

Consumer Lending/Retail Banking Update

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Third Circuit Court of Appeals Finds in Favor of Lender on Reasonableness of Title Insurance Charge

On June 27, 2008, in the case of *Fields v. Option One Mortgage Corp.*,¹ the United States Court of Appeals for the Third Circuit affirmed decisions of the federal district court and bankruptcy court for the Eastern District of Pennsylvania, in favor of Option One, concluding that the borrower had failed to prove that she qualified for a lower “refinance rate” for title insurance. Blank Rome successfully represented Option One in the appeals before both the district court and the Third Circuit.

In the underlying litigation before the bankruptcy court the borrower challenged the reasonableness of the title insurance charge in connection with a mortgage refinancing in January 2002. The borrower claimed that she was entitled to a lower “refinance” rate for title insurance rather than the standard “basic” rate, and that the difference between the two rates (i.e., the alleged “unrea-

sonable” portion) should have been included in the “points and fees” test under Section 226.32 of Regulation Z and HOEPA. Had the borrower prevailed, she would have been entitled to rescind the loan because the points and fees would have exceeded 8% of the total loan amount, but Option One did not provide the “high cost” disclosures.

While the Third Circuit’s decision is non-precedential, it is still important in two respects. First, with respect to title insurance charges in Pennsylvania, we were able to convince the court that the ultimate burden of proof rests with the borrower to establish entitlement to any rate lower than the basic rate, at least in cases where challenges to the “reasonableness” of the charge are made under TILA. The borrower, on the other hand, wanted the court to presume certain evidence that was not present in the record below.

Title insurance charges in Pennsylvania are governed by the *Manual of the Title Insurance Rating Bureau of Pennsylvania* (the “TIRBOP Manual”). Under Section 5.6 of the TIRBOP Manual, as in effect in January 2002, a borrower was entitled to a lower “refinance” rate where: (1) the new loan was made within three years from the date of closing of a previously insured mortgage loan; (2) the premises insured were identical to, or a part of, the premises previously insured; and (3) there had been no change in fee ownership since the closing of the prior insured mortgage loan. While the parties stipulated at trial before the bankruptcy court that title insurance on a prior mortgage loan had been purchased, the record contained no evidence that the premises were identical and that there had been no change in the fee ownership during the required three-year period. For this reason, the

1. *Fields v. Option One Mortgage Corp.*, No. 06-3942, 2008 WL 2553030 (3d Cir. June 27, 2008).

Third Circuit affirmed the lower court decisions.²

Second, the Third Circuit's opinion is significant because it broadly confirms that TILA challenges to the "reasonableness" of a fee place the burden on the borrower to establish unreasonableness, as argued by Option One. In *Fields*, the borrower asked the Third Circuit to presume that the real property was the same and that there had been no change in fee simple ownership. In rejecting this position, the court stated: "Because a plaintiff must prove all of the elements of her cause of action, we cannot reverse the judgment of the District Court based on such presumptions, however reasonable they may be."

The court's holding on this point is important, as borrowers frequently seek TILA damages and extended rescission rights by claiming that certain charges should have been included in the finance charge or the "points and fees" test. Section 226.4(c)(7) of Regulation Z excludes from the finance charge many types of closing costs, provided that the fees are "bona fide and reasonable in amount." Similarly, such charges are excluded from the "points and fees" test under Section 226.32, so long as neither the creditor nor its affiliate receives compensation in connection with the

charge and the charge is "reasonable."

For instance, an appraisal fee is not normally considered a finance charge or part of points and fees (assuming it is paid to a party that is not affiliated with the creditor). However, borrowers sometimes claim that the appraisal fee (or at least a portion of the fee) is a finance charge and part of the points and fees because the amount of the appraisal fee is excessive. The Third Circuit's opinion in *Fields* makes clear that it is the borrower's burden to establish by competent evidence that the amount of the appraisal fee and similar charges are unreasonable.

While a victory for our client and the industry, lenders should nevertheless adopt loan origination procedures that minimize the risk of being challenged with similar claims. Blank Rome has extensive experience litigating consumer credit cases. Our seasoned litigators work closely with our regulatory attorneys to craft successful defenses and strategies. We have successfully defended consumer lenders in numerous lawsuits and governmental proceedings involving claims such as TILA, RESPA, ECOA, FCRA, FDCPA, and state lending and unfair trade practice laws. Please contact us if we can assist you.

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2. In 2005, the TIRBOP Manual was amended by adding Section 2.8, which provides that evidence of prior title insurance within the specified time period (i.e., the relevant time period for the lower reissue or refinance rates) may include either documents provided by the borrower (such as a copy of the prior policy) or the recording of either a deed to a bona fide purchaser for value or an unsatisfied mortgage to an institutional lender. Notably, this amendment did not address the other two requirements for a lower rate relating to the identity of the property and fee ownership.

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