



In this class action lawsuit, Plaintiffs allege that Defendant violated the Missouri Second Mortgage Loan Act (MSMLA) by charging prohibited fees on second mortgage loans. In December 2002, the case was certified as a class action. In March 2003, the certification was amended to expand the limitations period to six years. The Plaintiffs' are asking the Court to enter Partial Summary Judgment in their favor on all alleged illegal charges made by McGuire Mortgage ( Now First Horizon Home Loan Association )

### ARGUMENT

#### PLAINTIFF DAVID C. AND HOLLY E. MCLEANS' MOTION FOR PARTIAL SUMMARY JUDGMENT

Plaintiffs state that McGuire made two Second Mortgage Loans to Plaintiffs in 1997 involving a lien upon McLeans' single family home.

The interest rates charged on both loans were subject to the Missouri Second Mortgage Small Loan Act.

McGuire charged contracted for and or received from the McLeans a loan discount fee and a tax service fee and in so doing violated Section 408.233.1.

Plaintiffs also argue that McGuire violated 408.233.4 by charging a late fee as provided in its' notes for a ten day late payment fee when the MSMLA limits a late payment fee after fifteen days.

#### FIRST HORIZON'S FACTUAL STATEMENT – PLAINTIFFS' MOTION FOR PARTIAL SUMMARY JUDGMENT

The Defendant moves to strike late charges on the basis that they are not part of the pleadings.

The Defendant also moves to strike that part of Plaintiff's Motion for Summary Judgment dealing with "late charges" on the basis that late charges are not part of the Plaintiffs' Petition.

McGuire further states that the Plaintiffs have not offered any evidence that the second mortgages they obtained were not used for business purposes.

The Defendant also argues that a discount fee is part of an origination fee and that the discount points paid had the effect of lowering the interest rate paid by the Plaintiffs.

With respect to the Tax Service Fees, the Defendant says it is used to pay the costs of a tax service vendor. The investors who purchased assessed a tax service fee to McGuire but did not require McGuire to retain a tax service vendor.

Late charges were not collected from McGuire and after mid 1998 the late charge provided was for payments made 15 days after the due date.

According to the Defendant other relevant factors were:

- 1) Many class members made second mortgage loans with interest rates that were below the usury rate.
- 2) Many class members made second mortgage loans that were loans as part of a single extension of credit.
- 3) Many class members have filed for Bankruptcy protection.
- 4) It is common for relatives of a borrower to advance money to fund the closing costs of a loan,
- 5) It is also common or sellers to give closing credits to a borrower for the purposes of paying a portion of the recipient's origination costs.

6) Loan officers and borrowers after have oral conversation and exchange numerous documents about loan fees and charges.

Defendant's responses were that Plaintiffs' Statement of Uncontroverted facts were generally not material or that they constituted a legal conclusion.

**FIRST HORIZON'S SUGGESTIONS IN OPPOSITION TO PLAINTIFF'S MOTION FOR  
PARTIAL SUMMARY JUDGMENT**

- 1) The Missouri Second Mortgage Loan Act exempts interest rates under applicable laws.
- 2) Legitimate closing costs paid to third parties are permitted.

**DEFENDANT'S ARGUMENT IN ITS SUGGESTIONS IN OPPOSITION**

- I. Plaintiffs have not shown that MSMLA applies to their loans
  - A. Loan rates were lawful under any applicable state or federal law.
  - B. Application of MSMLA is at least a question of fact or whether the loans were business loans.
- II. No basis for Summary Judgment on the basis that discount points were not permissible because these points qualify as an origination fee. Pages 6 through page 2 of Defendant's Suggestion in Opposition.
- III. There is no basis for Summary Judgment bases on Tax Service Fees since they are collected at closing and later paid to third parties.
- IV. Plaintiffs have made no claim that a late charge violated 408.233.4.
  - A. Late charges are not pleaded in Plaintiffs' Petition and there is no proof that they were paid. 408.233.4 restricts the collection of late charges, the claims in time barred and they were legal under controlling law (Kansas).

V. Plaintiffs Are Not Entitled to Summary Judgment on Behalf of the Class.

On pages 32 to 49 of Defendant's Suggestions in Opposition to Plaintiffs, Motion, the Defendant makes various arguments that attempt to differentiate the members of the class.

**First Horizon's Factual Statement in Opposition to Plaintiffs'**

**Motion for Summary Judgment**

1. Plaintiffs' have offered no evidence that the loans they obtained from McGuire were not used for business purposes. ( page 1 )
2. Discount fees are part of the organizational fee. ( page 2 to 4 )
3. The tax service fees collected by Defendant were for distribution to Investors.
4. No late charges were collected from the Plaintiffs because their notes were immediately sold to investors.
5. Defendant states that other relevant facts were:
  - a) Interest rates on many loans to class members were below the general Missouri usury statutory limit.
  - b) Many loans were part of a single extension of credit.
  - c) Many class members have filed for bankruptcy protection.
  - d) It is common for relatives of borrowers to pay organizational costs.
  - e) It is common for sellers to give credits to borrowers to cover organizational costs.

f) Loan officers and borrowers have oral conversations about loan fees and charges.

**PLAINTIFFS' REPLY MEMORANDUM EXPLAINING WHY THE McLEANS'**

**MOTION FOR SUMMARY JUDGMENT SHOULD BE GRANTED**

Missouri law and MSMLA governed all the second mortgage loans at issue in this case.

McGuire's exemption defense based upon Kansas Law has been decided.

Section 408.233.1 RSMo. enumerates the fees a lender can charge if paid by the lenders for the purposes of reducing the rate of interest. The 1998 amendment did not allow the lender to charge and receive new and completely different fees.

All loans made to McLeans were consumer loans and not business loans.

A loan discount fee is not an origination fee.

A tax service fee was charged and received and there is no creditable evidence that any such fees were paid to third parties.

MSMLA is a consumer protection statute – Avila vs Community Bank of Northern Virginia 143 SW 3<sup>rd</sup>, 4 Mo Ct App 2003 et seq at Page 4 of Plaintiff's reply brief.

The General Assembly has identified all permissible fees.

MSMLA applies to Second Mortgage Loans. Page 5 of Plaintiffs' Reply Brief.

1) The Courts' previous order and the Special Master Report adopted by the court on November 7, 2005 states that Missouri law and MSMLA govern.

2) No loans made to the McLeans and members of the class so situated were business loans.

a) McGuire's own documents page 7 & 8 of Plaintiffs' Reply Brief states that the Plaintiffs' two loans were used to pay off credit card debt.

b) All proceeds must be for business purposes (Sec 408.015 RSMO)

There is no genuine issue over whether McGuire violated Sec 408.233.1 by charging and receiving the loan discount fee.

1) The courts order distinguishes origination fees under 408.233.1 (5) from all other fees. P 11 of Plaintiff's Reply Brief.

2) A loan origination fee is a one time charge by the lender to cover closing costs. A loan discount fee is a one time charge to reduce the interest rate.

3) The court must give effect to a statute as plainly written. (See Avila Page 14 of Plaintiffs' Reply Brief).

4) Laura Borrelli cannot define the meaning of a clear and unambiguous statute (See Farmers and Laborers Coop Ins. Assn. V Director of Revenue 742 SW 2<sup>nd</sup> 141, Adkison v First Plus Bank 143 SW 3d 29, 38 and n2 (Mo Ct App 2004).

5) McGuire charged and receive a loan discount fee from the McLeans that exceeded 2% of either of the McLeans loans if you consider loan discount fee part of the origination fee.

D) McGuire violated Sec. 408.233.1 RSMo. by charging and receiving a tax service fee.

- 1) This fee does not fall within the enumerated list in MSMLA.
- 2) The loan documents require the disclosure of third parties (Plaintiff's Reply Brief at page 19).

E) Contraction for the 10 day default

Not addressed by the Special Master in view of the Special Master Report on Plaintiff's Motion to File Third Amended Petition. Late fees are not in the lawsuit.

F) McGuire desires to dispose McLean's a second time.

- 1) McLean's already deposed the Plaintiffs at length.

G) The adjudication of the named Plaintiffs claims only applies to the claims of the class similarly situated.

With respect to Judge Russell's decision in the Arbitration – Towsly v Dallas Mortgage Corp. Case No 57 148E0001604 December 22, 2005. – The Special Master has no specific knowledge of the facts submitted to Judge Russell and accordingly has not considered the Towsly case in this decision.

#### DISCUSSION

The Missouri Second Mortgage Loan Act is a consumer protection statute. *Avila v Community Bank of Northern Virginia*, 143 SW 3<sup>rd</sup> 1, 4 (Mo App 2003). The statute must, therefore, be liberally construed to protect the consumer. Its purpose is to permit a lender to charge an exceptionally high rate that otherwise would be usurious. Sec 408.232 RSMo. The statute further prohibits the lender from charging and collecting additional fees except for those allowed by the statute.

Missouri Law applies as the Special Master recommended and the court approved on November 7, 2005 on the Special Master's Report on Legality.

With respect to the business loan exception (Sec. 408.015 (2)), the burden is on the lender to prove this exception. The Defendant has not satisfied this burden. McGuire Defendant has not satisfied this burden. The files produced by McGuire acknowledged that these loans were offered or extended to a consumer for family or household purposes. McGuire's own documents disclosed that the loans were made pursuant to the Real Estate Settlement Procedures Act (RESPA). 12 USC Sec. 2601. RESPA does not apply to transactions involving extensions of credit—primarily for business, commercial, or agricultural purposes. Further, McGuire admitted that the loans were extended to a consumer for personal or household purposes. (See section 32 calculations to determine if these loans were so called HOEPA loans). McGuire also admits that the McLeans' loans were used to pay off credit card debt. Lastly, to satisfy the business exemption, all the proceeds from the loan must be used in a business or to acquire a business. These loans were not business loans.

Regarding the loan discount fee and the tax service fee, they both violate the provisions of Section 408.233.1. A loan discount fee is not set forth as an allowable fee. The statute is clear. A loan origination fee covers the lenders administrative costs in processing the loan. A loan discount fee is a one time charge by a lender to reduce the amount of the loan. *Phipps v FDIC*, 417 F 3<sup>rd</sup> 1006, 1012 (8<sup>th</sup> Cr 2004)

Finally, even if you are to ignore the above, summary judgment is also warranted on the issue of loan discount fees because the attempt to include loan

discount fees as part of an origination fee would exceed the 2 percent limitation in MSMLA Sec. 408.233.1.

Regarding Tax Service Fee, it obviously does not fit the legality of the Statute. It is not in the enumerated list. There is no evidence that this fee was paid to a third person as set forth in McGuire's own documents. (See page 19 of Plaintiffs' Reply Suggeston).

Regarding the Late Fees, the Special Master has already declared that they are not a part of this class action.

Defendant also claims that there is no proof that the representative loans are similar to those loans of the members of the class. Summary Judgment will apply only to those members in the class so situated.

The Defendants request to delay the decision because it wants to depose the Plaintiff for a second time is without merit.

**RECOMMENDATION**

The Special Master respectfully recommends that the Court partially sustain the Plaintiffs' Motion for Summary Judgment as to loan discount fees and tax service fees and overrule Plaintiffs' Motion with respect to late charges..

1/13/06  
Date

William F. Mauer  
**The Honorable William F. Mauer**  
Special Master

On \_\_\_\_\_, 200\_\_\_\_, this Special Master's Report was submitted to

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CERTIFICATE OF SERVICE

The undersigned does hereby certify that on January 13, 2006, a true and correct copy of the above was placed in the United States mail, first class, postage prepaid and addressed as follows:

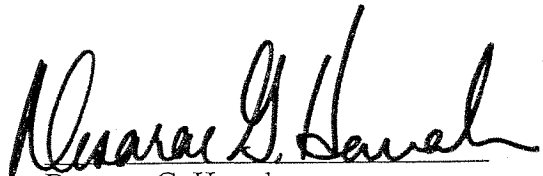
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