

IN THE CIRCUIT COURT OF JACKSON COUNTY, MISSOURI
AT INDEPENDENCE

DAVID C. AND HOLLY E. McLEAN,
et al.,

Plaintiffs,

v.

FIRST HORIZON HOME LOAN
CORPORATION (f/k/a McGUIRE
MORTGAGE COMPANY),

Defendant.

Case No. 00CV-228530

Division 28

THIRD AMENDED PETITION

For their Third Amended Petition, Plaintiffs David C. McLean and Holly E. McLean and Roger K. Jones and Eugenia M. Jones, individually and on behalf of all other persons similarly situated, state and allege the following:

Introduction

1. This action is a certified class action suit brought against FIRST HORIZON HOME LOAN CORPORATION, f/k/a McGuire Mortgage Company and continuing to do business for most times relevant under the name McGuire Mortgage (hereinafter "MCGUIRE MORTGAGE"). This action seeks redress on behalf of the plaintiffs and the certified plaintiff class against MCGUIRE MORTGAGE for violations of Missouri's Second Mortgage Loans Act §§408.231 *et seq.* RSMo, including claims for injunctive relief.

The Plaintiff Parties

2. Plaintiffs David C. and Holly E. McLean (the "MCLEANS") are lawfully married individuals who reside at 3912 Christopher Circle, Independence, Jackson County, Missouri.

3. Plaintiffs Roger K. Jones and Eugenia M. Jones (the "JONES") are lawfully married individuals who reside at 11910 Sycamore, Grandview, Jackson County, Missouri.

The Defendant

4. Defendant MCGUIRE MORTGAGE, at all times relevant hereto, was a Missouri corporation and has since merged with First Horizon Home Loan Corporation, who, as successor, is responsible for these claims as a result of the said merger and who shall continue to be referred to in this Third Amended Petition as "MCGUIRE MORTGAGE."

5. The Circuit Court of Jackson County, Missouri, has jurisdiction over MCGUIRE MORTGAGE, it having been a Missouri corporation and having transacted business, made a contract within, and committed torts within this State of Missouri and because both MCGUIRE MORTGAGE before the merger and its successor, First Horizon Home Loan Corporation, have a registered agent in Missouri.

6. Venue is proper in this Court pursuant to the terms of §408.562 RSMo and because plaintiffs and other members of the putative class reside in this county and because the transactions which are complained of occurred in this county.

General Allegations

7. PLAINTIFFS (sometimes collectively, the "REPRESENTATIVE PLAINTIFFS") bring this action individually and as a class action on behalf of the statewide class of Missouri residential real estate owners or borrowers who obtained Second Mortgage Loans from MCGUIRE MORTGAGE. "Second Mortgage Loans" are defined at § 408.231.1 RSMo to mean "... a loan secured in whole or in part by a lien upon any interest in residential real estate created by a security instrument, including a mortgage, trust deed, or other similar instrument or document . . . which residential real estate is subject to one or more prior mortgage loans."

“Residential real estate” is defined at §408.231.3 RSMo, to mean “. . . any real estate used or intended to be used as a residence by not more than four families” Finally, §408.234.2 RSMo makes it illegal for a lender to take a security interest in any collateral other than residential real estate in connection with a Second Mortgage Loan.

8. Within the six years prior to the filing of this action and through the present time, MCGUIRE MORTGAGE made Second Mortgage Loans to the REPRESENTATIVE PLAINTIFFS and the other members of the class.

9. In each of the of the Second Mortgage Loans at issue, MCGUIRE MORTGAGE received a promissory note from the REPRESENTATIVE PLAINTIFFS and from the members of the SECOND MORTGAGE CLASS and was named as the “Beneficiary” in a second mortgage deed of trust to secure the Second Mortgage Loans.

10. In connection with these Second Mortgage Loans, the rate of interest was unlawful, except for the lawful rate of interest permitted by Missouri’s Second Mortgage Loans Act, and in particular § 408.232.1 RSMo.

11. In connection with these Second Mortgage Loans, MCGUIRE MORTGAGE charged costs and fees that violated Missouri’s Second Mortgage Loans Act. In particular, MCGUIRE MORTGAGE charged fees and charges that were in excess of and/or not authorized by § 408.233 RSMo, including, but not limited to:

- a. Loan discount fees;
- b. Origination fees in excess of 2% (5% for loans made after August 28, 1998);
- c. Tax service fees;
- d. Flood certificate fees;
- e. Express mail fees;

- f. Direct mortgage brokerage fees;
- g. Underwriting fees;
- h. Processing fees.

The McLeans' Second Mortgage Loans

12. On or about February 18, 1997, and again on or about November 18, 1997, defendant MCGUIRE MORTGAGE loaned the MCLEANS \$30,000.00 and \$45,250.00, respectively, to be repaid with interest at the annual rate of 15.5% and 13.99%, respectively, each over a period of fifteen (15) years.

13. Each of the interest rates charged in paragraph 12 above were lawful rates permitted by § 408.232.1, but was otherwise “unlawful” without regard to the rate permitted by § 408.232.1, in that, among other things, the interest rates charged exceeded the maximum rate permitted by § 408.030.1 RSMo, either 10% per annum or the “market rate” if the “market rate” exceeded 10%.

14. To secure repayment of their note, the MCLEANS were required to and did execute a deed of trust for the benefit of MCGUIRE MORTGAGE. The deed of trust granted MCGUIRE MORTGAGE a security lien in Residential real estate as defined at §408.231 RSMo and was subject to one or more prior mortgage loans.

15. In connection with this Second Mortgage Loan, MCGUIRE MORTGAGE charged the MCLEANS, and the MCLEANS paid, on two separate loans, “Loan Discount” fees of 2.9126% (first loan) in the amount of \$873.78 and 2.5% (second loan) in the amount of \$1,131.25.

16. In connection with these Second Mortgage Loans, MCGUIRE MORTGAGE charged the MCLEANS and the MCLEANS paid, on each loan, a “tax service” fees of \$76.00

(both loans) and “flood certification fees” of \$22.00 (first loan) and \$22.50 (second loan), all in violation of Missouri’s Second Mortgage Loans Act (§ 408.231.1 RSMo).

17. The MCLEANS incurred these fees and costs when the loan was funded by financing such fees over the life of the loans, as evidenced by the fact that such charges were included in the principal balance of the note.

The Joneses’ Second Mortgage Loan

18. On or about May 20, 1998, defendant MCGUIRE MORTGAGE loaned the JONESES \$25,000.00 to be repaid with interest at the annual rate of 14.99% over a period of twenty (20) years.

19. The interest rate charged in paragraph 18 above was a lawful rate permitted by § 408.232.1, but was otherwise “unlawful” without regard to the rate permitted by § 408.232.1, in that, among other things, the interest rate charged exceeded the maximum rate permitted by § 408.030.1 RSMo, either 10% per annum or the “market rate” if the “market rate” exceeded 10%.

20. To secure repayment of their note, the JONESES were required to and did execute a deed of trust for the benefit of MCGUIRE MORTGAGE. The deed of trust granted MCGUIRE MORTGAGE a security lien in Residential real estate as defined at §408.231 RSMo and was subject to one or more prior mortgage loans.

21. In connection with this Second Mortgage Loan, MCGUIRE MORTGAGE charged the JONESES, and the JONESES paid, a “Loan Discount” fee of 2.8986% or \$724.65 in violation of Missouri’s Second Mortgage Loans Act (§ 408.231.1 RSMo).

22. In connection with this Second Mortgage Loan, MCGUIRE MORTGAGE charged the JONESES, and the JONESES paid, a “Life of Loan Flood Cert” fee in the amount of \$6.00 in violation of Missouri’s Second Mortgage Loans Act (§ 408.231.1 RSMo).

23. The JONESES incurred these fees and costs when the loan was funded by financing such fees over the life of the loans, as evidenced by the fact that such charges were included in the principal balance of the note.

COUNT I

(Class Action for Violations of Missouri's Second Mortgage Loans Act)

24. Plaintiffs incorporate by reference paragraphs 1 through 23 of this Third Amended Petition as though fully set forth in this Count I.

Plaintiff Class Action Allegations

25. This action is properly brought as a plaintiff class action under Mo.R.Civ.P.

52.08. The class consists of all persons who satisfy the following criteria:

All individuals who, from November 16, 1994 through December 17, 2002, executed a promissory note and deed of trust for a "Second Mortgage Loan" on "Residential Real Estate" from First Horizon Home Loan Corporation (f/k/a McGuire Mortgage Company), provided such promissory note is not for a business loan as defined by § 408.015(2) and in an amount of five thousand dollars or greater as set forth in § 408.035(2); and paid:

1. An origination fee exceeding 2% of the principal loan amount for loans having a loan date before August 28, 1998; or
2. An origination fee exceeding 5% of the principal loan amount for loans having a loan date on or after August 28, 1998; or
3. Any other fees or costs paid or financed as a part of the principal loan balance including, without limitation, the fees and costs identified in subparagraph a below, but excluding the fees and costs identified in subparagraph b:

a. Fees and Costs Included

- LOAN DISCOUNT FEES
- BROKERS FEES
- POINTS/POINTS TO LENDER
- DOCUMENT SIGNING FEES
- UNDERWRITING FEES
- PROCESSING FEES

- ADMINISTRATION FEES
- TAX SERVICE FEES
- FLOOD CERTIFICATE FEES
- EXPRESS MAIL FEES
- DIRECT MORTGAGE BROKER FEES

b. Fees and Costs Excluded

- Fees and charges paid for perfecting, releasing, or satisfying a security interest related to the second mortgage loan
- Taxes
- Fees or premiums for title examination, title insurance, or similar purposes including survey
- Fees for preparation of a deed, settlement statement, or other documents
- Fees for notarizing deeds and other documents
- Appraisal fees
- Fees for credit reports
- Charges for insurance (i) protecting the lender against the borrower's default or other credit loss (ii) against loss of or damage to the property, where no such coverage then existed or (h) providing life, accident, health or involuntary unemployment coverage.

26. The class includes persons who entered into such loans within six years next before the filing of this action ("THE SECOND MORTGAGE CLASS").

27. The particular members of THE SECOND MORTGAGE CLASS are capable of being described without difficult managerial or administrative problems. The members of THE SECOND MORTGAGE CLASS are readily identifiable from the information and records in the possession or control of MCGUIRE MORTGAGE and/or its representatives or servicing agents.

28. There are over 4,400 members of THE SECOND MORTGAGE CLASS. The members of THE SECOND MORTGAGE CLASS are so numerous that individual joinder of all members is impractical.

29. There are questions of law and fact common to the class, which questions predominate over any questions affecting only individual members of THE SECOND

MORTGAGE CLASS and, in fact, the wrongs suffered and remedies sought by the REPRESENTATIVE PLAINTIFFS and the other members of THE SECOND MORTGAGE CLASS are identical, the only difference being the exact monetary amount to which each member of THE SECOND MORTGAGE CLASS is entitled. The principal common issues are:

(a) Whether MCGUIRE MORTGAGE violated §408.233 et seq. RSMo by charging, contracting for or receiving from the REPRESENTATIVE PLAINTIFFS or THE SECOND MORTGAGE CLASS the fees and charges described in paragraphs 11, 15, 16, 21, 22 and 25 above;

(b) Whether MCGUIRE MORTGAGE under the provisions of §408.236 RSMo is liable to return all past interest illegally paid and it should be enjoined from receiving any future interest; and

(c) Whether MCGUIRE MORTGAGE is liable, in addition to the other civil remedies or penalties, for actual damages, together with punitive damages and attorneys fees pursuant to § 408.562 RSMo.

30. The REPRESENTATIVE PLAINTIFFS' claims are typical of those of the class and are based on the same legal and factual theories.

31. The REPRESENTATIVE PLAINTIFFS' will fairly and adequately represent and protect the interests of the class. They have suffered substantial economic injury in their own capacity from the practices complained of. They have retained counsel experienced in handling class actions and actions involving unlawful commercial practices. Neither the REPRESENTATIVE PLAINTIFFS nor their counsel have any interests which might cause them not to vigorously pursue this action.

32. This action was properly certified as a plaintiff class under Mo. R. Civ. P. 52.08(b)(2) in that MCGUIRE MORTGAGE illegally charged contracted for or received closing costs, fees and interest on these Second Mortgage Loans and pursuant to § 408.236 RSMo it should be enjoined from collecting any interest from these Second Mortgage Notes and ordered to return any interest previously collected.

33. This action was properly certified as a plaintiff class under Mo. R. Civ. P. 52.08(b)(3) in that common questions predominate over any individual questions and a plaintiff class action is superior for the fair and efficient adjudication of this controversy. A plaintiff class action will cause an orderly and expeditious administration of THE SECOND MORTGAGE CLASS' claims and economies of time, effort and expense will be fostered and uniformity of decisions will be insured. Moreover, the individual class members are likely to be unaware of their rights and not in a position (either through experience or financially) to commence individual litigation against the likes of MCGUIRE MORTGAGE.

Defendants' Liability Under Missouri's Second Mortgage Loans Act

34. Each of the loans that MCGUIRE MORTGAGE made to the REPRESENTATIVE PLAINTIFFS and THE SECOND MORTGAGE CLASS constituted a "Second Mortgage Loan" within the meaning of §408.231.1 RSMo.

35. § 408.233 RSMo provides in pertinent part as follows:

1. No charge other than that permitted by section 408.232 shall be directly or indirectly charged, contracted for or received in connection with any Second Mortgage Loan, except as provided in this section:

* * * * *

(3) Bona Fide closing costs **paid to third parties**, which shall include:

- (a) Fees or premiums for title examination, title insurance, or similar purposes including survey;
- (b) Fees for preparation of a deed, settlement statement, or other documents;
- (c) Fees for notarizing deeds and other documents;
- (d) Appraisal fees; and
- (e) Fees for credit reports

* * * * *

- (5) A nonrefundable origination fee not to exceed two percent of the principal... (increased to five percent by the 1998 amendment to the statute).
- (6) Any amounts paid to the lender by any person, corporation or entity, **other than the borrower**, to reduce the rate on a second mortgage loan or to assist the borrower in qualifying for the loan.

§ 408.233.1 RSMo (emphasis added).

36. MCGUIRE MORTGAGE violated § 408.233 RSMo by directly or indirectly charging and/or contracting for and/or receiving fees and costs that were not allowed or authorized by § 408.233 RSMo or in excess of those fees and charges allowed by § 408.233 RSMo.

37. The “Loan Discount” fees that MCGUIRE MORTGAGE charged to and received from the REPRESENTATIVE PLAINTIFFS and other members of THE SECOND MORTGAGE CLASS violated § 408.233.1 RSMo because such fees are not an enumerated and specifically allowed fee and therefore the charging of the same is a violation of Missouri’s Second Mortgage Loans Act and further because even if deemed a nonrefundable “Loan Origination” fees, such fees were in excess of the “Loan Origination” fees allowed by § 408.233.1(5) RSMo, and still further because even if such fees were legitimately in the nature of

points, that is paid for the purpose and having the actual effect of lowering the rate of interest charged on the loan, such fees were paid by the borrowers and are therefore, a violation of § 408.233.1(6) RSMo.

38. The “tax service” fees, “flood certificate fees,” “express mail fees,” “direct mortgage brokerage fees,” “underwriting fees,” and “processing fees” that MCGUIRE MORTGAGE charged to and received from the REPRESENTATIVE PLAINTIFFS and/or other members of THE SECOND MORTGAGE CLASS violated § 408.233.1 RSMo because such fees are not an enumerated and specifically allowed fee and therefore the charging of the same is a violation of Missouri’s Second Mortgage Loans Act and even were they deemed to be an allowed fee under § 408.233.1(3) and bona fide, these fees still violate Missouri’s Second Mortgage Loan act to the extent that such fees were paid to MCGUIRE MORTGAGE rather than a third party as required by § 408.233.1(3) RSMo.

39. § 408.236 RSMo provides as follows:

Any person violating the provisions of sections 408.231 to 408.237 shall be barred from recovery of any interest on the contract, except where such violation occurred either:

- (1) As a result of an accidental and bona fide error of computations; or
- (2) As a result of any acts done or omitted in reliance on a written interpretation of the provisions of sections 408.231 to 408.240 by the division of finance.

40. The conduct of MCGUIRE MORTGAGE and the resulting statutory violations described above did not occur as a result of an accidental and bona fide error of computation or as a result of any acts done or omitted in reliance on any governmental interpretation; said conduct was, instead, intentional, willful, wanton and malicious, or otherwise showed a complete

indifference to and a conscious disregard of the rights of the REPRESENTATIVE PLAINTIFFS and every other member of THE SECOND MORTGAGE CLASS.

41. MCGUIRE MORTGAGE is liable to the REPRESENTATIVE PLAINTIFFS and THE SECOND MORTGAGE CLASS for all interest that has been collected or will hereinafter be collected from the Second Mortgage Loans.

42. MCGUIRE MORTGAGE should be forever barred and enjoined under §408.236 RSMo from collecting or recovering any interest on any Second Mortgage Loans they continue to hold as to any members of THE SECOND MORTGAGE CLASS for the reasons set out above.

43. Section 408.562 RSMo provides as follows:

In addition to any other civil remedies or penalties provided for by law, any person who suffers any loss of money or property as a result of any act, method or practice in violation of the provisions of sections 408.100 to 408.561 may bring an action in the circuit court of the county in which any of the defendants reside, in which the plaintiff resides, or in which the transaction complained of occurred to recover actual damages. The court may, in its discretion, award punitive damages and may award to the prevailing party in such action attorney's fees, based on the amount of time reasonably expended, and may provide such equitable relief as it deems necessary and proper.

44. As a result of the statutory violations described above, each of the REPRESENTATIVE PLAINTIFFS and other members of THE SECOND MORTGAGE CLASS incurred actual damages and suffered a loss of money or property in that they were charged and paid and/or became obligated to pay fees, charges and costs that were not allowed by or in amounts greater than those allowed by Missouri law and were charged interest in violation of Missouri law.

45. The conduct of MCGUIRE MORTGAGE and the resulting violations of Missouri law, were intentional, willful, wanton and malicious, or otherwise showed a complete indifference to or a conscious disregard of the rights of each of the REPRESENTATIVE

PLAINTIFFS and the other members of THE SECOND MORTGAGE CLASS, entitling them to punitive damages as are fair and reasonable to punish defendants and to deter defendants and others from like conduct.

Prayer for Relief

WHEREFORE, the REPRESENTATIVE PLAINTIFFS, on behalf of themselves and all members of THE SECOND MORTGAGE CLASS, pray for judgment against defendant MCGUIRE MORTGAGE as follows:

(a) For a continuation of the prior Order certifying that this action may be maintained as class action under Mo. R. Civ. P. 52.08, appointing the REPRESENTATIVE PLAINTIFFS and their counsel to represent THE SECOND MORTGAGE CLASS, and directing that reasonable notice of this action be given to all other members of THE SECOND MORTGAGE CLASS;

(b) For a permanent injunction enjoining the defendant MCGUIRE MORTGAGE, together with its officers, directors, employees, agents, partners or representatives, successors and any and all persons acting in concert, from directly or indirectly engaging in the wrongful acts and practices described above for the benefit of the REPRESENTATIVE PLAINTIFFS and THE SECOND MORTGAGE CLASS;

(c) For an order directing disgorgement or restitution of all improperly collected charges and the imposition of an equitable constructive trust over such amounts for the benefit of the REPRESENTATIVE PLAINTIFFS and other members of THE SECOND MORTGAGE CLASS;

(d) For a declaration that the REPRESENTATIVE PLAINTIFFS and other members of THE SECOND MORTGAGE CLASS have a right to offset any finance charges (including

interest), closing costs, points, or other loan fees paid against the principal amounts due on those loans if they exercise their right to rescind; and an order directing MCGUIRE MORTGAGE to inform the REPRESENTATIVE PLAINTIFFS and other members of THE SECOND MORTGAGE CLASS of these rights;

(e) For actual damages to be proven at the time of trial, including a repayment of all interest paid on these Second Mortgage Loans and all illegal closing fees and costs;

(f) For punitive damages as are fair and reasonable to punish defendant and to deter defendant and others from like conduct;

(g) For reasonable attorneys' fees as provided by law and statute;

(h) For pre-and-post- judgment interest as provided by law in amount according to proof at trial;

(i) For an award of costs and expenses incurred in this action; and

(j) For such other and further relief as the Court may deem necessary and proper.

Dated: April 11, 2006

Respectfully Submitted,

WALTERS BENDER STROHBEHN
& VAUGHAN, P.C.

By 

J. Michael Vaughan Mo. Bar 24989
R. Frederick Walters Mo. Bar 25069
Kip D. Richards Mo. Bar 39743
David M. Skeens Mo. Bar 35728
2500 City Center Square
1100 Main Street
P.O. Box 26188
Kansas City, MO 64196
(816) 421-6620
(816) 421-4747 (Facsimile)

and

TRAVIS & CALHOUN
Eric Calhoun
1000 Providence Towers East
5001 Spring Valley Road
Dallas, TX 75244
(972) 934-4100
(972) 934-4101 (Facsimile)

ATTORNEYS FOR PLAINTIFFS

CERTIFICATE OF SERVICE

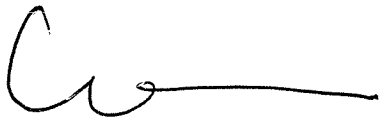
The undersigned certifies that the above document was mailed by U.S. Mail, first class postage paid, this 17th day of April 2006 to:

Richard L. Martin
Matthew Grundy
Martin Leigh Laws & Fritzlen, P.C.
1044 Main Street, Suite 400
Kansas City, MO 64105
(816) 221-1044 (fax)
Attorneys for Defendant

R. Lawrence Ward
Mark A. Olthoff
Shughart Thomson & Kilroy, P.C.
1700 Twelve Wyandotte Plaza
120 W. 12th Street
Kansas City, Missouri 64105-1929
(816) 421-0509 (fax)
Attorneys for Defendant

Thomas M. Hefferon
Joseph F. Yenouskas
Goodwin Procter LLP
901 New York Ave., NW
Washington DC 20007
(202) 346-4444 (fax)
Attorneys for Defendant

Hon. William F. Mauer
901 Burning Tree Drive
Kansas City, MO 64145
(816) 943-3444 (fax)
Special Master



An Attorney for Plaintiffs