

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO. 09-23507-CIV- GOLD/MCALILEY

FEDERAL TRADE COMMISSION,

Plaintiff,

vs.

KIRKLAND YOUNG, LLC, a limited
liability company, and
ATTORNEY AID, LLC a limited liability
company, DAVID BOTTON, APRIL BOTTON
KRAWIECKI, AND SAMY BOTTON

Defendants.

**DEFENDANTS DAVID BOTTON AND APRIL BOTTON
KRAWIECKI'S RESPONSE TO RECEIVER'S MOTION
FOR INSTRUCTIONS CONCERNING
THE WINDING DOWN OF KIRKLAND YOUNG, LLC**

Defendants David Botton, and April Botton Krawiecki ("Defendants") by and through their counsel, file and serve their response to the Receiver's Motion for Instructions Concerning the Winding Down of Kirkland Young, LLC, (Dkt. 117) and state:

The issue before the Court is a narrow one. Should the Receiver be permitted to fulfill the contractual obligations of Kirkland Young and Attorney's Aid to continue to process loan modifications for 123 non-Florida residents over the informal objections of the Florida Attorney General? Specifically, the customers have paid their initial fees and

in many circumstances made monthly payments to escrow accounts to build cash reserves that were intended to be used to induce the lenders to enter into loan modification or forbearance agreements.¹

It is not apparent why the Florida Attorney General has not chosen to intervene in this action and have its views heard in a formal context rather than its communications with the Receiver. The FTC seems to have deferred to the Florida Attorney General's position that any transaction that purportedly violated §501.1377, payments for mortgage modification services, makes such contracts void even for homeowners in states other than Florida. This reasoning is applied even to the Receiver and presumably even over the vigorous objections of the consumers who will otherwise risk losing a significant portion of their escrow account based upon the position of the FTC that such funds should be distributed *pro rata*. Presumably, the Florida Attorney General and the FTC take the position that the Receiver must breach the contracts, even when the consumers will suffer significant consequential injury that is not even theoretically recoverable under FDUTPA. See *Rodriguez v. Recovery Performance & Marine*, ____ So. 2d ____, 35 Fla. L. Weekly, D1122(a) (Fla. 3d DCA, May 19, 2010). (Consequential damages are not available under FDUTPA).

The informal intervention by the Florida Attorney General reveals the fundamental due process issues associated with this case. First, both the FTC and the

¹ The contracts also permitted, subject to the written approval of the customer, that Kirkland Young, LLC's "back-end" fee be paid from those funds. Certain administrative fees were deducted pursuant to the contract.

Florida Attorney General seek consumer redress for the same class of consumers-anyone in the country who dealt with the Defendants whether they received satisfactory services or not. Presumably, no consumer is bound by the results in either case because none have joined the action, and neither the FTC or the Florida Attorney General have sought to rely on Rule 23, Fed. R. Civ. Proc.

Second, the Receiver's motion illustrates that customers have obtained real value in the Defendants' mortgage modification services. It is significant that the consumer modifications obtained were by the use of the same personnel employed by Defendant Kirkland Young. *See* Receiver's Motion for Instructions Concerning the Winding Down of Kirkland Young, LLC, (Dkt. 117), p. 4. The Receiver explicitly states "that in winding down of the affairs of Kirkland Young, LLC, that the work has been performed by the Receiver and his staff of five former Kirkland Young employees (Senior Loan Processor.)" *Id.* at p. 4. If given the opportunity, Defendants would show that it obtained loan modifications at a substantially higher rate than the Receiver, and provided substantial benefits to many consumers.

However, the Florida Attorney General and the FTC simply ignore the reality that many consumers got what they paid for when they contracted with Kirkland Young. The FTC takes the position that causation and injury in fact are irrelevant to the issue of consumer redress since same transactions were "tainted" by phone messages that directed consumers to Kirkland Young. Under the FTC's theory, it has no obligation to prove causation, injury, or that misrepresentations occurred as to each consumer. Implicit in

this position, is the value of services provided is irrelevant and consumers were legally unable to ratify the contracts under any circumstances.

As the Receiver points out, none of the current customers being processed are Florida residents and from 2008, Defendants did not actively market to Florida customers. *See* Receiver's Motion for Instructions Concerning the Winding Down of Kirkland Young, LLC, (Dkt. 117), p. 4. It is also clear that § 501.1377 was not intended to have extra-territorial effect and was intended to protect only Florida homeowners. Receiver's Reply Memorandum, Dkt. 127, pp. 4-5; § 501.1377(1). Why should Florida policy dictate whether Oregon consumers are allowed to pay an "up front" charges for loan modification services? The statute itself clearly evidences its intention to apply only to Florida residents. This is shown by the exclusions which include: (1) A person excluded under § 501.212 which refers to activities or persons regulated by certain state agencies. *See* § 501.212(4)(a) (the Office of Insurance Regulations of the Financial Services Commission); § 501.212(4)(d) (former Department of Insurance which are now administered by the Department of Financial Services); § 501.212(6) any act or practice involving the sale, lease, rental, or approval of real estate by a person licensed, certified, or registered pursuant to Chapter 475, which Act or Practice violates § 475.42 and § 475.626. Clearly, these state exclusions evidence an intention to limit the coverage to Florida homeowners. This point is made even clearer by § 501.1377(2)(b)(7), which excludes "an attorney licensed to practice law in this state who provides foreclosure

rescue related services as an ancillary matter to the attorney's representation of the homeowner as a client." (emphasis added).

The FTC has deferred to the Florida Attorney General who has sued the same parties and others in the state suit. The inference of the FTC's position is that the state case should resolve the question of violations of § 501.1377. However, the same consumer redress is sought in both cases and the Court must exercise control of all claims against the entities in receiverships.

CONCLUSION

The Florida Attorney General's position, which the FTC has accepted, would create substantial consumer hardship, severely injure consumers who funded "escrow" accounts based upon written contracts, and stop in mid-stream serious efforts to assist consumers who face foreclosure or immediate sale. Further, the Attorney General bases its position on the incorrect conclusion that § 501.1377 has extraterritorial application. Such a result is inconsistent with the clear language of the statute.

The Defendants respectfully suggest that the Attorney General intervene in some capacity or as *amicas curia* in this case, so consistent judgments can be obtained, and end the absurdity of two government agencies spending resources to obtain redress for the same consumers from limited resources. Finally, the Receiver is clearly entitled to clear direction on its duties under the Act. The Defendants suggest a joint mediation with all parties to resolve this matter so limited resources are applied in the most equitable manner practical and are not consumed by litigation expenses.

Respectfully submitted,

/s/ Douglas B. Brown

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CERTIFICATE OF SERVICE

WE HEREBY CERTIFY that on the 20th day of May, 2010, we electronically filed the foregoing with the Clerk of the Court by using the CM/ECF system which will send a notice of electronic filing to: Chris Couillou at ccouillou@ftc.gov; Sana C. Chriss at schriss@ftc.com; Amanda Maxwell at amaxw@aol.com; David B. Rothman at DBR@RothmanLawyers.com; Arthur Rosenberg at arr@arosenberg.com; George Rudd at george.rudd@myfloridalegal.com; Richard Wayne Epstein at richard.epstein@gmlaw.com; Gregory R. Brthelette at george5252@hotmail.com;

Richard Sharpstein at ras@jordenusa.com; David B. Rosemberg at drosemberg@broadandcassel.com; and Mark F. Raymond at MRaymond@BroadandCassel.com. We also certify that all above counsel received the foregoing via email this 20th day of May, 2010.

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