

# 52511

COMMONWEALTH OF MASSACHUSETTS

SUFFOLK. SS.

SUPERIOR COURT  
CIVIL ACTION  
No. 98-5534A

COMMONWEALTH OF MASSACHUSETTS,  
Plaintiff

vs.

FIRST ALLIANCE MORTGAGE COMPANY,  
Defendant

MEMORANDUM OF DECISION AND ORDER IN CONNECTION WITH  
PLAINTIFFS' MOTION FOR A PRELIMINARY INJUNCTION

On November 24, 1998 the parties were before the court for hearing on the motion of plaintiff Commonwealth of Massachusetts ("Commonwealth") for injunctive relief. The Commonwealth seeks to enjoin defendant First Alliance Mortgage Company ("FAMCO") from violating G.L. c. 93A, §2(a) and other consumer protection regulations in the provision of residential mortgage loans to Massachusetts customers. Specifically, the Commonwealth seeks to enjoin FAMCO from 1) charging rates, points and other terms which deviate significantly from industry-wide standards or are otherwise unconscionable and 2) taking any steps to foreclose on any residential real property in the Commonwealth without first providing written notice to the Commonwealth within ten days of sending an acceleration notice to the borrower.

*Notice*  
*sent*  
*11-30-98*  
*M.D.S.*  
*J.P.1*  
*B.R.F.*  
*J.H.*  
*P.S.K.*  
*(mt)*

For the following reasons, the motion of the Commonwealth is ALLOWED.

### BACKGROUND

On March 31, 1997, the Massachusetts Commissioner of Banks issued FAMCO a temporary license to conduct business in the Commonwealth as a mortgage lender, pursuant to G.L. c. 255E, §2. G.L. c. 255E, §8 requires every licensee to file an annual report with the Banking Commissioner concerning its business and operations during the preceding calendar year. After examining FAMCO's annual report, the Commissioner found evidence that FAMCO's charges of up to 23 points for subprime borrowers<sup>1</sup> were inconsistent with industry-wide standards. On August 12, 1998, the Attorney General sent FAMCO a letter informing it of the Commonwealth's intent to file suit and inviting the defendants to discuss the proposed action. FAMCO's license has now expired. Although the company applied for a renewal, the Commissioner has not issued a new license.

### DISCUSSION

In considering whether to grant a preliminary injunction, the court conducts a balancing test. The court evaluates the moving party's claim of injury together with its chance of success on the merits. Packaging Industries Group, Inc. v. Cheney, 380 Mass. 609, 617 (1980). If the court believes that a failure to issue the injunction would "subject the moving party to a substantial risk of irreparable harm" the court must balance this risk against any similar risk of irreparable harm which granting the injunction would create for the opposing party. Id. Only where the balance between these risks cuts in favor of the moving party may a preliminary injunction properly be issued. Id.; Planned Parenthood League of Massachusetts, Inc. v. Operation Rescue, 406 Mass. 701, 710 (1990). Where appropriate, this court will also consider

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<sup>1</sup> Borrowers with less than "A" credit ratings

the public interest in determining whether to grant a preliminary injunction. GTE Products v. Stewart, 414 Mass. 721, 723 (1993); Brookline v. Goldstein, 388 Mass. 443, 447 (1983).

**A. The Commonwealth's likelihood of success on the merits**

In this action, the Commonwealth has a substantial likelihood of succeeding on the merits. The Attorney General has the authority to regulate "unfair methods of competition and unfair or deceptive acts or practices in the conduct of any trade or commerce." G.L. c.93A, §2 (a)(c). Pursuant to that authority, the Attorney General has adopted regulations defining unfair or deceptive business practices for mortgage lenders. See 940 CMR 8.00. As a provider of residential mortgages to Massachusetts consumers for purposes other than the purchase or initial construction of residential property, FAMCO is subject to these regulations as a "mortgage lender"

It is "an unfair or deceptive practice for a mortgage...lender to procure or negotiate for a borrower a mortgage loan with rates or terms which significantly deviate from industry-wide standards or which are otherwise unconscionable." 940 CMR 8.06(6). Pursuant to G.L. c. 93A and 940 CMR 8, therefore, the Attorney General has the statutory authority to determine that a mortgage lender's rates constitute unfair or deceptive business practices. In this case, the Attorney General has determined that the number of points charged by FAMCO is unconscionable.

A "point" is defined by the regulations as an origination fee, finder's fee, or other fee or service charge which is charged by the mortgage lender at or before the time of the mortgage loan. 940 CMR 8.03. A point is one percent of the total loan amount. Prior to 1995, the Banking Commissioner had statutory authority to cap the number of points that mortgage lenders could

charge. G.L. c. 183, §63 (1992). In 1995, however, the Legislature eliminated the cap on points, replacing it with a requirement of full disclosure of the costs and terms of the proposed loan.

G.L. c. 183, §63 (1995). FAMCO argues that the intent of the Legislature in making the change was to let market forces determine the number of points charged by mortgage lenders.

Consequently, FAMCO contends that the Attorney General has exceeded his authority by challenging the number of points FAMCO charges for residential mortgages.

G.L. c. 183, §63 does not eliminate the Attorney General's responsibility under G.L. c. 93A to regulate unfair or deceptive acts in business. "When two statutes are capable of coexistence, it is the duty of courts, absent clearly expressed congressional intention to the contrary, to regard each as effective." Vimar Seguros v Reaseguros, S.A. v. M/V Sky Reefer, 115 S.Ct. 2322, 2326 (1995). In this case, the Legislature has given no indication that G.L. c. 183, §63 prevents the Attorney General from exercising his authority under G.L. c. 93A. Therefore, where the Attorney General has determined that a charge of more than five points is unreasonable, and FAMCO is charging up to 23 points, the Attorney General may properly decide that a charge of 23 points is unconscionable. G.L. c. 93A; 940 CMR 8.03.

FAMCO also argues that the Attorney General has exceeded his authority in this case because the use of points alone does not show the true cost of a loan to consumers. It is beyond dispute, however, that an up-front charge of 23 points significantly reduces the number of dollars that the consumer is borrowing. For example, with 23 points, a consumer borrowing \$1000 must pay FAMCO \$230 up-front, reducing the amount of the actual loan available to the consumer to \$770. However, the consumer must then pay FAMCO interest on the full \$1000 for the life of

the loan. Consequently, although FAMCO's monthly payments may seem lower, the consumer is paying a much higher rate of interest for the amount of money actually borrowed.<sup>2</sup>

Because the Attorney General has the statutory and regulatory authority to determine whether a charge of 23 points constitutes an unfair or deceptive business practice, the Commonwealth has a reasonable likelihood of success on the merits of the case.

**B. Balance of Harms**

The Commonwealth argues that an injunction is necessary in this case because several consumers who were misled by FAMCO's promise of lower monthly charges now face the threat of foreclosure. Where the Attorney General has determined that some FAMCO consumers are in danger of losing their homes, there is a real risk of irreparable harm to those consumers. In contrast, FAMCO will suffer only money damages if the injunction is granted, and money damages do not constitute irreparable injury where the plaintiff has a satisfactory remedy at law. See Foxboro Co. v. Arabian American Oil Company, 805 F.2d 34 (1986).

**C. The Public Interest**

In appropriate cases, the court should also consider the risk of harm to the public interest. GTE Products Corp. v. Stewart, 414 Mass. 721, 723 (1993). Commonwealth v. Massachusetts CRINC, 392 Mass. 79, 88-89 (1984). The consumer protection statute, G.L. c. 93A, authorizes the Attorney General to act to protect the public interest. In the current action, where the Attorney General has determined that an up-front charge of 23 points is "unconscionable" under the applicable mortgage lender regulations, the public interest requires that the Attorney General

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<sup>2</sup> The Commonwealth does not argue, however, that FAMCO's disclosures are deceptive.

take appropriate action to protect consumers. For that reason, the requested injunction serves the public interest.

**CONCLUSION**

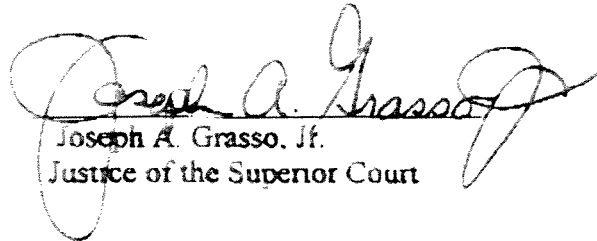
For the reasons set forth above, the Commonwealth's motion for a preliminary injunction is **ALLOWED**.

**ORDER**

It is hereby **ORDERED**

1) That FAMCO is enjoined from making any mortgage loans in the Commonwealth in violation of the **Mortgage Brokers and Mortgage Lenders Regulations of the Attorney General**, 940 CMR 8.06(6), and of G.L. c. 93A, §2(a), including specifically, by making mortgage loans in excess of five points; and

2) That FAMCO is enjoined from taking any steps to foreclose on any residential real property in the Commonwealth without first providing written notice to the Commonwealth within ten days of sending an acceleration notice to the borrower, to Pamela Kogut, Consumer Protection and Antitrust Division, Office of the Attorney General, One Ashburton Place, Boston, MA 02108.

  
Joseph A. Grasso, Jr.  
Justice of the Superior Court

Dated: November 27, 1998