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UNITED STATES BANKRUPTCY COURT  
WESTERN DISTRICT OF NEW YORK

Take notice of the entry  
of this Order on 7/11/02

In re:

PENNY R. NUNN,

CASE NO. 01-21920

Debtors.

DECISION & ORDER

PENNY R. NUNN,

Plaintiffs,

V.

AP #01-2104

IMC MORTGAGE COMPANY,

Defendants.

**BACKGROUND**

On May 9, 2002, the Court decided the Debtor's February 25, 2002 Motion for Partial Summary Judgment by a Decision & Order (the "Decision"), a copy of which is attached.<sup>1</sup>

On May 20, 2002, the Debtor filed a Motion for Reconsideration (the "Reconsideration Motion"), which asserted that in the Decision, the Court: (1) made the following four findings of fact that were erroneous because there was no evidence in the record to support them: (a) the Origination Agreement was signed by the Debtor before the mortgage broker negotiated a fee with IMC; (b) the Debtor was never liable for the Indirect Fee; (c) the Debtor

<sup>1</sup> The terms used in this Decision & Order shall have the same meanings as defined in the attached Decision.

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received full disclosure regarding the Indirect Fee; and (d) the Debtor was represented by counsel at the closing of the IMC Mortgage; and (2) made the following three errors of law: (a) the Debtor's only claim for relief under HOEPA with regard to the eight percent (8%) points and fees trigger was that the Indirect Fee must be included; (b) a fee "payable by the consumer at or before closing" in HOEPA Section 1602(aa)(1)(B) did not include a mortgage broker fee that the mortgagee paid to the broker at closing, but which the consumer had agreed to pay for by paying a higher interest rate to the mortgagee; and (c) failure to apply a strict liability analysis to rescission under HOEPA.

On June 27, 2002, IMC interposed opposition (the "IMC Opposition").

### DISCUSSION

#### I. "Payable by the Consumer at or Before Closing"

In the Decision, the Court determined that the Debtor: (1) was contractually liable to the mortgage broker for the payment of the direct mortgage broker fee paid in connection with the IMC Mortgage; (2) was never continually or otherwise legally liable to the mortgage broker for the payment of the Indirect Fee. Therefore, the Court found that: (1) the Indirect Fee was not "payable" by the Debtor at or before the closing; and (2) the

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Indirect Fee was not required to be included in computing the points and fees trigger.

As set forth in the Decision, once the Origination Agreement was executed, the mortgage broker, in order to earn a fee, could only obtain a mortgage product for the Debtor that would require the mortgagee to pay an Indirect Fee. Therefore, under their contract, there never was a time when the Debtor was or could have been liable to the mortgage broker for the payment of the Indirect Fee.

In the Reconsideration Motion, the Debtor asserted that the Court's determination was legally incorrect because the Debtor was in fact liable for the Indirect Fee, since she had agreed to and was, therefore, "liable" to pay IMC a higher interest rate on the IMC Mortgage so that IMC could pay the Indirect Fee.

The Court's determination that the Debtor was never liable to the mortgage broker to pay all of the mortgage broker fees due and paid in connection with the Loan Transaction, specifically the Indirect Fee, was not a determination that in one way or another the Debtor was not "paying for" the Indirect Fee. The Court's determination supported its construction and interpretation of the relevant statutory phrase "payable by the consumer at or before closing." The Court's interpretation of that phrase, as it relates to mortgage broker fees paid in connection with the IMC Mortgage,

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is more literal than the Debtor's. In the Decision, the Court interpreted "payable" to require that the fee: (1) actually be required to be paid to the mortgage broker at or before the mortgage closing by the consumer and be paid at the closing from the consumer's assets or the mortgage proceeds, even if paid from the mortgage proceeds by a representative of the Debtor such as an escrow agent or closing attorney; or (2) be payable to the mortgage broker by the consumer because the consumer was contractually or otherwise legally liable at or before the closing to the mortgage broker to pay the fee.

As acknowledged by the Debtor and IMC, the applicable statute and regulations on the one hand appear to include all mortgage broker fees in the definition of points and fees, but then clearly limit those fees which are to be included in the points and fees trigger to those "payable by the consumer at or before the closing." In this Court's opinion, if Congress intended for a mortgage broker fee, such as the Indirect Fee paid in this case, to be included in the points and fees trigger, it failed to enact a provision that makes its intention clear. For a fee to be payable by the consumer at or before the closing because ultimately the consumer may be "paying for" the fee by paying a higher interest rate on their mortgage, is far different from the plain meaning of payable by the consumer at or before the closing.

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In the Reconsideration Motion the Debtor asserted that throughout the HOEPA statute and regulations, paid and payable are often used interchangeably. However, in this direct and indirect mortgage broker fee context, it would appear that paid and payable are quite different. For example, at the time of the Loan Transaction it was possible that the Debtor would never even "pay for" the Indirect Fee since there could be a first payment default, a foreclosure and a deficiency. In that case, IMC would never even be paid for the Indirect Fee that was payable and paid by it at the closing.

The only entity that was required to and did pay the Indirect Fee, and, therefore, the only entity the fee was payable by at or before the IMC Mortgage closing was IMC.

## **II. Timing**

In the Decision, the Court found that the Debtor entered into the Origination Agreement with the mortgage broker prior to: (1) the broker negotiating for any particular mortgage product on behalf of the Debtor, including the IMC Mortgage; and (2) the broker earning a fee.

In the Reconsideration Motion, the Debtor asserted that the Court was in error in determining that the broker had not negotiated a fee with IMC prior to the execution of the Origination Agreement.

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Although IMC may have regularly and routinely made available to brokers, including the Debtor's mortgage broker, its lien spread premium<sup>2</sup> fee schedule, so that the Debtor's broker was aware of these fee schedules prior to or at the time of the execution of the Origination Agreement, until the Debtor elected in the Origination Agreement how the mortgage broker was to be paid for its services: (1) in whole or in part directly by the Debtor by the use of non-mortgage loan proceeds; (2) in whole or in part by the use of mortgage loan proceeds; (3) through an increased interest rate; or (4) otherwise, as the Court set out in the Decision, the mortgage broker could not negotiate on behalf of the Debtor for a specific mortgage product. Therefore, until the Origination Agreement was executed, neither the Debtor nor the mortgage broker knew: (1) the final amount of the mortgage broker fee; and (2) how the fee would be paid at or before closing.

This determination by the Court was only in support of its determination that the Debtor was never contractually or otherwise legally liable to the mortgage broker for the full amount of the mortgage broker fee paid in connection with the Loan Transaction.

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<sup>2</sup> At the Hearing, the attorney for IMC asserted that the Indirect Fee was known in the industry as a yield spread premium and that such lien spread premiums existed before the relevant HOEPA statute and regulations were enacted. The attorney for the Debtor did not dispute those assertions.

As set out in Footnote 5 of the Decision, at least one treatise opines that such yield spread premiums are not included in the points and fees trigger.

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**III. Failure to Apply Strict Liability Analysis**

After deciding that the Indirect Fee was not required to be included in the points and fees trigger, the Court attempted in the Decision to set forth that, although the Debtor's situation presented significant equities, there were also equities against rescission.

The Court is aware that HOEPA is a strict liability statute, and that if the Indirect Fee must be included in the points and fees trigger as a matter of law and IMC failed to give the Debtor the HOEPA Notice, any equities among the parties are irrelevant. Therefore, I agree with the Debtor that the Court's discussion of equities was irrelevant to its determination of statutory construction and interpretation, and should not have been included in the Decision.

**IV. Representation by Counsel**

At the June 28, 2002 hearing on the Reconsideration Motion (the "Hearing"), the attorneys for the Debtor and IMC also confirmed that the Debtor was not represented by counsel in connection with the Loan Transaction.

Although the Court was in error when it presumed that the Debtor would not have entered into a first mortgage transaction for her residence without being represented by an attorney, that does not change the Court's Decision.

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In the Decision, the Court indicated that it did not believe that it was clear from the plain language of the applicable HOEPA statute and regulations that the Indirect Fee must be included in the eight percent (8%) points and fees trigger.

One of the equities against rescission that the Court discussed, but which it has acknowledged is irrelevant, was the nature and extent of the disclosure that the Debtor received regarding the Indirect Fee.

As set forth in the Decision, the Court is of the opinion that the Origination Agreement, HUD-1 Closing Statement and Fee Affidavit disclosed to the Debtor that, although the Indirect Fee was to be paid by IMC at closing, by agreeing to pay a higher interest rate on the IMC Mortgage and thereby increasing her monthly mortgage payments, she would be "paying for" that fee. When the Court erroneously believed that the Debtor was represented by an attorney, it felt that in addition to the disclosure she received from the documents, any questions the Debtor might have had with respect to the Indirect Fee would have been answered by her attorney.

However, even if the Debtor was not represented by an attorney, she received adequate disclosure of the existence and amount of the Indirect Fee and the fact that she would be "paying for" the Indirect Fee over time by the payment of a higher interest rate on the IMC Mortgage.

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The Decision is hereby amended to clarify that the Debtor was not represented by an attorney in connection with the Loan Transaction.

**V. Full Disclosure**

At the Hearing, the attorney for the Debtor asserted that the Debtor had not received "full disclosure" regarding the Indirect Fee, because neither IMC nor the mortgage broker had disclosed to the Debtor the actual cost of "paying for" the Indirect Fee by her agreement to pay a higher interest rate over the term of the IMC Mortgage. However, the attorney for the Debtor did not and could not assert that either HOEPA or any other state or federal truth-in-lending statute required that degree of disclosure.

In this regard, even the HOEPA Notice, which the Debtor has asserted should have been given to her because the eight percent (8%) points and fee trigger was exceeded, would not have provided the Debtor with any details with respect to the actual cost to her of the increased interest rate over the term of the IMC Mortgage.

Once again, however, this question of the nature and extent of the disclosure the Debtor received regarding the Indirect Fee is irrelevant to the determination of the issue of what must be included in calculating the points and fees trigger.

**VI. HOEPA Causes of Action**

At the Hearing, the attorneys for the Debtor and IMC confirmed that they had understood that the Debtor had: (1) retained a claim

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that the fee paid to the attorney that represented IMC at the mortgage closing should be included in the eight percent (8%) points and fees trigger; and (2) this claim had not been included in the Motion for Summary Judgment because the attorneys had agreed that there were a number of disputed material facts and if the Court granted the Motion it would be dispositive of all of the Debtor's causes of action.

The Decision is hereby amended to clarify that the Debtor has retained that additional claim.

**VII. Leave to Appeal**

At the Hearing, the attorneys for the parties also indicated that they were negotiating for a possible settlement of this Adversary Proceeding that would allow the Debtor to retain her residence. Should the parties not settle this matter, the only way the Debtor will be able to retain her residence is for her to succeed in this Adversary Proceeding and have the IMC Mortgage rescinded. In this regard, Southern Tier Legal Services has indicated that it will continue to prosecute this Adversary Proceeding, cause of action by cause of action, until it has succeeded on the Debtor's behalf or all of her causes of action have been denied. Southern Tier Legal Services has further indicated that it will appeal this Court's Decision and its denial of the Reconsideration Motion and will request leave to appeal from the District Court.

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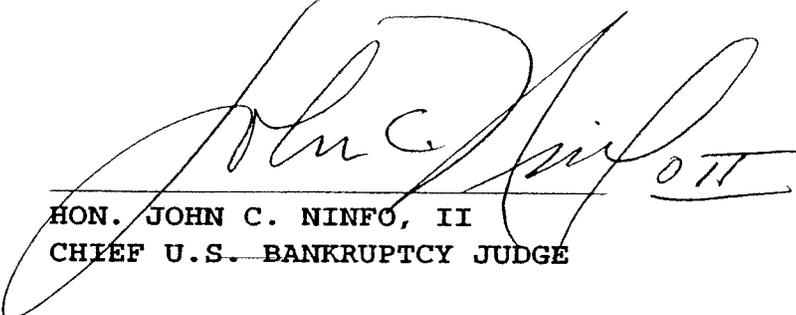
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Neither the parties nor the Court could find a published decision on this interesting legal issue on which courts might reasonably differ, and a decision by the District Court, if it reversed the Decision and determined that the Indirect Fee must be included in the eight percent (8%) points and fees trigger, would put an end to this litigation, subject to any further appeals. In addition, it would relieve the parties and this Court of the additional time and expense of conducting trials on the Debtor's other causes of action. Therefore, I believe that in the interests of judicial economy, this would be an appropriate case for leave to appeal to be granted, and I respectfully recommend such to the District Court.

**CONCLUSION**

The Reconsideration Motion is denied. However, the Court's May 9, 2002 Decision & Order is hereby amended as set forth in this Decision.

**IT IS SO ORDERED.**

  
HON. JOHN C. NINFO, II  
CHIEF U.S. BANKRUPTCY JUDGE

**Dated: July 11, 2002**