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UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF MARYLAND
at Greenbelt

IN RE:	
DAVID LEE WOLFE Debtor	Case No. 99-12837PM Chapter 13
DAVID LEE WOLFE Plaintiff	Adversary No. 99-1-666-PM
v.	
IMC MORTGAGE COMPANY, INC. Defendant.	

MEMORANDUM OF DECISION

David Lee Wolfe (debtor) filed this adversary proceeding on November 23, 1999. The complaint alleges that defendant IMC Mortgage Company, Inc.'s (IMC) assignor failed to make several disclosures to him required by the Home Ownership and Equity Protection Act (HOEPA), 15 U.S.C. § 1639, a part of the Truth In Lending Act (TILA). 15 U.S.C. § 1601 et seq. The complaint also alleges that IMC disregarded debtor's rescission notice and failed to release the second deed of trust as provided for in 15 U.S.C. § 1635. After proper service of the complaint under Bankruptcy Rule 7004, IMC failed to file a response. The clerk entered a default as to IMC on February 14, 2000, pursuant to Bankruptcy Rule 7055(a). An order was entered on February 14, 2000, setting a hearing on the issue of damages.

As a result of the default, the following issues are uncontested: (1) IMC's assignor violated HOEPA disclosure provisions; (2) IMC is liable as an assignee; and (3) IMC failed to honor debtor's request for rescission. Remaining for determination by this court is the relief to

be granted to the debtor.

The subject property is located at 12507 Detour Road, Keymar, Maryland 21757. Debtor hired Premier Financial Corporation to obtain a mortgage loan from a third party. On August 17, 1998, the debtor and his wife executed a second deed of trust on the aforementioned property in favor of Residential Money Centers, Inc. (Residential). The second deed of trust secured a promissory note for $40,800.00. The deed of trust was recorded on October 27, 1998, among the land records of Frederick County, Maryland. A mortgage broker fee of $2,997.00, a flood certification fee of $22.00, and $22.00 in overcharged recording fees were paid out of the loan proceeds. The deed of trust was subsequently assigned to IMC.

TILA was enacted in 1968 to "aid the unsophisticated consumer so that he would not be easily misled as to the total costs of financing." Thomka v. A.Z. Chevrolet, Inc., 619 F.2d 246, 248 (CA3 1980). Consequently, courts have held:

> . . .TILA, as a remedial statute which is designed to balance the scales "thought to be weighed in favor of lenders," is to be liberally construed in favor of borrowers. Bizier v. Globe Financial Services, 654 F.2d 1, 3 (1st Cir.1981). See Johnson, 527 F.2d at 262.
>
> TILA achieves its remedial goals by a system of strict liability in favor of the consumers when mandated disclosures have not been made. 15 U.S.C. § 1640(a). A creditor who fails to comply with TILA in any respect is liable to the consumer under the statute regardless of the nature of the violation or the creditor's intent. See Thomka v. A.Z. Chevrolet Inc., 619 F.2d 246, 249-50 (3d Cir.1980). "[O]nce the court finds a violation, no matter how technical, it has no discretion with respect to liability." Grant v. Imperial Motors, 539 F.2d 506, 510 (5th Cir.1976).

Smith v. Fidelity Consumer Discount Co., 898 F.2d 896, 898 (CA3 1990). Further, finding that TILA's protections were inadequate, Congress added the protections and requirements of HOEPA in 1994. 15 U.S.C. § 1639. HOEPA was designed to address the problem of "reverse redlining". S. Rep. No. 103-169, 103rd Cong., 1st Sess. 21 (1993). "Reverse redlining" is the

targeting of residents based on income, race, or ethnicity, and extending credit on unfair terms. Id.

The transaction between the debtor and Residential was a closed-end credit transaction as defined by 12 C.F.R. § 226.2(a)(10). Section 226.2(a)(10) defines "closed-end credit" as "consumer credit other than 'open-end credit' as defined in this section." Section 226.2(a)(20) provides:

> "Open-end credit" means consumer credit extended by a creditor under a plan in which:
>
> (i) The creditor reasonably contemplated repeated transactions;
> (ii) The creditor may impose a finance charge from time to time on an outstanding unpaid balance; and
> (iii) The amount of credit that may be extended to the consumer during the term of the plan (up to any limit set by the creditor) is generally made available to the extent that any outstanding balance is repaid.

TILA mandates the specific disclosures required in closed-end transactions. 15 U.S.C. § 1638.

Additional disclosure requirements may be required if the transaction falls under HOEPA. This remedial legislation created a special class of regulated closed-end loans made at high annual percentage rates or with excessive fees. Section 1602(aa) defines eligibility under HOEPA. In this case, § 1602(aa)(1) provides the applicable rule of law. Section 1602(aa)(1) provides:

> (1) A mortgage referred to in this subsection means a consumer credit transaction that is secured by the consumer's principal dwelling, other than a residential mortgage transaction, a reverse mortgage transaction, or a transaction under an open end credit plan, if –
>
> (A) the annual percentage rate at consummation of the transaction will exceed by more than 10 percentage points the yield on Treasury securities having comparable periods of maturity on the fifteenth day of the month immediately preceding the month in which the application for the extension of credit is received by the creditor; or
> (B) the total points and fees payable by the consumer at or before closing will exceed the greater of –

(i) 8 percent of the total loan amount; or
(ii) $400.

The debtor states that the applicable HOEPA trigger in this case is § 1602(aa)(1)(B)(i). The "total loan amount" is not expressly defined by the act. However, the Official Staff Commentary on Regulation Z states that the total loan amount is calculated by taking the amount financed, as determined according to 12 C.F.R. § 226.18(b), and deducting any cost listed in § 226.32(b)(1)(iii) that is both included as points and fees under § 226.32(b)(1) and financed by the creditor.

In this case, the loan amount was $40,800.00. Included in this amount was a $2,997.00 mortgage brokers fee, a $22.00 flood certification fee, and a $22.00 recording fee overcharge. Under § 226.18(b), the amount financed is $37,803.00, that is $40,800.00, the principal amount of the loan, minus $2997.00, the prepaid finance charge. If the analysis ended here, debtor would not qualify for HOEPA protection because 8 percent of $37,803.00 is $3,024.24, and the $2,997.00 charge does not exceed that amount. However, additional charges were assessed totaling $44.00 for flood certification and recording fees, both of which are normally excluded from the definition of finance charges in § 226.4(c)(7), but are specifically included in the definition of "points and fees" in § 226.32(b)(1)(iii). Therefore, the total loan amount is $37,759.00. The total of the "points and fees" is $3,041.00. 12 C.F.R. § 226.32(b)(1)(i)-(iii). Eight percent of the total loan amount is $3,020.72, triggering HOEPA.

The debtor pleads that the lender and assignee violated the following provisions of HOEPA and TILA:

§ 1635. Right of rescission as to certain transactions
(a) Disclosure of obligor's right to rescind. Except as otherwise provided in this section, in the case of any consumer credit transaction (including opening or

increasing the credit limit for an open 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 under this title [15 U.S.C. §§ 1601 et seq.], whichever is later, by notifying the creditor, in accordance with regulations of the Board, of his intention to do so. The creditor shall clearly and conspicuously disclose, in accordance with regulations of the Board, to any obligor in a transaction subject to this section the rights of the obligor under this section. The creditor shall also provide, in accordance with regulations of the Board, appropriate forms for the obligor to exercise his right to rescind any transaction subject to this section.

(b) Return of money or property following rescission. When an obligor exercises his right to rescind under subsection (a), he is not liable for any 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 20 days after receipt of a notice of rescission, the creditor shall return to the obligor any money or property given as earnest money, downpayment, 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 impracticable 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 20 days after tender by the obligor, ownership of the property vests 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.

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§ 1639. Requirements of certain mortgages

(a) Disclosures. (1) Specific disclosures. In addition to other disclosures required under this title [15 U.S.C. §§ 1601 et seq.], for each mortgage referred to in section 103(aa) [15 U.S.C. § 1602(aa)], the creditor shall provide the following disclosures in conspicuous type size:

> (A) "You are not required to complete this agreement merely because you have received these disclosures or have signed a loan application.".

(B) "If you obtain this loan, the lender will have a mortgage on your home. You could lose your home, and any money you have put into it, if you do not meet your obligations under the loan.".

(2) Annual percentage rate. In addition to the disclosures required under paragraph (1), the creditor shall disclose–

(A) in the case of a credit transaction with a fixed rate of interest, the annual percentage rate and the amount of the regular monthly payment; . . .

Specifically, the debtor states that IMC's assignor failed to provide the disclosures set forth in §§ 1639(a)(1)(A) and (B), as well as the disclosures set forth in § 1639(a)(2)(A). Further, the debtor asserts that IMC disregarded his notice of rescission, and has since failed to take any action to release the mortgage as required by § 1635.

All TILA violations, including HOEPA violations, give rise to the civil liability set forth in 15 U.S.C. § 1640(a). Section 1640(a) provides:

(a) Individual or class action for damages; amount of award; factors determining amount of award. Except as otherwise provided in this section, any creditor who fails to comply with any requirement imposed under this chapter [15 U.S.C. §§ 1631 et seq.], including any requirement under section 125 [15 U.S.C. § 1635], or chapter 4 or 5 of this title [15 U.S.C. §§ 1666 et seq. or 1667 et seq.] with respect to any person is liable to such person in an amount equal to the sum of–

(1) any actual damage sustained by such person as a result of the failure;

(2)(A)(i) in the case of an individual action twice the amount of any finance charge in connection with the transaction, or (ii) in the case of an individual action relating to a consumer lease under chapter 5 of this title [15 U.S.C. §§ 1667 et seq.], 25 per centum of the total amount of monthly payments under the lease, except that the liability under this subparagraph shall not be less than $100 nor greater than $1,000, or (iii) in the case of an individual action relating to a credit transaction not under an open end credit plan that is secured by real property or a dwelling, not less than $200 or greater than $2,000; . . .

(3) in the case of any successful action to enforce the foregoing liability or in any action in which a person is determined to have a right of rescission under section 125 [15 U.S.C. § 1635], the costs of the action, together with a reasonable attorney's fee as determined by the court; and

(4) in the case of a failure to comply with any requirement under section

> 129 [15 U.S.C. § 1639], an amount equal to the sum of all finance charges and fees, paid by the consumer, unless the creditor demonstrates that the failure to comply is not material.

The enhanced damages provided for in § 1640(a)(4) are only applicable to HOEPA transactions and were interpreted to supplement the existing civil liability provisions. See Newton v. United Companies Financial Corp., 24 F. Supp. 2d. 444, 451 (E.D. Penn. 1998). In Newton, the District Court stated:

> The recission and damage remedies are cumulative. Since the failure to honor a valid rescission demand is itself a TILA violation giving rise to statutory damages, 15 U.S.C. § 1640(a)(3), a consumer who is entitled to recission may also recover a statutory damage award for the creditor's failure to rescind voluntarily. See Smith v. Fidelity Consumer Discount Co. 898 F.2d. 896, 903 (3rd Cir. 1990). HOEPA explicitly provided that violations of its special protection provisions would entitle consumers to rescind mortgage loans and to recover the TILA statutory penalties. 15 U.S.C. § 1639(j). In addition, the statutory damages provision was amended to increase the total award to the consumer in the case of HOEPA violations. Besides the standard $2,000 TILA penalty, the consumer may also recover an amount equal to the total finance charges and fees paid. 15 U.S.C. § 1640(a)(4).

The liability of assignees as to transactions governed by HOEPA is stated in 15 U.S.C. § 1641(d). 15 U.S.C. § 1641(d) provides:

> (d) **Rights upon assignment of certain mortgages.** (1) In general. Any person who purchases or is otherwise assigned a mortgage referred to in section 103(aa) [15 U.S.C. § 1602(aa)] shall be subject to all claims and defenses with respect to that mortgage that the consumer could assert against the creditor of the mortgage, unless the purchaser or assignee demonstrates, by a preponderance of the evidence, that a reasonable person exercising ordinary due diligence, could not determine, based on the documentation required by this title [15 U.S.C. §§ 1601 et seq.], the itemization of the amount financed, and other disclosure of disbursements that the mortgage was a mortgage referred to in section 103(aa) [15 U.S.C. 1602(aa)]. The preceding sentence does not affect rights of consumers under subsection (a), (b), or (c) of this section or any other provision of this title [15 U.S.C. §§ 1601 et seq.].
>
> (2) Limitation on damages. Notwithstanding any other provision of law, relief provided as a result of any action made permissible by paragraph (1) may not exceed–

(A) with respect to actions based upon a violation of this title, the amount specified in section 130 [15 U.S.C. § 1640]; and
(B) with respect to all other causes of action, the sum of–
(i) the amount of all remaining indebtedness; and
(ii) the total amount paid by the consumer in connection with the transaction.

(3) Offset. The amount of damages that may be awarded under paragraph (2)(B) shall be reduced by the amount of any damages awarded under paragraph (2)(A).

(4) Notice. Any person who sells or otherwise assigns a mortgage referred to in section 103(aa) [15 U.S.C. § 1602(aa)] shall include a prominent notice of the potential liability under this subsection as determined by the Board.

With a default being entered, the defense available to assignees in § 1641(d) is not available to IMC. IMC is liable for all of the debtor's claims arising from the HOEPA transaction sub judice as an assignee of a HOEPA transaction.

The issue of damages allowance under TILA and HOEPA is complex. Debtor seeks the following damages: (1) statutory damages for each statutory violation; (2) recission of the transaction; (3) a declaration that the defendant's unsecured claim does include finance charges and that the claim be reduced by all payments made by the plaintiff; and (4) costs and attorney fees. Each remedy sought requires a separate analysis.

The debtor seeks multiple statutory damages for IMC's HOEPA violations. While one is entitled to multiple statutory damage awards for multiple violations of HOEPA's substantive statutory prohibitions, 15 U.S.C. § 1640(g) specifically limits an individual to a single statutory damage award for multiple failures to disclose. Debtor alleges that IMC's assignor failed to make the proper disclosures required under § 1639. As an assignee, IMC is also liable for the disclosure violations. Under § 1640(g), the debtor is entitled to one statutory award for all disclosure failures. However, the non-disclosure violations, such as IMC's failure to honor the

recission notice and failure to rescind voluntarily, warrant additional statutory awards. See Newton v. United Companies Financial Corp., 24 F. Supp. 2d. 444, 451 (E.D. Penn. 1998).

The general rule for calculating statutory damages under TILA is "twice the amount of any finance charge in connection with the transaction." 15 U.S.C. § 1640(a)(2)(A)(i). This provision does not limit the amount of damages. However, this case involves "a credit transaction not under an open end credit plan that is secured by real property or a dwelling. . . ." 15 U.S.C. § 1640(a)(2)(A)(iii). Therefore, the general rule does not apply. Statutory damages allowed under § 1640(a)(2)(A)(iii) must be between $200 and $2,000. The finance charges in this transaction exceeded $2,000, therefore the $2,000 cap is the applicable statutory damage amount for each HOEPA violation. However, in the interest of justice, this court elects to set damages at $1,000 for each separate violation.

A consumer's right of rescission under HOEPA is governed by 15 U.S.C. § 1635 and 12 C.F.R. § 226.23. A consumer borrower such as the debtor is granted a right to rescind certain loan transactions. 15 U.S.C. § 1635(a) provides:

> (a) Disclosure of obligor's right to rescind. Except as otherwise provided in this section, in the case of any consumer credit 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 te 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 under this title [15 U.S.C. §§ 1601 et seq.], whichever is later, by notifying the creditor, in accordance with regulations of the Board, of his intention to do so.

12 C.F.R. § 226.23(a)(1) provides:

> (a) Consumer's right to rescind. (1) In a credit transaction in which a security interest is or will be retained or acquired in a consumer's principal dwelling, each

> consumer whose ownership interest is or will be subject to the security interest shall have the right to rescind the transaction except for transactions described in paragraph (f) of this section.

This transaction is not among the exempt transactions listed in 12 C.F.R. § 226.23(f). The next issue for the court is whether the debtor exercised his right of rescission in a timely manner.

The general time limit within which to exercise the recission right for a HOEPA transaction is set out in 12 C.F.R. § 226.23(a)(3). That section provides:

> (3) The consumer may exercise the right to rescind until midnight of the third business day following consummation, delivery of the notice required by paragraph (b) of this section, or delivery of all material disclosures, whichever occurs last. If the required notice or material disclosures are not delivered, the right to rescind shall expire three years after consummation, upon transfer of all the consumer's interest in the property, or upon sale of the property, whichever occurs first. In the case of certain administrative proceedings, the rescission period shall be extended in accordance with § 125(f) of the act [15 U.S.C. § 1635(f)].

The term "material disclosures" is defined in § 1602(u):

> The term "material disclosures" means the disclosure, as required by this title [15 U.S.C. §§ 1601 et seq.], of the annual percentage rate, the method of determining the finance charge and the balance upon which a finance charge will be imposed, the amount of the finance charge, the amount to be financed, the total of payments, the number of and amount of payments, the due dates or periods of payments scheduled to repay the indebtedness, and the disclosures required by section 129(a) [15 U.S.C. § 1639(a)].

The debtor alleges that IMC's assignor never made the disclosures required under 15 U.S.C. § 1639(a). Therefore, the extended rescission period applies to the debtor. The debtor states in his complaint that he sent a notice of rescission to IMC more than 20 days before this action was filed. Since this statement is uncontested, this court finds that the transaction was in fact properly rescinded.

The effect of rescission is explained in 12 C.F.R. § 226.23(d). 12 C.F.R. § 226.23(d)

provides:

> (d) Effects of rescission. (1) When a consumer rescinds a transaction, the security interest giving rise to the right of rescission becomes void and the consumer shall not be liable for any amount, including any finance charge.
> (2) Within 20 calendar days after receipt of a notice of recission, the creditor shall return any money or property that has been given to anyone in connection with the transaction and shall take any action necessary to reflect the termination of the security interest.
> (3) If the creditor has delivered any money or property, the consumer may retain possession until the creditor has met its obligation under paragraph (d)(2) of this section. When the creditor has complied with that paragraph, the consumer shall tender the money or property to the creditor or, where the latter would be impracticable or inequitable, tender its reasonable value. At the consumer's option, tender of property may be made at the location of the property or at the consumer's residence. Tender of money must be made at the creditor's designated place of business. If the creditor does not take possession of the money or property within 20 calendar days after the consumer's tender, the consumer may keep it without further obligation.
> (4) The procedures outlined in paragraphs (d)(2) and (3) of this section may be modified by court order.

The effect of the rescission of the agreement before the court is to put the parties in the same position they were in prior to the making of the agreement. See Invenginee ring, Inc. v. Foregger Co., 293 F.2d 201, 204 (CA3 1961). On rescission of a contract, the contract is declared nonexistent, and rescission places "the parties in the position they would have been in had the agreement never been executed. . . ." Id. "A party seeking rescission of a contract must 'disgorge the fruits of the bargain." Woodling v. Garrett Corp., 813 F.2d 543, 561 (CA2 1987).

The debtor remains indebted to IMC as he was prior to rescission, but IMC now holds an unsecured claim without priority, not a secured claim. In addition, the debtor is not liable for "any amount, including any finance charge." 12 C.F.R. § 226.23(d)(1). As a result, IMC's unsecured claim may not include any claim for finance charges. The claim must also be reduced

by the sum of the total payments made by debtor pursuant to the HOEPA transaction as required by 12 C.F.R. § 226.23(d)(2).

Lastly, the debtor seeks costs and attorney fees pursuant to 15 U.S.C. § 1640(a)(3). Section 1640(a)(3) mandates that the non-prevailing party pay the costs of the action, and authorizes "reasonable attorney fees" for plaintiffs who prevail in actions to enforce its requirements. 15 U.S.C. S 1640(a)(3). The amount of the award is left to the sound discretion of the trial court and is subject to review only for abuse of that discretion. See Norwood v. Harrison, 581 F.2d 518, 520 (5th Cir.1978). The Fourth Circuit has adopted the analysis set forth in Johnson v. Georgia Highway Express, Inc., 488 F.2d 714 (CA5 1974), which stated that the analysis should begin with counsel's actual expenditure of time and then application of the 12 "Johnson" factors. The most important factor in calculating a reasonable attorney fee award is the degree of success attained in the case. See Hensley v. Eckerhart, 461 U.S. 424, 436 (1983).

The debtor's attorney has not provided this court with any information concerning the amount of time expended in prosecuting this action. However, this court can estimate the time that counsel devoted to this matter. Counsel was employed on a contingency basis. This court refuses to base any fee award on a contingency agreement. Therefore, debtor's counsel is directed to submit to this court a fee application in the form required under Local Bankruptcy Rule 2016-1.

An appropriate order will be entered.

DATE SIGNED: MAY 1 3 2010

PAUL MANNES, Chief Judge
United States Bankruptcy Court
For the District of Maryland

cc: Debtor(s)
Scott Borison, Esq.
IMC Mortgage Company
c/o The Corporation Trust, Inc.
IMC Mortgage Company
c/o Ocwen Federal Bank, FSB
Biermann & Geesing, LLC