLUSION

7 Defendants have presented this Court with law that conclusively establishes that the
8 Washington Consumer Loan Act and its regulations did not apply to First Franklin, both because
9 they did not apply to entities such as First Franklin operating under federal banking law, and
10 because they only applied to licensees of the Department of Financial Institutions, which First
11 Franklin was not. All of Plaintiff's claims are premised on a violation of the CLA and/or its
12 regulations. There being no violation of the CLA or its regulations, the Defendants are entitled
13 to summary judgment.

14 Therefore, it is hereby **ORDERED**:

- 15 1. Plaintiff's Motion for Summary Judgment (Dkt. 79), incorporating Motion for Partial
16 Summary Judgment (Dkt. 56) is **DENIED**.
- 17 2. Defendants' Motion for Summary Judgment (Dkt. 74) is **GRANTED**.
- 18 3. All remaining motions (Dkt. 59, 60, and 70) are **DENIED** as **MOOT**.
- 19 4. Plaintiff's claims are **DISMISSED** in their entirety.

21
22 ¹ This Court previously dismissed Plaintiff's claim for violation of the Washington
23 Consumer Protection Act on the ground the claim was preempted by federal law. Dkt. 44.
24 Although not raised or addressed in this Order, it appears that application of the CLA would
similarly be preempted by federal law. See *Martinez v. Wells Fargo Home Mortgage, Inc.*,
598 F.3d 549 (9th Cir. 2010),

1 Dated this 8th day of November, 2011.

2 

3
4 ROBERT J. BRYAN
United States District Judge