J 52512

COMMONWEALTH OF MASSACHUSETTS

APPEALS COURT

98-J-0857

COMMONWEALTH

vs.

FIRST ALLIANCE MORTGAGE CO.

ORDER

Under G. L. c. 231, § 118, par. 1, the defendant (FAMCO), a sub-prime mortgage lender, has filed a petition asking that I, as single justice, annul a preliminary injunction entered in the Superior Court (Grasso, J.) that restricts FAMCO, when writing mortgage loans, to charging no more than five points and, when carrying on mortgage foreclosures, to notifying the Consumer Protection Division of the Attorney General's Office no more than ten days from sending an acceleration notice to the borrower.

The Attorney General sought the injunction to enforce his regulation 8:06(6), which makes it a violation of G. L. c. 93A, § 2(a), for a lender to write a mortgage loan "with rates or terms which significantly deviate from industry-wide standards or which are otherwise unconscionable." It is the Attorney General's position that setting points in excess of five is a term that significantly deviates from industry-wide standards, a position that on the record before me, seems to have factual support despite a smattering of examples of mortgage lenders

charging more points in the sub-prime market.

FAMCO does not challenge the validity of G. L. c. 93A, § 2(c) (the source of the Attorney General's rule-making power) or regulation 8.06(6). Rather, it argues that the application of the regulation in practice to establish a five-point ceiling on points is in violation of legislative intent and is an economically irrational restriction on pricing structure in the sub-prime mortgage market.

The legislative intent argument is based on the Legislature's repeal of the predecessor statute to G. L. c. 183, § 63, as appearing in St. 1996, c. 359, § 33A, which had previously authorized the Commissioner of Banks directly to regulate the charging of points. The new statute requires only full disclosure of such charges to the borrower in advance of the transaction, failing which the borrower is not obligated to pay such charges. In effect, the argument goes, the Attorney General has subverted the Legislature's intention to terminate direct regulation of points in favor of full disclosure and economic forces by reimposing direct regulation under the auspices of G. L. c. 93A. The argument is not without merit. Given, however, the facts that (1) the Legislature has not acted to restrict the Attorney General's rule-making power under G. L. c. 93A; (2) that rule-making power has been very expansively read by the Supreme Judicial Court (see, e.g., Maillet v. ATF-Davidson Co., 407 Mass. 185, 193 [1990]); and (3) the Attorney General's

de facto point ceiling (five points) offers more scope for price structuring than that imposed by the Commissioner of Banks (two points), I am unable to conclude that Judge Grasso was very probably in error in rejecting FAMCO's argument. This court normally does not grant relief under G. L. c. 231, § 118, par. 1., unless it is convinced that the trial judge's interlocutory order is relatively clearly erroneous or an abuse of discretion. Jet-Line Svcs., Inc. v. Board of Selectmen of Stoughton, 25 Mass. App. Ct. 645, 646 (1988).

The contention that the five-point ceiling makes no economic sense is well argued but is too restrictive in treating A.P.R. comparisons as the sole rational approach to measuring the possibilities of unfairness to vulnerable borrowers. The policy of full disclosure of terms adequately protects the rational, knowledgeable consumer envisioned in classical economics. However, the borrowers in the sub-prime mortgage market are apt to have overrepresentation of minorities, the elderly, and the inner-city and rural poor (see United Companies Lending Corp. v. Sargeant, 20 F. Supp. 2d 192, 202 (D. Mass. 1998), who may reasonably be assumed to be unsophisticated borrowers, easily misled by interest rate comparisons without adequate appreciation of other factors. As a class, such borrowers are by definition more prone to defaults than borrowers in the prime mortgage market. A special disadvantage of a high-points, low-interest mortgage is that a default in the early years of the scheduled

life of the loan will leave the borrower with less equity in the residence than a default under a standard low-points, higher interest rate mortgage that generated the same net principal amount for the borrower. Being unable at this stage to conclude that the five-point restriction has no reasonable likelihood of being sustained as a rational application of the statute, I decline to interfere with Judge Grasso's determination that it should be enforced pending resolution of the case on the merits.

For the reasons set out above, the relief sought in the petition is denied.

By the Court (Armstrong, J.),

Assistant Clerk

Entered: January 7, 1999.