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COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON
By _____

No. 329429

**THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION III**

ISIB, LLC

Respondent

v.

MARLENA HIMES,

Appellant.

APPELLANT'S BRIEF

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I. **INTRODUCTION**

Appellant, Marlena Himes (“Ms. Himes”), appeals from the trial court order granting summary judgment to respondent, ISIB, LLC (“ISIB”), denying her motion for partial summary judgment, and striking her defenses to ISIB’s action in replevin for breach of a retail installment sales contract for the purchase of her manufactured home. The trial court essentially found that because ISIB was a holder in due course of the retail installment sales contract, Ms. Himes was prohibited from asserting any defenses or counterclaims against ISIB. However, RCW 63.14.020 provides that when a retail installment sales contract is sold or assigned to a third party, as occurred here, the third party is not insulated from any right of action or defense which the buyer may have against the original retail seller, and each such promissory note or other evidence of indebtedness shall contain a statement to that effect.

The trial court erred as a matter of law when it refused to apply RCW 63.14 and entered judgment in favor of ISIB against Ms. Himes. Ms. Himes asks this court to reverse that error, find that the holder in due course doctrine does not apply to retail installment contracts, and reverse the judgment.

II. ASSIGNMENTS OF ERROR

The trial court erred in granting ISIB's motion for summary judgment, denying Ms. Himes' motion for summary judgment, and striking her counterclaims and defenses because it:

1. Erroneously applied RCW 62A.3-104 instead of RCW 63.14, to the retail installment contract Ms. Himes signed on June 7, 2007;
2. Failed to find that under RCW 63.14.145 as an assignee, ISIB is liable for the original violations of the consumer protections afforded by RCW 63.14;
3. Erroneously concluded that the consumer protections available under RCW 63.14.158 did not apply because of the 2013 refinancing of the retail installment contract; and
4. Failed to determine the statutory defenses, damages, fees and costs due to Ms. Himes by operation of RCW 63.14.

III. **ISSUES PERTAINING TO ASSIGNMENTS OF ERROR**

1. Does RCW 63.14 govern retail installment contracts entered into in Washington? (Assignment of Error 1.)
2. Does a retail installment contract sold, transferred or assigned to a third party remain a retail installment contract for purposes of RCW 63.14? (Assignment of Error 2.)
3. Does the ultimate holder of a retail installment contract insulate itself from the statutory defenses, counterclaims, statutory damages, and fees available against the original holder by the maker? (Assignment of Error 3.)
4. Does a retail installment contract lose the protections of RCW 63.14 when a promissory note executed in connection therewith is refinanced? (Assignment of Error 4.)

IV. **STATEMENT OF THE CASE**

Sun Pacific Homes LLC (“Sun Pacific”) was regularly engaged in the business of making retail sales of manufactured homes to retail buyers for use as personal residences, and was a vehicle dealer as defined by RCW 46.70.011(17)(b) and RCW 46.70.260. CP 13. Sun Pacific regularly sold manufactured homes using an installment sale agreement that required more than four installment payments, and imposed an interest

charge. *Id.* On June 7, 2007, Ms. Himes bought a used manufactured home from Sun Pacific to use as a home for her family. CP 24-36. Sun Pacific offered her a retail installment sale contract, as defined by and subject to the Retail Installment Sales of Goods and Services Act, RCW 63.14 (“RISA”), for the purchase. CP 24-32.

Sun Pacific’s retail installment sale contract was a standard, boilerplate form selected and required by Sun Pacific. Sun Pacific’s contract “total purchase price” was \$49,950, (meeting the definition of “sale price” described in RCW 63.14.010(14)). Sun Pacific also imposed a “service charge” as defined by RCW 63.14.010(15) of 12 percent interest. Sun Pacific set monthly payments at \$300 for a ten-year term and included the principal and service charge. CP 24-32. Ms. Himes paid \$30,000 towards the purchase price of the manufactured home and \$1,383.89 in various fees. *Id.* A promissory note and security agreement were signed contemporaneously with the contract for sale to finance and secure the remaining sale price of \$19,500. CP 27-32.

The Isaacson Revocable Trust purchased the contract in December 2007 and Sun Pacific assigned the retail installment contract, security agreement and promissory note to the Trust. CP 6. The Isaacson Revocable Trust subsequently assigned the promissory note to ISIB. CP 2, 51. ISIB stands for “Isaacson Siblings.” *Id.*

In 2013, after paying approximately \$51,439.26 to the holders of the retail installment contract, Ms. Himes fell behind on the monthly installment payments under the retail installment contract. ISIB refinanced the 2007 promissory note, adding the past due interest payments to the principal of the new promissory note. CP 10. However, Ms. Himes' financial situation remained unchanged, and she was immediately in default.

ISIB brought suit against Ms. Himes for breach of contract and replevin. CP 1-4. In her verified answer Ms. Himes asserted numerous violations of RCW 63.14. CP 11-38. These violations provided Ms. Himes with defenses that completely barred ISIB's recovery. CP 11-22. ISIB brought a motion for summary judgment arguing that its 2013 refinance of the 2007 promissory note was a "novation" that insulated it from the illegality of the 2007 retail installment sales contract, or in the alternative, it was a holder in due course and similarly insulated from the bad conduct of Sun Pacific. CP 39-49. Ms. Himes also moved for summary judgment asking the trial court to find that RISA had eliminated the holder in due course doctrine as to retail installment contracts, that the refinancing of the 2007 promissory note had no effect on the consumer protections afforded by RCW 63.14, and to apply the statutory defenses and damages of RCW 63.14. CP 204-215. No party disputes that the retail installment

sales contract between Sun Pacific and Ms. Himes violates RCW 63.14. CP 108. The trial court granted summary judgment in favor of ISIB. CP 256-257. Ms. Himes timely appealed. CP 254-255.

V. **SUMMARY OF ARGUMENT**

Ms. Himes asks this court to find that the consumer protections required by RISA, apply to the transactions at issue in this case. RISA specifically eliminated the holder in due course defense for covered transactions between retail buyers and retail sellers. RCW 63.14.020; the U.C.C. prohibits an assignee from claiming defenses available to Holders in Due Course, RCW 62A.3-106(d); and the U.C.C. states where required consumer warnings are omitted, the account debtor may assert against an assignee those claims and defenses that would have been available if the record included such a statement, RCW 62A.9A-403(d). As a result, RISA bars ISIB's claims for additional fees beyond the sales price and permits Ms. Himes to obtain statutory damages, fees and costs.

RISA governs all retail installment contracts in Washington. Even after a buyer signs a retail sales installment contract, the contract maintains its character as a retail installment contract. The retail seller may not change the character of the contract, and strip the retail buyer of the protections of RCW 63.14 by assigning the contract to a new holder. RISA also prohibits splitting off the promissory note for separate enforcement to

evade the consumer protections afforded by RISA. RCW 63.14.020.

“Every retail installment contract shall be contained in a single document which shall contain the entire agreement of the parties including any promissory notes or other evidences of indebtedness between the parties relating to the transaction.” *Id.*

ISIB may not rely on the “holder in due course” defense because RCW 63.14 specifically eliminated that defense. The U.C.C. also permits the retail buyer to assert any defenses and counterclaims against any person attempting to enforce the retail installment contract to the same extent she could against the original retail seller. The retail seller’s intentional or negligent omissions of the statutory disclosures required by RISA do not affect the retail buyer’s rights and a subsequent purchaser of the retail sales installment contract stands in the shoes of the initial seller.

VI. ARGUMENT

Courts of Appeal review a grant of summary judgment *de novo*, engaging in the same inquiry as the trial court. *Auto. United Trades Org. v. State*, 175 Wn.2d 537, 541, 286 P.3d 377 (2012). Summary judgment is proper when no genuine issues of material fact remain and the moving party is entitled to judgment as a matter of law. CR 56(c); *Huff v. Budbill*, 141 Wn.2d 1, 7, 1 P.3d 1138 (2000). Summary judgment is appropriate if reasonable persons could reach but one conclusion. *Trimble v. Wash. State*

Univ., 140 Wn.2d 88, 93, 993 P.2d 259 (2000). The trial court, applying this standard, should have granted Ms. Himes' motion for summary judgment and denied ISIB's motion.

As was the case below, the only issue before the court is whether the consumer protections of RISA apply. The court should look to the statute's plain language to give effect to the legislative intent. *Calhoun v. State*, 146 Wn. App. 877, 885, 193 P.3d 188 (2008). The trial court erred when it reached the conclusion that ignored both RISA and the U.C.C. It effectively found that clearly drafted consumer protections mandated by the legislature in RISA could be evaded by retail sellers and that the penalty for their illegal acts should be borne by retail buyers, the very class of people meant to be protected. This is a defining legal error.

A. **The consumer protections contained in the Retail Installment Sales of Goods and Services Act, RCW 63.14, apply to this contract.**

RISA applies to every transaction where a contract is "entered into or performed in this state for a retail installment transaction."

RCW 63.14.010(11). A "retail installment transaction" means, any transaction in which a (1) retail buyer, (2) purchases goods, (3) from a retail seller, (4) under a retail installment contract, (5) that provides for a service charge, and (6) under which the buyer agrees to pay the unpaid principal balance in one or more installments. RCW 63.14.01(12). The

evidence is undisputed that Ms. Himes was a retail buyer¹ who purchased goods² under a retail installment contract from Sun Pacific, a retail seller³ as defined by RISA.

RCW 63.14 sets out comprehensive consumer protections in RISA transactions. If a retail seller—including an assignee⁴—violates RISA, RISA prohibits it from collecting interest, fees, costs or attorney fees from the purchaser. RCW 63.14.180. A seller cannot avoid the consequences of a RISA violation by assigning the contract to another to collect or by refinancing the underlying promissory note. *See In re Paradise Palms Vacation Club*, 41 B.R. 916, 922 (D. Haw. 1984). ISIB, as the assignee of a RISA contract, is responsible for the RISA violations on the face of that contract. *Id.* An assignment does not allow a third party purchaser to escape the illegality of the underlying retail installment contract. *Lookebill v. Mom's Mobile Home, Inc.*, 16 Wn. App 817, 823, 559 P.2d 600, 604 (1977)(“the burden of compliance lays on defendants under the Act.”) Therefore, for Ms. Himes to defeat ISIB’s claim, she must only show that

¹ "Retail buyer" or "buyer" means, in pertinent part, a person who buys or agrees to buy goods from a retail seller. RCW 63.14.01(9).

² "Goods" means all chattels personal when purchased primarily for personal, family, or household use. RCW 63.14.01(2).

³ "Retail seller" or "seller" means a person engaged in the business of selling goods or services to retail buyers. RCW 63.14.01(13).

⁴ The holder of a retail installment contract or contracts may, upon agreement in writing with the buyer, refinance the payment of the unpaid time balance or balances of the contract or contracts by providing for a new schedule of installment payments. RCW 63.14.158

the underlying retail installment contract violated RISA. *Id.* As set forth below, this is a standard she easily meets.

1. The 2007 Retail Installment Contract violated RISA.

ISIB concedes that the 2007 retail installment contract entered into between Sun Pacific and Ms. Himes violated RISA, CP 108. The retail installment contract violated RCW 63.14.020 by not containing (1) the entire agreement of the parties including the promissory note in one document and (2) not containing the required notice that assignment would not cut off any right of action or defense which the buyer may have against the seller.

That any such promissory note or other evidence of indebtedness executed by the buyer shall not, when assigned or negotiated, cut off as to third parties any right of action or defense which the buyer may have against the seller, and each such promissory note or other evidence of indebtedness shall contain a statement to that effect.

RCW 63.14.020

RISA “uses the term ‘shall’”, indicating a clear legislative intent to create an affirmative duty of compliance by the seller. See RCW 63.14.020. “The plain language of RCW 63.14.020 does not condition the consumer protection upon inclusion of the warning, nor does it place the inclusion of the warning on the consumer's shoulders.” *In re Paradise Palms Vacation Club* at 921. “The requirements of the Act are clear and unambiguous, limiting courts from engrafting exceptions to such

provisions.” *Lookebill v. Mom's Mobile Homes, Inc.*, 16 Wn. App. 817, 821, 559 P.2d 600, 603 (1977); (citing *State ex rel. Hagan v. Chinook Hotel, Inc.*, 65 Wn.2d 573, 399 P.2d 8 (1965); *Ransom v. South Bend*, 76 Wash. 396, 136 P. 365 (1913)).

The retail installment sale contract also violated RCW 63.14.040 because it failed to make disclosure of specific terms and language, in the sequence and format required by RCW 63.14.040(1) (See A-1) and to provide specific warnings and notice of rights in language required by RCW 63.14.040(2). (See A-2).

Finally, the retail installment sale contract imposed upon and collected from the Ms. Himes a service charge in excess of the disclosed 12 percent rate, in violation of RCW 63.14.130. A 12 percent service charge rate applied to a \$19,950 principal balance requires a monthly installment payment of only \$286.22 to fully amortize the unpaid principal and interest over a 10 year term. CP 34-38. However, this retail installment sale contract required monthly installments of \$300 per month, a payment which actually collects a 13 percent service charge rate. *Id.*

2. Assignees of the retail installment contract are subject to the same defenses that Ms. Himes could assert against Sun Pacific.

ISIB and its predecessor in interest, the Isaacson Revocable Trust, are assignees of the illegal retail installment sale contract. An assignee

takes a “contract subject to any defenses or setoffs that account debtor may have against creditor/assignor.” *Pacific Northwest Life Ins. Co. v. Turnbull*, 51 Wn. App. 692, 754 P.2d 1262 (1988); *Nancy’s Prod., Inc. v. Fred Meyer, Inc.*, 61 Wn. App. 645, 651, 811 P.2d 250, 254 (1991)(“This general rule is incorporated into CR 13(j) which allows a defendant in a civil action based on an express or implied contract to set off against the assignee “a demand of a like nature” existing against the assignor at the time of the assignment.”)

The court below relied on, but misapplied, *Washington Mut. Sav. Bank v. Saltz*, 34 Wn. App. 679; 663 P.2d 862 (1983) to this case. The *Saltz* case is wholly distinguishable and, in fact, supports the application of RISA to an assignee of a retail installment sale contract in direct line from the original seller. This case involves a retail buyer, a retail seller, the creation of an illegal retail installment sale contract, and the assignment of that retail installment contract. In the *Saltz* case, Mr. Saltz obtained a consumer loan from Washington Mutual and used it to purchase a manufactured home from North Country Mobile Homes. Washington Mutual was the lender the consumer found independently to finance the purchase. Mr. Saltz gave North Country Mobile Homes the entire purchase price, financed by the Washington Mutual loan.

Washington Mutual was a bank, not a “retail seller.” North Country Mobile Homes was the retail seller of consumer goods.

There was no provable connection between Washington Mutual and North Country Mobile Homes. North Country Mobile Homes did not finance the mobile home. There was no joint venture with Washington Mutual for the transaction. The action involved was a foreclosure on the security agreement taken by the bank to secure a promissory note. There was no retail installment contract issued by North Country Mobile Homes. Therefore, the Court of Appeals held that Mr. Saltz had to assert his claims about the retail sale contract against the seller, North County Mobile Homes, because the bank was not a party to the retail sale contract. Mr. Saltz as the buyer was required to assert any consumer protection claims or defenses related to the contract or the mobile home against the retail seller, North Country Mobile Homes. There was no violation of RISA in the *Saltz* case that could be pursued against the independent lender.

However, in the present case, the lender and the seller were one and the same. Sun Pacific Homes entered into a retail installment sale transaction in which a (1) Ms. Himes (a retail buyer), (2) purchased a mobile home (goods), (3) from a Sun Pacific (a retail seller), (4) under a retail installment contract, (5) that provides for a service charge, and

(6) under which the buyer agrees to pay the unpaid principal balance in one or more installments. RCW 63.14.01(12).

Unlike Washington Mutual, ISIB is not a holder of an independently transacted promissory note; instead it stands in direct line of assignment of the retail installment sale contract and the note securing the agreement itself. ISIB does not dispute that Sun Pacific's contract with Ms. Himes violated the consumer protections in RISA. ISIB voluntarily accepted the assignment of a retail installment sale contract, and the obvious violations of RISA were evident on the face of that contract. ISIB now stands in the shoes of the original retail seller "subject to any defenses or setoffs that account debtor may have against creditor/assignor." *Nancy's Prod., Inc.* at 651.

Unlike *Saltz*, no bank (or any party) independently loaned money to Ms. Himes. Ms. Himes paid Sun Pacific \$19,500, and signed a retail installment sale contract to pay the remaining balance at 12 percent interest. The Isaacson Revocable Trust then purchased that retail installment contract from Sun Pacific and assigned it to ISIB. CP 2, 51 Having done so, it also assumes the risk of Sun Pacific's violations of RISA. There is no legal basis for ISIB to avoid the liability for the consumer protection violations that are apparent on the face of the retail

installment contract by refinancing the promissory note executed along with that retail installment contract.

3. ISIB's Argument that it is a holder in due course is unsupported by both Federal and Washington Law.

ISIB asserts that RISA is only applicable to Sun Pacific. ISIB claims that it is a "holder in due course" under the Uniform Commercial Code and therefore exempt from the consumer protections in RISA. However, the U.C.C. requires consumer protections to take precedence over the U.C.C. general terms. The U.C.C. states that if an original retail seller omits required consumer protection notices in its paper, the law will read the contract as if the required notices were there. The U.C.C. is not permitted to be used to undermine consumer protections.

The U.C.C. prohibits an assignee from claiming defenses available to holders in due course. RCW 62A.3-106(d) provides:

"If [the contract, note, or other instrument] contains a statement, required by applicable statutory or administrative law, to the effect that the rights of a holder or transferee are subject to claims or defenses that the issuer could assert against the original payee, the promise or order is not thereby made conditional for the purposes of RCW 62A.3-104(a); but if the promise or order is an instrument, there cannot be a holder in due course of the instrument."

U.C.C. Article 3 defers to Article 4 or Article 9 in questions of interpretation; if there are any conflicts, Articles 4 and 9 govern.

RCW 62A.3-102(b). Here, Article 3 does not discuss how consumer

statutes should be dealt with, or what to do if required consumer protection notices are omitted; therefore, we must look to Article 4 or Article 9. Article 9 tells us that consumer protection laws apply to all transactions:

Applicable consumer laws and other law. A transaction subject to this Article is subject to any applicable rule of law which establishes a different rule for consumers and (1) any other statute or regulation that regulates the rates, charges, agreements, and practices for loans, credit sales, or other extensions of credit and (2) any consumer-protection statute or regulation.

RCW 62A.9A-201(b).

The U.C.C. establishes that retail installment sale contracts must comply with RISA requirements; RISA requires a notice on each instrument stating the consumer's rights and defenses apply no matter who holds the note. Thus, the U.C.C. makes the holder in due course defense unavailable to assignees of retail installment sales contracts. This seems perfectly clear, but the drafters of U.C.C. Article 9 as adopted in Washington, emphasized this point in the official comment to RCW 62A.9A-201(b):

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Subsection (b) is intended to make clear that transactions subject to the Uniform Commercial Code remain subject to other applicable laws relating to consumers, to the regulation of loans and the extension of credit, and to consumer protection, including, without limitation, chapter 19.52 RCW (Interest-Usury), chapter 19.86 RCW (Consumer Protection Act), chapter 31.04 RCW (Consumer Loan Act), and chapter 63.14 RCW (Retail Installment Sales).

It is so universally accepted that Washington Practice, when discussing U.C.C. forms draws it to the attention of a new practitioner who may be unaware:

Washington has a retail installment sale statute, in RCW 63.14. It covers purchase money transactions in “chattels personal when purchased primarily for personal, family or household use and not for commercial or business use ...” RCW 63.14.010(1). Goods of these types will be “consumer goods” in the U.C.C. property classification. See the discussion in Comment 9:1270, Consumer goods.

8 Wash. Prac., U.C.C. Forms 9:1490 COMMENT

It is clear that the U.C.C. incorporates the RISA consumer protections, and prohibits an assignee from relying on the holder in due course doctrine where it purchases paper that contains a statement, required by applicable statutory or administrative law, to the effect that the rights of a holder or transferee are subject to claims or defenses that the issuer could assert against the original payee under RCW 62A.3-104(a). However, in this case, the contract that Ms. Himes signed in favor of Sun Pacific Holmes omitted the statutorily required language. The U.C.C. also addresses the failure to include required statements:

Omission of required statement in consumer transaction. In a consumer transaction⁵, if a record evidences the account debtor's obligation, law other than this Article requires that the record include a statement to the effect that the rights of an assignee are subject to

⁵ “Consumer-goods transaction” means a consumer transaction in which:
(A) An individual incurs a consumer obligation; and (B) A security interest in consumer goods secures the obligation. RCW 62A.9A-102 (24)

claims or defenses that the account debtor could assert against the original obligee, and the record does not include such a statement: (1) *The record has the same effect as if the record included such a statement; and (2) The account debtor may assert against an assignee those claims and defenses that would have been available if the record included such a statement.*⁶

RCW 62A.9A-403(d), emphasis added.

As other courts have ruled, a reading of RISA that would permit a seller and any assignees to avoid its protections by violating what a consumer notice requires is clearly incorrect. *In re Paradise Palms Vacation Club*, 41 B.R. 916, 922 (D. Haw. 1984):

The history of laws such as Washington's Retail Installment Sales Act dictates the alternative reading: that the holder in due course status is absolutely eliminated, and the requirement of the warning to third-party purchasers of consumer paper simply indicates the legislature's determination that third party holders of such consumer paper should be forewarned that they are subject to the buyers rights and defenses. Washington's Retail Installment Sales Act is a risk-shifting statute in that it transfers the burden of seller misconduct from consumer to third-party financier. Any risk that stems from the sellers' failure to include the required warning must devolve onto the third party as well, for to make the consumer bear the risk would contravene the reasoning behind, and nullify the effect of, the entire statute. Once again, it is clear that the third party holder is better able than the consumer to return to the original seller the costs associated with the seller's failure to include the warning.

⁶ **Relationship to Federal Trade Commission Rule.** Subsection (d) is new. It applies to rights evidenced by a record that is required to contain, but does not contain, the notice set forth in Federal Trade Commission Rule 433, 16 C.F.R. Part 433 (the "Holder-in-Due-Course Regulations"). Under this subsection, an assignee of such a record takes subject to the consumer account debtor's claims and defenses to the same extent as it would have if the writing had contained the required notice. Thus, subsection (d) effectively renders waiver-of-defense clauses ineffective in the transactions with consumers to which it applies. RCW 62A.9A-403 Comment 5.

Id.

The law is clear—RISA applies to the note held by ISIB. The lack of the required consumer disclosures has no effect. ISIB is subject to any claims or defenses that Ms. Himes could make based on the illegality of the retail installment sales contract. If ISIB is aggrieved by this situation, it may pursue claims against the assigner of the illegal note, but it may not strip statutory protections from a retail consumer in Washington.

4. The 2013 Retail Installment Contract was a Refinancing Transaction contemplated by RISA and does not permit ISIB to evade the violation of RCW 63.14.040.

No subsequent actions alleged by the ISIB altered the nature of the original transaction as a retail installment sale or varied the application of RCW 63.14. ISIB's reliance on the September 2013 refinancing agreement does not alter the application of RCW 63.14 to these transactions. That agreement could not lawfully, and does not by its terms even purport to strip Ms. Himes of her RISA protections and remedies, including her rights under RCW 63.14.180. RISA expressly contemplates subsequent dealings between buyers and holders of a retail installment sales contract, but does not change the fundamental legal relationship of those parties. In this case, the September 2013 refinancing of the promissory note constitutes a "refinancing agreement," subject to the requirements of RCW 63.14.110 (Consolidation of subsequent purchases with

previous contract) and as defined by RCW 63.14.158. (See A4-6). Even if this court were to accept that a novation occurred, that novation would apply only to the promissory note executed on June 12, 2007 (CP 28-29) not the retail installment contract executed on June 6, 2007 (CP 23-26).

The September 12, 2013 promissory note states it is a “novation of the June 12, 2007, contract.” CP 10. The only legal instrument executed on June 12, 2007 is the 2007 promissory note. CP 29-29. The retail installment contract executed on June 6, 2007 was not referenced in the September 13, 2013 novation. At best, this language is confusing and ambiguous as to which “contract” is refinanced by the 2013 promissory note. “Language is ambiguous if, on its face, it is fairly susceptible to more than one reasonable interpretation.” *Mendoza v. Rivera-Chavez*, 88 Wn. App. 261, 268, 945 P.2d 232. “[A]mbiguous contract language is strictly construed against the drafter.” *Jones Assocs. v. Eastside Properties*, 41 Wn. App. 462, 468, 704 P.2d 681(1985). Therefore, under Washington’s rules of interpretation, the language drafted by ISIB should be strictly construed against ISIB, resolving any ambiguity in favor of Ms. Himes. That is, this court should find that the 2007 retail installment contract was not altered, replaced, or disposed of when ISIB refinanced the underlying 2007 promissory note.

Regardless, RCW 63.14.110 expressly authorizes the holder of a retail installment contract to contract for refinancing, while RCW 63.14.158 specifically permits extending payment terms. However, nothing in the statute exempts refinancing agreements from the general coverage of RISA, or relieves the holder from compliance with the prohibitions and remedies of RCW 63.14.180. In the absence of such a provision, no court may infer a statutory exception to coverage not expressly stated. That conclusion would be contrary to the legislative purpose of RCW 63.14, as holders could otherwise easily launder away the obligations and consumer rights established by RISA simply by requiring the buyer to execute a refinancing agreement that's been labeled a "novation."

The September 2013 refinancing agreement does not contain any clear, conspicuous, or knowing waiver by Ms. Himes of the protections or accrued rights afforded her by RCW 63.14—including her rights under RCW 63.14.180, which allows the court to deem that the contract has been fully paid. The trial court's misapplication of the RISA law to this case thus resulted in the effective deprivation of Ms. Himes' home. Correcting the erroneous ruling entitles Ms. Himes to a declaration that ISIB's lien in her manufactured home was fully satisfied and should be released.

B. ISIB may not recover any amounts from Ms. Himes in excess of the contract price of \$49,950.

RCW 63.14.180 prohibits ISIB from demanding or receiving any service charge, official fees, or any delinquency or collection charge in connection with or arising from the retail installment sales alleged in its complaint. In *Kenworthy v. Bolin*, the Court of Appeals set out an illustrative example of how RISA should apply and provides important guidance for trial courts:

“The statutory remedy for violation of the Retail Installment Sales Act allows the seller to recover the cash price of the goods or services, plus the cost of any insurance, but denies recovery for ‘any service charge, official fees, or any delinquency or collection charge.’

RCW 63.14.180. *The interest charged on the promissory note is within the definition of service charge under RCW 63.14.010(8).* The promissory note which covered the vendees' interest, plus sales tax, was for \$3,739.40 at 12 percent interest. The Kenworthys had paid \$1,174 on the note, and at the time of trial, \$2,754 remained due and owing. It is apparent that a substantial portion of that payment included interest. Because of the violation of the act as noted above, the sellers are not entitled to interest; therefore, the court should have disregarded any interest paid, subtracting the amount paid from the original amount of the note, exclusive of interest and awarded the difference to the sellers. As thus computed, judgment should have been, and is, hereby modified to be \$2,565.40.”

Kenworthy v. Bolin, 17 Wn. App. 650, 655-56, 564 P.2d 835, 838-39 (1977), emphasis added.

Likewise, in this case the ISIB may lawfully recover only the sale price of the manufactured home. The sale price of Ms. Himes's

manufactured home was \$49,950. CP 24. Ms Himes paid \$30,883.89 at the signing of the retail installment sales contract. Since that time, Ms. Himes has paid about 65 monthly installments of \$300, and three monthly installments of \$351.79, totaling approximately \$20,555.37. As of the date ISIB filed its breach of contract action, Ms. Himes had paid a total of approximately \$51,439.26 (\$1,489.26 over the sale price of the manufactured home). Because Sun Pacific's contract violated the consumer protections required in retail sales installment contracts, no one may collect anything beyond the sales prices for the home.

There is no exception; if the original contract violated RISA, neither the seller nor any assignee may collect anything more than the sales price. *Lookebill v. Mom's Mobile Homes, Inc.*, 16 Wn. App. 817, 823, 559 P.2d 600, 604 (1977), *rev. denied* ("While the penalties provided for in RCW 63.14.180 appear harsh in the context of the circumstances of this case, we are bound to follow the legislative enactment.") Therefore, this Court should find that by operation of RISA, Ms. Himes fully paid the 2007 retail installment sales contract, discharging the 2007 promissory note and security agreement. The Court also should award Ms. Himes \$1,489.26 for amounts paid in excess of the sales price. RCW 63.14.180

C. **Ms. Himes is entitled to recover statutory damages, fees⁷ and costs because the ISIB attempted to collect more fees that are statutorily prohibited.**

The service charge in a retail installment sale must be “inclusive of all charges incident to investigating and making the retail installment contract or charge agreement and for the privilege of making the installment payments thereunder.” RCW 63.14.130. Other than the 12⁸ percent service charge, no other fee, expense or charge whatsoever could lawfully be taken, received, reserved, or contracted for from Ms. Himes, save for a “vehicle dealer administrative fee” - if allowed by the terms of RCW 46.68.440(1) - or a “vehicle dealer documentary service fee” - if allowed by the terms of RCW 46.70.180(2). *See* RCW 63.14.130

Because this retail installment sales contract imposed service charges in excess of that permitted by RCW 63.14.130, Ms. Himes is also entitled to recover an amount equal to the total of (1) **twice** the amount of the service charge she has previously paid⁹, **plus** (2) the amount of the

⁷ Attorney Fees, Costs and Litigation Expenses. The trial court has authority to act on claims for attorney fees, costs and litigation expenses. A party may obtain review of a trial court decision on attorney fees, costs and litigation expenses in the same review proceeding as that challenging the judgment without filing a separate notice of appeal or notice for discretionary review. RAP 7.2(i)

⁸ The actual interest rate was 13%. CP 34-38.

⁹ \$10,718.16 (through November 2012) x 2 = \$21,436.32. CP 241.

service charge contracted for and not paid¹⁰, plus (3) costs and reasonable attorney fees¹¹. See RCW 63.14.180.

D. **ISIB's Violation of RCW 63.14 is a per se Violation of Washington's Consumer Protection Act.**

Pursuant to RCW 19.86.020, "Unfair methods of competition and unfair or deceptive acts or practices in the conduct of any trade or commerce are hereby declared unlawful." A Consumer Protection Act claim may be based on a per se violation of a statute, *Salois v. Mutual of Omaha Ins. Co.*, 90 Wn.2d 355, 581 P.2d 1349 (1978). To recover for a per se violation, plaintiffs must prove (1) the existence of a pertinent statute, (2) its violation, (3) that such violation was the proximate cause of damages sustained, and (4) that they were within the class of people the statute sought to protect. *Dempsey v. Joe Pignataro Chevrolet, Inc.*, 22 Wn. App. 384, 393, 589 P.2d 1265 (1979); *Hangman Ridge Training Stables, Inc. v. Safeco title Insurance Company*, 33 Wn. App. 129, 136; 652 P.2d 962 (1982).

It is undisputed that: (1) RCW 63.14 governs retail installment sales of goods; (2) the retail installment contract violated RCW 63.14; (3) its violation caused the damages alleged by Ms. Himes; and (4) retail purchasers were exactly the class of people this statute sought to protect.

¹⁰ \$3,678.79 = (\$14,396.95-\$10,718.16) CP 243.

¹¹ To be submitted

Therefore, this court should find that a violation of RISA is a *per se* violation of the Consumer Protection Act.

E. **Ms. Himes is entitled to Reasonable Attorney Fees on Appeal**

RISA entitles plaintiffs who succeed on their claims to an award of reasonable attorney fees. RCW 63.14.180. The party seeking an award of attorney fees need only meet the burden of proving that such fees are reasonable. *Scott Fetzer Co. v. Weeks*, 122 Wn.2d 141, 151, 859 P.2d 1210 (1993) Under RAP 18.1(a) where “applicable law grants to a party the right to recover reasonable attorney fees or expenses on review before either the Court of Appeals or Supreme Court, the party must request the fees or expenses as provided in this rule.” The court should reverse and vacate the trial court judgment and Ms. Himes should be awarded fees and costs as provided in RISA, the Consumer Protection Act and the 2013 promissory note.¹²

VII. **CONCLUSION**

The consumer protections required by RISA do not evaporate when a retail seller assigns a note for someone else to collect. RISA specifically applies consumer protections to assignees, and requires the

¹² In any action on a contract or lease entered into after September 21, 1977, where such contract or lease specifically provides that attorneys' fees and costs, which are incurred to enforce the provisions of such contract or lease, shall be awarded to one of the parties, the prevailing party, whether he or she is the party specified in the contract or lease or not, shall be entitled to reasonable attorneys' fees in addition to costs and necessary disbursements. RCW 4.84.330

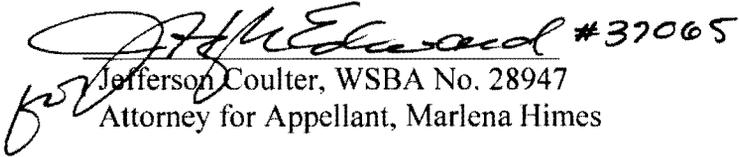
original contract documents to notify consumer and potential assignees that any liability based on RISA violations applies to assignees. The U.C.C. does not allow sellers to violate consumer protections with impunity by allowing their assignees to claim defenses under holder in due course doctrine. In fact, the U.C.C. specifically prohibits just that in order to ensure that those persons in the business of buying commercial paper bear the risk for the quality of the paper they purchase. They are not given a green light to strip valuable consumer protections from Washington consumers.

Ms. Himes respectfully requests that this court reverse the decision of the trial court below and find that the contract in dispute is a retail installment sales contract, subject to the consumer protections set out in RISA, that the holder in due course defense is eliminated in RISA transactions, and that the omission of required language has no effect on a retail consumers rights. Ms. Himes also respectfully requests that this Court find that the violation of RISA is a per se violation of the Consumer Protection Act, declare her purchase price on her home to be fully paid, release the lien that ISIB has asserted and award her attorney fees on appeal pursuant to a cost bill to be submitted per RAP 14.4.

March 6, 2015

Respectfully submitted,

Northwest Justice Project

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APPENDIX

RCW 63.14.040. Retail installment contracts — Contents.

(1) The retail installment contract shall contain the names of the seller and the buyer, the place of business of the seller, the residence or other address of the buyer as specified by the buyer and a description or identification of the goods sold or to be sold, or service furnished or rendered or to be furnished or rendered. The contract also shall contain the following items, which shall be set forth in the sequence appearing below:

- (a) The sale price of each item of goods or services;
- (b) The amount of the buyer's down payment, if any, identifying the amounts paid in money and allowed for goods traded in;
- (c) The difference between items (a) and (b);
- (d) The aggregate amount, if any, included for insurance, specifying the type or types of insurance and the terms of coverage;
- (e) The aggregate amount of official fees, if any;
- (f) The amount, if any, actually paid or to be paid by the retail seller pursuant to an agreement with the buyer to discharge a security interest or lien on like-kind goods traded in or lease interest in the circumstance of a lease for like goods being terminated in conjunction with the sale pursuant to a retail installment contract;
- (g) The principal balance, which is the sum of items (c), (d), (e), and (f);
- (h) The dollar amount or rate of the service charge;
- (i) The amount of the time balance owed by the buyer to the seller, which is the sum of items (g) and (h), if (h) [of this subsection] is stated in a dollar amount; and
- (j) Except as otherwise provided in the next two sentences, the maximum number of installment payments required and the amount of each installment and the due date of each payment necessary to pay such

balance. If installment payments other than the final payment are stated as a series of equal scheduled amounts and if the amount of the final installment payment does not substantially exceed the scheduled amount of each preceding installment payment, the maximum number of payments and the amount and due date of each payment need not be separately stated and the amount of the scheduled final installment payment may be stated as the remaining unpaid balance. The due date of the first installment payment may be fixed by a day or date or may be fixed by reference to the date of the contract or to the time of delivery or installation.

Additional items may be included to explain the calculations involved in determining the balance to be paid by the buyer.

(2) Every retail installment contract shall contain the following notice in ten point bold face type or larger directly above the space reserved in the contract for the signature of the buyer: "NOTICE TO BUYER:

(a) Do not sign this contract before you read it or if any spaces intended for the agreed terms, except as to unavailable information, are blank.

(b) You are entitled to a copy of this contract at the time you sign it.

(c) You may at any time pay off the full unpaid balance due under this contract, and in so doing you may receive a partial rebate of the service charge.

(d) The service charge does not exceed . . . % (must be filled in) per annum computed monthly.

(e) You may cancel this contract if it is solicited in person, and you sign it, at a place other than the seller's business address shown on the contract, by sending notice of such cancellation by certified mail return receipt requested to the seller at his or her address shown on the contract which notice shall be posted not later than midnight of the third day (excluding Sundays and holidays) following your signing this contract. If you choose to cancel this contract, you must return or make available to the seller at the place of delivery any merchandise, in its original condition, received by you under this contract."

Subsection (2)(e) of this section needs to be included in the notice only

if the contract is solicited in person by the seller or his or her representative, and the buyer signs it, at a place other than the seller's business address shown on the contract.

[2012 c 117 § 167; 1999 c 113 § 2; 1981 c 77 § 3; 1972 ex.s. c 47 § 2; 1969 c 2 § 1 (Initiative Measure No. 245, approved November 5, 1968); 1967 c 234 § 3; 1963 c 236 § 4.]

RCW 63.14.110 Consolidation of subsequent purchases with previous contract.

(1) If, in a retail installment transaction, a retail buyer makes any subsequent purchases of goods or services from a retail seller from whom he or she has previously purchased goods or services under one or more retail installment contracts, and the amounts under such previous contract or contracts have not been fully paid, the subsequent purchases may, at the seller's option, be included in and consolidated with one or more of the previous contracts. All the provisions of this chapter with respect to retail installment contracts shall be applicable to such subsequent purchases except as hereinafter stated in this subsection. In the event of such consolidation, in lieu of the buyer's executing a retail installment contract respecting each subsequent purchase, as provided in this section, it shall be sufficient if the seller shall prepare a written memorandum of each such subsequent purchase, in which case the provisions of RCW 63.14.020, 63.14.030, and 63.14.040 shall not be applicable. Unless previously furnished in writing to the buyer by the seller, by sales slip, memoranda, or otherwise, such memorandum shall set forth with respect to each subsequent purchase items (a) to (h) inclusive of RCW 63.14.040(1), and in addition, if the service charge is stated as a dollar amount, the amount of the time balance owed by the buyer to the seller for the subsequent purchase, the outstanding balance of the previous contract or contracts, the consolidated time balance, and the revised installments applicable to the consolidated time balance, if any, in accordance with RCW 63.14.040. If the service charge is not stated in a dollar amount, in addition to the items (a) to (h) inclusive of RCW 63.14.040(1), the memorandum shall set forth the outstanding balance of the previous contract or contracts, the consolidated outstanding balance, and the revised installments applicable to the consolidated outstanding balance, in accordance with RCW 63.14.040.

The seller shall deliver to the buyer a copy of such memorandum prior to the due date of the first installment of such consolidated contract.

(2) When such subsequent purchases are made, if the seller has retained title or taken a lien or other security interest in any of the goods purchased under any one of the contracts included in the consolidation:

(a) The entire amount of all payments made prior to such subsequent purchases shall be deemed to have been applied on the previous

purchases;

(b) The amount of any down payment on the subsequent purchase shall be allocated in its entirety to such subsequent purchase;

(c) Each payment received after the subsequent purchase shall be deemed to be allocated to all of the various time balances in the same proportion or ratio as the original cash sale prices of the various retail installment transactions bear to one another: PROVIDED, That the seller may elect, where the amount of each installment payment is increased in connection with the subsequent purchase, to allocate only the increased amount to the time balance of the subsequent retail installment transaction, and to allocate the amount of each installment payment prior to the increase to the time balance(s) existing at the time of the subsequent purchase.

The provisions of this subsection shall not apply to cases where such previous and subsequent purchases involve equipment, parts, or other goods attached or affixed to goods previously purchased and not fully paid, or to services in connection therewith rendered by the seller at the buyer's request.

[2012 c 117 § 170; 1999 c 113 § 3; 1967 c 234 § 6; 1963 c 236 § 11.]

RCW 63.14.145. Retail installment contracts and charge agreements — Sale, transfer, or assignment.

(1) A retail seller may sell, transfer, or assign a retail installment contract or charge agreement. After such sale, transfer, or assignment, the retail installment contract or charge agreement remains a retail installment contract or charge agreement.

(2) Nothing contained in this chapter shall be deemed to limit any charge made by an assignee of a retail installment contract or charge agreement to the seller-assignor upon the sale, transfer, assignment, or discount of the contract or agreement, notwithstanding retention by the assignee of recourse rights against the seller-assignor and notwithstanding duties retained by the seller-assignor to service delinquencies, perform service or warranty agreements regarding the property which is the subject matter of the assigned or discounted contracts or charge agreements, or to do or perform any other duty with respect to the contract or agreement assigned or the subject matter of such contract or agreement.

[1993 sp.s. c 5 § 2.]

RCW 63.14.158. Refinancing agreements — Costs — Contents.

The holder of a retail installment contract or contracts may, upon agreement in writing with the buyer, refinance the payment of the unpaid time balance or balances of the contract or contracts by providing for a new schedule of installment payments.

The holder may charge and contract for the payment of a refinance charge by the buyer and collect and receive the same but such refinance charge (1) shall be based upon the amount refinanced, plus any additional cost of insurance and of official fees incident to such refinancing, after the deduction of a refund credit in an amount equal to that to which the buyer would have been entitled under RCW 63.14.080 if he or she had prepaid in full his or her obligations under the contract or contracts, but in computing such refund credit there shall not be allowed the minimum earned service charge as authorized by subsection (1)(d) of such section, and (2) may not exceed the rate of service charge provided under RCW 63.14.130. Such agreement for refinancing may also provide for the payment by the buyer of the additional cost to the holder of the contract or contracts of premiums for continuing in force, until the maturity of the contract or contracts as refinanced, any insurance coverages provided for therein, subject to the provisions of RCW 63.14.140.

The refinancing agreement shall set forth the amount of the unpaid time balance or balances to be refinanced, the amount of any refund credit, the amount to be refinanced after the deduction of the refund credit, the amount or rate of the service charge under the refinancing agreement, any additional cost of insurance and of official fees to the buyer, the new unpaid time balance, if the service charge is stated as a dollar amount, and the new schedule of installment payments. Where there is a consolidation of two or more contracts, then the provisions of RCW 63.14.110 shall apply. [2012 c 117 § 175; 1967 c 234 § 14.]