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UNITED STATES BANKRUPTCY COURT
DISTRICT OF MASSACHUSETTS

In re: Sandi Bourgeois, Debtor	Chapter 13 No. 95-12036-WCH
Sandi Bourgeois, Plaintiff v. Mortgage Funding Corporation, Northern Financial Associates, Inc., and John Mercauto, Defendants	Adversary Proceeding No. 95-1541

ORDER

In accordance with the attached Memorandum of Decision, the Court grants judgment for the Plaintiff against Defendant Mortgage Funding Corporation on Counts I and VI of the Complaint; judgment for Defendants Northern Financial Associates and John Mercauto on Counts I and VI; and judgment for all defendants on all other counts. The Court further orders as follows:

1. Mortgage Funding Corporation's claim is allowed as a general unsecured claim in the amount of $2,837.12, subject to further reduction pending the filing of a fee application by Debtor's counsel within 30 days and the allowance thereof in amount not to exceed $2,837.12;
2. Mortgage Funding Corporation is ordered to take all necessary steps to effectuate the rescission of its mortgage on the Debtor's property located at 69 Woodside Lane, Arlington, Massachusetts; and
3. If applicable, the Debtor shall, within 30 days after determination of the final

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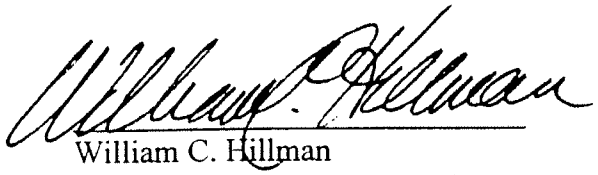
amount of the claim of Mortgage Funding Corporation, filed an amended plan reflecting the decision herein.



William C. Hillman
United States Bankruptcy Judge

March 6, 1998

Not for Publication

UNITED STATES BANKRUPTCY COURT
DISTRICT OF MASSACHUSETTS

In re: Sandi Bourgeois, Debtor	Chapter 13 No. 95-12036-WCH
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MEMORANDUM OF DECISION

I. Introduction

Debtor/Plaintiff Sandi Bourgeois ("Debtor") filed for relief under Chapter 13 of the Bankruptcy Code on March 27, 1995. Defendant Mortgage Funding Corporation ("MFC") filed a secured proof of claim in the amount of $37,227.66 based upon a mortgage loan which it had made to the Debtor in April, 1989. The Debtor filed an objection to MFC's claim and commenced this adversary proceeding pursuant to 11 U.S.C. § 502. In her complaint, the Debtor alleges violations of the federal Truth in Lending Act, 15 U.S.C. § 1640 et seq. ("TILA");

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violations of the Massachusetts Consumer Credit Cost Disclosure Act, Mass. Gen. Laws ch. 140D ("CCCDA"); fraud; unconscionability; breach of fiduciary duty; and violations of the Massachusetts Consumer Protection Act, Mass. Gen. Laws ch. 93A ("93A"). For the reasons set forth below, I find that MFC violated CCCDA and 93A, but, because these claims are time barred, the Debtor's recovery is limited to recoupment. I also find that the Debtor's remaining claims against MFC and all of the claims against the two other defendants, Northern Financial Services, Inc. ("NFA") and John Mercauto, ("Mercauto"), lack merit.

Pursuant to Fed. R. Civ. P. 52(a), made applicable to this adversary proceeding by Fed. R. Bankr. P. 7052, the following constitute my findings of fact and conclusions of law.

II. Background

A. The Loan

On or around March 27, 1989, the Debtor contacted Northern Financial Associates ("NFA") seeking a $15,000 loan to pay off her credit card debt. She had learned of NFA through a newspaper advertisement in which NFA offered loans secured by second and third mortgages for people with poor credit. At the time she contacted NFA, the Debtor's principal dwelling was encumbered by two mortgages. The first, held by Bank Five for Savings, had a principal balance of $4,195.19. The second, held by Shawmut Bank, had a principal balance of $35,470.27. The Debtor's income was about $600 per month.

The Debtor spoke to William Flynn ("Flynn"), an employee of NFA, who completed a credit application using the information the Debtor provided to him. The Debtor testified that, based on NFA's advertisement, she believed that NFA was a lender. Flynn did not tell the Debtor

that NFA was primarily a mortgage broker.[1] NFA submitted the Debtor's application to MFC without her knowledge.[2] MFC approved the loan on March 27, 1989. The approval sheet listed NFA as the broker and $1,700 as the broker's fee. It also showed that MFC would sell the mortgage to Financial Trust, which was NFA's profit sharing plan with MFC.

On April 4, 1989, the Debtor spoke on the telephone to Linda Quinlan ("Quinlan"), a loan officer at NFA. Realizing that $15,000 would not be sufficient to satisfy her debt, the Debtor sought to increase the amount of the loan to $25,000. During that telephone call Quinlan did not tell the Debtor that NFA was a broker, nor did she mention a broker's fee. Quinlan submitted a revised application which MFC approved on April 5, 1989. The approval sheet indicated NFA as the broker and $2,300 as the broker's fee. There was a change in the purchaser of the mortgage; MFC would sell the mortgage to U.S. Trust rather than to Financial Trust.

Shortly thereafter, the Debtor had a second telephone conversation with Quinlan during which Quinlan told the Debtor that a loan had been approved for $25,000, but that the actual loan amount would be $28,500 because of "closing costs". During that conversation, Quinlan disclosed some of the terms of the loan, including a 20% flexible interest rate (8 ½% above the prime rate); 59 monthly interest-only payments each in the amount of $475; a balloon payment for the full principal at the end of five years; a broker's fee in the amount of $2,300; attorney's fee of $750; points of $570; and an inspection fee of $175. The Debtor did not ask questions about the

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[1] NFA was incorporated in 1979 for the purpose of "lend[ing] money secured by mortgages on real estate, and to operate as a mortgage loan broker." NFA made some direct loans, either in the form of fee takebacks or home equity loans, but the defendants' witness testified that NFA made no more than five of these loans in 1989.

[2] MFC was incorporated in 1985 for the purpose of lending money secured by mortgages on real estate.

terms of the loan. The Debtor testified that she did not understand what the $2,300 broker's fee was for, but that she thought it had something to do with points. She also did not know that someone other than NFA was going to be the lender.

The loan closing took place on April 10, 1989, at the office of Donald Kethro ("Kethro"), MFC's attorney. Only the Debtor and Kethro were present. The Debtor noticed MFC's name on numerous documents and asked who MFC was. Kethro told her that MFC was the lender. The Debtor was surprised since she had never heard of MFC and had thought that NFA was the lender.

The Debtor received a truth-in-lending disclosure statement at the closing. The statement showed an annual percentage rate ("APR") of 20.77, a finance charge of $29,600.54, an amount financed of $27,399.46, and total payments of $57,000.00. The finance charge consisted of interest of $28,500.00, a pre-paid finance charge of $570.00, pre-paid interest of $265.54, an inspection fee of $175.00, a title insurance fee of $50.00, and a credit report fee of $40.00. The amount financed included the cash disbursement of $24,349.46, attorney's fees of $750.00, and a broker's fee of $2,300.00.

At the closing, the Debtor received a document telling her how the interest rate could vary.[3] She also signed an affidavit saying that NFA was the mortgage broker that she had employed to seek financing on her behalf. The Debtor signed all the closing papers, although she did not understand all of the documents. She testified that she need the money and that she

[3] At trial, the defendants presented a three page document, consisting of a letter and a two page attachment, with the Debtor's alleged signature on the second page. The Debtor testified that she had not received the first page (the letter) and that the signature was not hers. She introduced into evidence an unsigned, two page version which she said was her copy from the closing. Kethro's usual practice was to make copies of the documents after the borrower had signed them. MFC did not account for the discrepancy between the copies of the document.

thought that she would not get the loan if she did not sign the papers. Kethro corroborated the Debtor's belief when he testified that the closing would not have taken place if the Debtor had objected to the content of the closing papers.

In the summer of 1991, having remained current on the loan, the Debtor called Quinlan at NFA to ask about refinancing. Quinlan told the Debtor she would need to submit some "documentation". The Debtor was in the hospital and did not follow up on the refinancing until 1993 when she spoke with Alan Farrell ("Farrell") at MFC. Farrell made some inquiries and told her that MFC could not refinance her loan. The Debtor did not seek refinancing again.

Between June, 1989 and April, 1993, the Debtor paid $25,290.00 to MFC. Between April, 1993 and March, 1994, the Debtor paid $950.00 in interest payments to MFC. The Debtor made no further payments after March, 1994. On March 6, 1995, MFC filed a complaint in Massachusetts Land Court, seeking authority to foreclose. On March 27, 1995, the Debtor filed for relief under Chapter 13 of the Bankruptcy Code. MFC filed a claim in the Debtor's bankruptcy case in the amount of $37,277.66. By letters dated June 15, 1995 and July 27, 1995, the Debtor demanded the defendants rescind the mortgage loan transaction for violations of TILA, CCCDA and 93A. The defendants did not respond to the Debtor's letters.

B. The Defendants

1. John Mercauto's interest in NFA and MFC

Although the Debtor learned that MFC was the lender at the closing, she did not know the extent of the affiliation between MFC and NFA until her attorney discovered it after MFC filed a proof of claim in the Debtor's bankruptcy case. At the time of the Debtor's loan, Mercauto

owned 50 per cent of NFA's capital stock.[4] Mercauto served as a member of NFA's Board of Directors from its inception through 1995, when he became the sole officer and director. From 1979 through 1995, Mercauto held a number of positions in NFA, including president, vice-president, treasurer, and clerk. Since 1988, Mercauto has overseen NFA's financial affairs. He was also responsible for hiring decisions, purchasing office equipment, and establishing policies for brokering loans. In 1988, Mercauto received $45,331.00 in interest income and $90, 937.00 in earnings from NFA. In 1989, Mercauto received $19,267.00 in interest income and lost $5,657.00 in earnings from NFA.[5]

Mercauto became the sole officer and director of MFC in 1986. His responsibilities at MFC include raising capital, purchasing office equipment, making lending decisions, handling foreclosure issues, making hiring decisions, and establishing policies for underwriting loans. In 1988, Mercauto received $9,198.00 in interest income and $225,667.00 in earnings from MFC. In 1989, Mercauto received $9,639.00 in interest income and $144,637.00 in earnings from MFC.

2. The relationship between MFC and NFA

MFC and NFA have several other things in common beyond Mercauto's interest in both companies. MFC employees are insured through NFA's health insurance plan. Mercauto testified that it was more cost-effective to add MFC to NFA's plan because MFC did not have enough employees to get a good rate. MFC reimburses NFA for the cost of the coverage. NFA

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[4] The other 50 per cent was owned by Lawrence McLaughlin, who is not a party to this action. Mercauto has owned 100 per cent of NFA since 1995.

[5] These figures are taken from the joint pre-trial statement. However, at trial, Mercauto denied having lent money to either corporation. This discrepancy has not been resolved, but the fact remains that Mercauto received those sums from NFA, however denominated.

provides a line of credit to MFC which MFC used to make loans. In February, 1988, the total principal balance of MFC's loans funded by the NFA line of credit was $545,153.68. In February 1988, the NFA line of credit funded about 12 ½ % of MFC's loans. NFA was the only one of MFC's brokers to provide it with a line of credit.

NFA maintained a profit sharing plan that purchased mortgages from MFC. In January, 1989, NFA held seven mortgages purchased from MFC, with a total value of $355,627.14. During 1989, NFA purchased 12 more mortgages from MFC, with a total value of $363,633.00. At the end of 1989, NFA held 14 mortgages purchased from MFC with a total value of $431,983.19.

MFC generated 90% of its loans through brokers.[6] In 1989, MFC worked with about 20 brokers. NFA was one of MFC's preferred brokers, both in terms of the total number of applications that NFA submitted and in the percentage of those applications approved. In 1989, NFA submitted 75% of the loan applications MFC received. In 1989, 45% of the loan applications MFC approved and funded were from NFA applications and 50% of the total amount loaned by MFC was for loans that NFA had brokered.

When borrowers sought to refinance MFC loans, MFC referred them to NFA, and if the loans were refinanced, MFC and NFA split the broker's fees.

III. Discussion

A. Count I--Truth in Lending Claims

The Debtor alleges violations of both the federal truth in lending law, TILA, and its

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[6] The defendants testified that occasionally MFC would get a cold call or a customer would come in from off of the street and that it would accept these applications. Most of the loans not made through a broker were refinancings of existing MFC loans.

Massachusetts counterpart, CCCDA. The two laws are similar in many respects, with the language of CCCDA often mirroring that of TILA. In accordance with its power under 15 U.S.C. § 1633, the Federal Reserve Board exempted CCCDA from the requirements of chapters 2 and 4 of TILA, i.e., §§ 1631 - 16 49 and §§ 1666 - 1666j. *See* 48 Fed.Reg. 14884, 14890 (April 6, 1983). Since this case concerns 15 U.S.C. §§ 1631 - 1640, CCCDA is the applicable law.[7]

The Debtor alleges that MFC violated CCCDA by including the broker's fee in the amount financed rather than in the finance charge. MFC, she argues, should have included the broker's fee in the finance charge because MFC imposed the fee as a cost of obtaining credit. By including the broker's fee in the amount financed, MFC incorrectly disclosed the APR, the amount financed and the finance charge.[8]

MFC counters that MFC properly included the broker's fee in the amount financed because it did not require the Debtor to use NFA or any other broker and because MFC did not receive any portion of the broker's fee. In support of its argument, MFC emphasizes that the Debtor voluntarily contacted NFA who in turn contacted MFC. NFA disclosed the broker's fee

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[7] State law does not exempt from the civil liability provisions of TILA. *See* 12 C.F.R. 226.29(b)(1). 15 U.S.C. § 1640 therefore remains relevant as to the Debtor's damages.

Although the four year statute of limitations for rescission has expired, *see* Mass. Gen. Laws ch. 260, §5A, a claim in recoupment may be asserted defensively at any time. Mass. Gen. Laws ch. 260, § 36(b). Many courts have found that TILA also allows recission in recoupment after expiration of the statute of limitations. *See, e.g., In re Botelho*, 195 B.R. 558, 567 (Bankr. D. Mass. 1995); *In re Shaw*, 178 B.R. 380, 387 (Bankr. D. N.J. 1994). The 1995 amendments to TILA specifically provide that state law governs a consumer's right of rescission in recoupment. 15 U.S.C. § 1635(i).

[8] The parties agree that if the broker's fee had been included in the finance charge, the APR would have been 23.25 rather than the 20.75 stated in the disclosure statement the Debtor received.

prior to closing. At the closing, moreover, the Debtor signed an affidavit stating that MFC did not require her to use a broker and that NFA was hired by the Debtor on her own behalf.[9] Lastly, the Debtor never objected to MFC's payment of the broker's fee.

CCCDA requires that a creditor in a closed-end consumer credit transaction disclose, *inter alia*, the amount financed, the finance charge and the APR. 209 C.M.R. 32:18. Whether charges are included in the amount financed or in the finance charge affects the APR. Creditors prefer to include a charge in the amount financed rather than in the finance charge because including charges in the amount financed lowers the APR.[10]

The creditor, however, must include certain charges in the finance charge. Charges that are directly or indirectly imposed on a borrower by a lender as an incident to the extension of credit must be disclosed as part of the finance charge. Mass. Gen. Laws ch. 140D, § 4(a). The Massachusetts version of TILA's Regulation Z defines the finance charge as follows: "[The finance charge] includes any charge payable directly or indirectly by the consumer and imposed directly or indirectly by the creditor as an incident to or a condition of the extension of credit." 209 C.M.R. 32.04(a). The regulation lists types of charges that may be excluded from the finance charge:

> i) Fees for title examination, abstract of title, title insurance, property survey, and similar purposes.

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[9] The defendants argue that this affidavit is significant, but I find that it carries little weight. MFC presented the affidavit along with many other papers and the Debtor's signing it did not make its contents true.

[10] The APR is inaccurate if the disclosed rate differs from the actual rate by more than an one-eighth of one per cent. Mass. Gen. Laws ch. 140D, § 5(c); 209 C.M.R. 32:22 (a)(2). An inaccuracy of $35 in the finance charge allows the Debtor to exercise her right of rescission as a defense to a foreclosure action. Mass. Gen. Laws ch. 140D, § 10(i)(2).

ii) Fees for preparing deeds, mortgages, and reconveyance, settlement, and similar documents.
iii) Notary, appraisal, and credit report fees.
iv) Amount required to be paid into escrow or trustee accounts if the amounts would not otherwise be included in the finance charge.

209 C.M.R. 32.04(c).

Neither the statute nor the regulation specifically includes or excludes broker's fees from the finance charge. Because CCCDA parallels TILA, it is helpful to turn to the Official Staff Commentary to Regulation Z ("Commentary") for guidance. The Commentary gives an example when broker's fees are a finance charge. It states that

> Charges imposed on the consumer by someone other than the creditor are finance charges (unless otherwise excluded) if the creditor requires the use of a third party as a condition of the loan or incident to the extension of credit, even if the consumer can choose the third party, or the creditor retains the charge. For example:
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> ....
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> A mortgage broker fee, to the extent that the broker shares the fee with the creditor.[11]

12 C.F.R. Part 226, Supp. I, Official Staff Interpretations at 226.4(a)-3.

Courts have interpreted the language found in the Commentary, "if the creditor requires the use of a third party as a condition of the loan," broadly. In addition to the example in the Commentary that the fee is required when the lender shares the broker's fee, courts have found that the lender required the use of the broker when the creditor makes it clear that payment of the broker's fee is a condition of making the loan, *Whitley v. Rhodes Financial Services, Inc. (In re Whitley)*, 177 B.R. 142, 144 (Bankr. D. Mass. 1995); when the lender rarely makes a loan without

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[11] The 1995 amendments to Regulation Z require that all mortgage broker fees be included in the finance charge, even if the creditor does not require the consumer to use a broker and does not retain any portion of the fee. 12 C.F.R. § 226.4(a)(3).

the use of a broker, *Hill v. Allright Mortgage Co. (In re Hill)*, 213 B.R. 934, 941 (Bankr. D. Md. 1996), *Johnson v. Fleet Finance, Inc.*, 785 F. Supp. 1003, 1012 (S.D. Ga. 1992), *aff'd*, 4 F.3d 946 (11th Cir. 1993), *Grigsby v. Thorp Consumer Discount Co. (In re Grigsby)*, 119 B.R. 479, 487 (Bankr. E.D. Penn. 1990), *vacated on other* grounds, 127 B.R. 759 (E.D. Penn. 1991); and when the lender and broker have a close or "symbiotic" relationship, *Grigsby*, 119 B.R. at 487, *In re Dukes*, 24 B.R. 404, 414 (Bankr. E.D. Mich. 1982).

Many of those same characteristics exist in this case. First, according to the testimony of MFC's attorney, MFC required compliance with the loan terms for the loan to close, therefore payment of the broker's fee was a condition of the loan. Second, about 90 per cent of MFC loans were made through brokers. The 10 per cent consisted mostly of refinancing and occasionally a borrower would "come in off the street."

Lastly, there was a close or symbiotic relationship between MFC and NFA. NFA brokered more than half of the loans that MFC made. About one third of the NFA loans were sent to MFC. NFA contributed substantial funds to MFC. NFA's letter of credit funded about 25% of MFC loans. NFA also had a profit sharing plan in which it bought loans from MFC. According to the approval sheet from the Debtor's application for the $15,000 loan, NFA intended to receive a broker's fee and then buy back the mortgage under its profit sharing plan. Although the Debtor's loan was ultimately funded by U.S. Trust, it appears that sometimes NFA funded loans that it had brokered and for which it had received a broker's fee. NFA, by acting as a broker for MFC rather than as a direct lender, received a broker's fee and MFC received an origination fee. MFC and NFA shared an employee health plan, which is further evidence of corporate intermingling.

Mercauto's interest in both companies provides further evidence of close or symbiotic

relationship. Mercauto had a 50% interest in NFA, and earned a substantial amount of his income from that business. NFA did business with various lenders and Mercauto became one of those lenders when he incorporated MFC and became its sole officer and director. He earned a substantial income from MFC as well. Mercauto was responsible for financial operations of both companies, as well as hiring decisions. Receiving a broker's fee for loans to MFC benefitted Mercauto because he profited from the extra charge.

For the foregoing reasons, I find that MFC required the Debtor to use NFA and the broker's fee should have been included in the finance charge as a cost of credit.

B. Count II--Fraud and Misrepresentation

The Debtor alleges that NFA committed fraud during the loan negotiation process. She claims that both NFA's holding out of itself to be the lender and its inducing her to take out the loan with promise of refinancing were fraudulent acts. In order to prevail, the Debtor must show that NFA made a false statement of material fact that induced the Debtor to act, and on which she relied to her detriment. *Piantes v. Pepperidge Farm, Inc.*, 875 F. Supp. 929, 933 (D. Mass. 1995). The Debtor has not introduced sufficient evidence to support her claim that NFA's acts constituted fraud or misrepresentation.

C. Count IV[12]--Unconscionability

Under Massachusetts law, a contract may be procedurally or substantively unconscionable. *Piantes*, 875 F. Supp. at 935. A contract may be procedurally unconscionable if it is the product of "unfair surprise". *Zapatha v. Dairy Mart, Inc.*, 381 Mass. 284, 293-294, 408 N.E.2d 1370 (1980). A contract may be substantively unconscionable if there is "gross disparity in

[12] Summary judgment for the Defendants was granted as to Count III on August 12, 1997.

consideration", *Waters v. Min Ltd.*, 412 Mass. 64, 68, 587 N.E.2d 231, 235 (1992), or if its terms are "oppressive". *Zapatha*, 381 Mass. at 294-95.

The Debtor alleges that both types of unconscionability. She claims that the loan negotiation process was procedurally unconscionable because she was not represented at the closing; because NFA misled her about the identity of the lender and the possibilities of refinancing; and because NFA's marketing strategy targeted vulnerable consumers. She claims that it was substantively unconscionable because of the high risk it placed on the Debtor while the defendants carried a very low risk because of the high debt to equity ratio and the interest-only payments.

Massachusetts courts adhere to the rule that "unconscionability must be determined on a case-by-case basis, with particular attention to whether the challenged provision could result in oppression and unfair surprise to the disadvantaged party and not to allocation of risk because of superior bargaining power. *Piantes*, 875 F. Supp. at 935, *Waters*, 412 Mass. at 68, *Zapatha*, 381 Mass. at 292-93. With this rule in mind, I find that the Debtor's allegations do not support a claim of unconscionability. Although the Debtor was misled about the identity of the lender, I do not believe that finding out about it at the closing constitutes unfair surprise. In addition, the Debtor has not proved that NFA misled her about the possibility of refinancing. There was no substantive unconscionability because the terms were not oppressive and the Debtor knew about them prior to the closing.

D. Count V--Breach of Fiduciary Duty

The Debtor alleges that NFA owed her a fiduciary duty as her broker, which it violated by acting as MFC's agent instead of representing her interests, and by not disclosing NFA's

relationship with MFC. Massachusetts law does not impose a fiduciary relationship between a broker and a borrower. Massachusetts law does, however, provide that a real estate broker is an agent of the seller and owes the seller a fiduciary duty, *Ries v. Rome*, 337 Mass. 376, 381, 149 N.E.2d 366, 370 (1958), and the Debtor urges me to extend that duty to a loan broker and a borrower. I decline to do so.

E. Count VI--Violations of Mass. Gen. Laws ch. 93A

The Debtor alleges correctly that violations of CCCDA, fraud, breach of fiduciary duty, and unconscionability, also constitute violations of Mass. Gen. Laws ch. 93A. A violation of CCCDA is a per se violation of ch. 93A. M.G.L. ch. 140D, § 34. Since I have found that MFC violated CCCDA by not including the broker's fee in the finance charge, MFC also violated 93A.

Like CCCDA, the statute of limitations for violations of 93A is four years. However, 93A claims are subject to the discovery rule, which states that the cause of action accrues from the time the plaintiff could reasonably have discovered the violation. *In re Fidler*, 210 B.R. 411 (Bankr. D. Mass. 1997). Because there was nothing in the closing papers that would have put the Debtor on notice that the broker's fee should have been included in the finance charge, I find that the Debtor's 93A claim is not time barred.

IV. Rescission, Recoupment and Damages

A. CCCDA

Mass. Gen. Laws ch. 140D, § 10 governs rescission of a loan in which a security interest in the borrower's principal dwelling was granted.[13] The Debtor had a continuing right to rescind

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[13] Mass. Gen. Laws ch. 140D, § 10(a) provides:

Except as otherwise provided in this section, in the case of any consumer credit

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loan as long as the required information was not disclosed correctly. Because the APR, the amount financed and the finance charge were incorrect on the disclosure statement that MFC gave to the Debtor at the closing, the Debtor's letters of June 15 and July 27, 1995 validly rescinded the loan. The effect of a valid rescission is governed by Mass. Gen. Laws ch. 140D, §10(b).[14] Upon the receipt of the Debtor's rescission, MFC was obligated to terminate the security interest in the

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transaction, including opening or increasing the credit limit for an open-end-credit plan, in which a security interest, including any such interest arising by operation of law, is or will be retained or acquired in any property which is used as the principal dwelling of the person to whom credit is extended, the obligor shall have the right to rescind the transaction until midnight of the third business day following the consummation of the transaction or the delivery of the information and rescission forms required under this section together with a statement containing the material disclosures required by this chapter, whichever is later, by notifying the creditor, in accordance with the regulations of the commissioner, of his intention to do so . . . No finance or other charge shall begin to accrue on any such transaction until the termination of the rescission period provided for in this section.

[14] Mass. Gen. Laws ch. 140D, §10(b) provides:

When an obligor exercises his right to rescind under subsection (a), he is not liable for nay finance or other charge, and any security interest given by the obligor, including any such interest arising by operation of law, becomes void upon such a rescission. Within twenty days after receipt of a notice of rescission, the creditor shall return to the obligor any money or property given as earnest money, down payment, or otherwise, and shall take any action necessary or appropriate to reflect the termination of any security interest created under the transaction. If the creditor has delivered any property to the obligor, the obligor may retain possession of it. Upon the performance of the creditor's obligations under this section, the obligor shall tender the property to the creditor, except that if return of the property in kind would be impractical or inequitable, the obligor shall tender its reasonable value. Tender shall be made at the location of the property or at the residence of the obligor, at the option of the obligor. If the creditor does not take possession of the property within twenty days after tender by the obligor, ownership of the property rests in the obligor without obligation on his part to pay for it. The procedures prescribed by this subsection shall apply except when otherwise ordered by a court.

Debtor's dwelling and return any finance charge paid. The Debtor need not return the amount borrowed until MFC has performed its obligations.

Because the Debtor's claim is limited to one in recoupment, she may offset MFC's claim in her bankruptcy case by the amount of the finance charge. MFC filed a claim in the bankruptcy case in the amount of $37,227.66. The Debtor paid $4,150.54 in finance charges at the closing, which were taken out of the principal loan amount. In addition, between 1989 and 1994, the Debtor paid interest in the amount of $26,240.00 for a total finance charge of $30,390.54.

In addition to the finance charge, the Debtor may recoup statutory penalties, costs and attorney's fees. See *In re Shaw*, 178 B.R. 380, 386 (Bankr. D. N.J. 1994). MFC never delivered accurate disclosures to the Debtor nor honored her rescission, so they are in continuing violation of CCCDA. The damages provision of CCCDA was amended in 1996 to correspond to the TILA amendments of 1995. Under both laws, statutory damages are two thousand dollars per violation. 15 U.S.C. § 1640 (a)(2)(A). Mass. Gen. Laws ch. 140D, § 32(a)(2)(a). The Debtor is entitled to $2,000.00 for incorrect disclosure of the APR, and $2,000.00 for failure to honor a valid notice of rescission, for a total of $4,000.00.

The finance charges and the damages reduce MFC's claim by $34,390.54, leaving $2,837.12 remaining. The Debtor's attorney's fees and costs are also available in recoupment. As the Debtor has not stated the amount of her costs and attorney's fee, her attorney shall submit an application to the court in usual form within thirty days.

B. Mass Gen. Laws ch. 93A

Under 93A, the court may double or treble damages when there is a willful and knowing violation of the statute. Mass. Gen. Laws ch. 93A, § 9. The Debtor asks that I impose treble

damages. Because the Debtor has not proved that MFC's violation of CCCDA was willful or knowing, I decline to double or treble her damages.

V. Conclusion

For the reasons set forth herein, I find for the Debtor against Mortgage Funding Corporation only on Counts I and VI and for all of the Defendants as to the other Counts. A separate order will issue.

William C. Hillman
United States Bankruptcy Judge

Dated: March 6, 1998