IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

IN RE: Albert & Deborah Strong,	:	**CHAPTER 13**
Debtors,	:	
	:	**Bankruptcy No. 01-35854BIF**
	:	
Albert & Deborah Strong,	:	
Appellants,	:	**Adversary No.: 02-626**
v.	:	
	:	**NO. 04-CV-4699**
Option One Mortgage Corporation	:	
d/b/a H&R Block Mortgage,	:	
Appellee.	:	

Diamond, J. **June 20, 2005**

MEMORANDUM

Albert and Deborah Strong appeal from a Bankruptcy Court Order refusing to disallow the secured claim of Appellee, Option One. Appellants contend that Appellee failed to comply with the Home Ownership and Equity Protection Act's disclosure requirements. 15 U.S.C. §1639. I disagree and affirm.

FACTUAL AND PROCEDURAL HISTORY

Appellants, husband and wife, own the property located at 1534 South 53rd Street, Philadelphia, Pennsylvania. Strong v. Option One Mortgage Corp. (In re Strong), Adv. No. 02-626 (Bankr. E.D. Pa. Aug. 31, 2004), at 2. Mr. Strong's mother originally purchased the property in the 1960s; her son inherited it in 1984. Id. at 3. Appellants moved into the property in 1992. Id.

On July 14, 1998, Appellants entered into an agreement with ContiMortgage Corporation.

Id. at 4. This $40,800 mortgage refinanced an earlier loan that the Appellants had obtained from Parkway Mortgage, Inc. Id. at 4, fn. 4.

In the Spring of 1999, Appellants decided to renovate their kitchen, and, on April 13, 1999, sought a loan from Appellee H&R Block Mortgage. Id. at 3. On April 22, 1999, Appellee mailed to Appellants numerous documents, including a truth-in-lending disclosure statement, a good faith estimate of settlement costs, an application disclosure, a servicing disclosure statement, an adjustable mortgage interest rate disclosure, and two unsigned borrower authorization forms. Id. at 5. Some time after May 3, 1999, Appellee informed Mrs. Strong that it had approved her loan. Id. at 7.

Appellee required Appellants to purchase title insurance on the property, and so secured a "lender's policy" (for Appellee's benefit) through General American Corporation. (Plaintiff's Brief in Support of the Amended Statement of Issues at 5). Appellee also required Mr. Strong to convey title in the property to joint ownership with his wife. (Plaintiff's Brief in Support of the Amended Statement of Issues at 4). Appellee explained that this was to ensure that both persons whose income was used to qualify for the loan had an interest in the property. (N.T. 247); (Brief of Appellee in Response to Amended Statement of Issues at 5-6).

At the May 12, 1999 closing, Appellants signed an adjustable rate note in the amount of $52,800, received $5,258.70 in cash, paid approximately $5,000 in fees, and, apparently, used the remaining proceeds to repay the July 1998 mortgage held by ContiMortgage. In re Strong, at 11, 12, 19; (Plaintiff's Brief in Support of Amended Statement of Issues at 6).

On November 9, 2001, Appellants filed a Chapter 13 bankruptcy case. In re Strong, at 17. On December 17, 2001, Appellee filed a secured proof of claim in the amount of $54,199.64

-- the amount it was owed under the Strong mortgage. Id. Appellants began an adversary proceeding against Appellee, claiming that the mortgage transaction violated HOEPA and other federal and state laws.

HOEPA, enacted in 1994 as an amendment to the Truth in Lending Act, prescribes certain advance disclosures that a mortgagee must make to a mortgagor. 15 U.S.C. §1602(aa). Failure to comply with these disclosure requirements can result in rescission of the loan and the awarding of damages against the lender. See 15 U.S.C. §§ 1635, 1639, 1640.

Among the required disclosures under HOEPA are terms and admonitions connected with a "high cost mortgage." 15 U.S.C. § 1602(aa). A credit transaction secured by the consumer's principal dwelling is a "high cost mortgage" when the points and fees exceed the greater of 8% of the total loan amount or $400. 15 U.S.C. §1602; 12 C.F.R. 226.32(a)(1)(ii). Section 1602(aa)(4) defines points and fees to include:

> (1) all items included in the finance charge;
> (2) all compensation to be paid to mortgage brokers; and
> (3) each of the charges listed in Section 106(e) [15 U.S.C. § 1605(e)], unless the charge is reasonable, the creditor receives no direct or indirect compensation, and the charge is paid to a third party unaffiliated with the creditor.

15 U.S.C. §§ 1602(aa)(4), 1605(e); see Reg. Z., 12 C.F.R. 226.32(b)(1)(iii) (interpreting HOEPA). Section 106(e) includes fees paid to a third party for title examination, title insurance, document preparation, credit reports, property survey, and appraisal. See also 12 C.F.R. 226.4(c)(7)(I); H.R. Conf. Rep. No. 652, 103rd Cong. 2d Sess. 147, 159 (1994).

Plaintiffs contended below that their mortgage was "high cost" under HOEPA. Thus, in Appellant's view, HOEPA required Appellee to disclose in advance all terms of the mortgage transaction. See 15 U.S.C. § 1639 (setting out specific disclosure requirements). Appellants

believed that Appellee's failure to make these disclosures entitled them to disallowance of Appelle's secured claim, rescission of the underlying mortgage, refund of all mortgage payments, and an award of damages. Appellee did not contend that it made all HOEPA-required disclosures. Rather, Appellee countered that the transaction with the Strongs was not a "high cost" mortgage under HOEPA, and so the disclosures were not required. To determine HOEPA's applicability, the Bankruptcy Court was required to calculate whether the points and fees associated with the Strong mortgage exceeded the greater of 8% of the total loan amount or $400.

During their August 2003 trial, the parties disagreed as to whether the HOEPA "points and fees" calculation should have included certain charges. If the charges were included -- as Appellants contended -- then the points and fees would have exceeded the 8% HOEPA cap. For instance, Appellants argued that they were improperly charged $546.75 -- the "basic rate" for the GAC title insurance -- the highest rate allowed under Pennsylvania law. In Appellants' view, they were entitled to the "refinance rate" -- the lowest allowable rate -- of $393.66. Appellants contended that because they were charged an improperly high rate, the Bankruptcy Court should have deemed the entire $546.75 premium "unreasonable," and added it to the points and fees HOEPA calculation. Had the Court done so, the points and fees would have exceeded the 8% cap.

The Bankruptcy Court ruled that Appellants were not entitled to the refinance rate which was available where

> a refinance or substitution loan is made within 3 years from the date of closing of a previously insured mortgage or fee interest and the premises to be insured are identical to or part of the real property previously insured and there has been no change in the fee simple ownership.

Manual of the Title Insurance Rating Bureau of Pennsylvania at ¶ 5.6. Appellants conceded below that there had been a recent "change in the fee simple ownership" of the property: the transfer from single to joint ownership. They argued, however, that this transfer was "unreasonably" required by Appellee as a precondition to the loan. In re Strong, at 80. Appellants further asserted that if the Bankruptcy Court found the required transfer of the property improper, then the costs associated with this transfer -- including the document preparation fee -- must be unreasonable under Section 1602(aa)(4), and included in points and fees. Id. at 89-90.

Appellants alternatively asserted that in light of their July 1998 mortgage with ContiMortgage, they qualified for the "reissue" rate of title insurance ($492.08), as the property to be insured was "identical to or part of real property insured 10 years immediately prior to the date the insured transaction closes." Manual of the Title Insurance Rating Bureau of Pennsylvania at ¶ 5.6.

Appellee responded that Appellants were not eligible for the refinance rate because of the recent transfer of the property, and that this transfer to joint ownership was reasonable as a means to create greater incentive for Mrs. Strong to repay the loan. (Brief of Appellee at 4). Appellee also argued that because Appellants failed to produce to GAC evidence of the earlier title insurance policy, as required by the Rate Manual, they were not eligible for the reissue rate. Thus, in Appellee's view, the "basic" title insurance rate was the only rate for which Appellants qualified. Finally, Appellee argued that even if it should have charged Appellants something lower than the basic rate, only that portion of the basic rate deemed to be excessive should be included in points and fees calculations.

In an opinion dated August 31, 2004, the Bankruptcy Court entered judgment in favor of Appellee, concluding that the loan agreement did not fall within the scope of HOEPA. In re Strong, at 18. The Court found that Appellee "acted reasonably in requiring that both [Appellants] be title owners to the property," and, as a result, Appellants did not qualify for the refinance rate. Id. at 80, 89. Accordingly, costs associated with the transfer, including the document preparation fee, were not unreasonable under Section 1602(aa)(4).

The Court also held, however, that because Appellee was "in the superior position, vis-à-vis the [Appellants], to know that [the] lower [reissue] rate was available upon production of the [Appellants'] prior title policy, . . . [Appellees] assumed the duty to the [Appellants] of advising the[m] to provide the prior title policy . . . in order to obtain the lower, reissue rate." In re Strong, at 80-81 (citing Johnson v. Know Financial Group, L.L.C., No. 03-378, 2004 U.S. Dist. LEXIS 9916 (E.D. Pa. May 27, 2004) (Van Antwerpen, J.)). Because Appellee failed to satisfy this duty, the Court excused Appellants from producing evidence of their "prior title policy," and held that they were entitled to "the lower, reissue rate."

The Bankruptcy Court rejected Appellants' contention that the entire title insurance premium should have been included in the HOEPA points and fees calculations. Relying on Judge Van Antwerpen's opinion in Johnson "find[ing] that only the portion of the [title insurance] charge which renders it not 'reasonable' . . . is to be included in the total [HOEPA] points and fees calculations," the Bankruptcy Court similarly held that only the "unreasonable" portion of the title insurance -- here, the basic rate less the reissue rate that should have been charged -- qualified as points and fees. Johnson, 2004 U.S. Dist. LEXIS 9916, *26-27; In re Strong, at 70-73, 81. Accordingly, the Bankruptcy Court took $54.67 -- the difference between

the "basic rate" ($546.75) and the reissue rate ($492.08) -- and added it to the points and fees. This total ($3,664.67) was under the 8% HOEPA cap ($3,916.04). In re Strong, at 90-91. Thus, the Court refused to disallow Appellee's secured claim, rescind the mortgage loan, refund the mortgage payments, or impose damages on Appellee.

Appellants ask me to reverse the Bankruptcy Court's decision on three grounds: 1) the Court erroneously held that only the "unreasonable" part of the title insurance premium should have been included in "points and fees," rather than the full title insurance premium; 2) the Court erred in holding that Appellants were not entitled to the refinance rate; and 3) Appellee failed to show that the document preparation fee and deed recording fee were bona fide or reasonable.

STANDARD OF REVIEW

The standard of review of the Bankruptcy Court's disposition of legal questions is plenary; its findings of fact are reviewed under a clearly erroneous standard. Mellon Bank, N.A. v. Metro Communications, Inc., 945 F.2d 635, 641 (3d Cir. 1991); In re Jersey City Medical Center, 817 F.2d 1055, 1059 (3d Cir. 1987); Decator Contracting v. Belin, Belin & Naddeo, 898 F.2d 339, 342 (3d Cir. 1980). Mixed questions of law and fact are subject to a mixed standard of review: the District Court accepts the Bankruptcy Court's findings of historical or narrative facts unless clearly erroneous, and exercises "plenary review of the trial court's choice and interpretation of legal precepts and its application of those legal precepts to the historical facts." Mellon Bank, 945 F.2d at 641-642 (quoting Universal Minerals, Inc. v. C.A. Hughes & Co., 669 F.2d 98, 101-102 (3d Cir. 1981)).

DISCUSSION

I. The Bankruptcy Court Properly Excluded Only The "Unreasonable" Portion of the "Basic" Title Insurance Premium

Appellants do not dispute that Appellee reasonably required them to purchase title insurance. Rather, they argue that because the rate was too high, the entire premium amount was "unreasonable" and should have been included in the HOEPA "points and fees" calculation. I disagree.

The Bankruptcy Court concluded that had Appellee charged the "reissue" rate, the Appellants would properly have been required to pay Appellee $492.08. Accordingly, the Bankruptcy Court refused to deem this portion of the title insurance premium "unreasonable." This is precisely the reasoning employed in Johnson, where the Court determined that under HOEPA, the disputed title insurance charge was not reasonable, "in that it exceeded the maximum amount that Plaintiffs could have been charged under the [Rate] Manual." Johnson, 2004 U.S. Dist. LEXIS 9916, at *26. The Court then addressed whether the entire charge or only the portion that rendered it unreasonable should be included in HOEPA "points and fees." Id. In doing so, it looked to those courts that have interpreted the phrase "reasonable in amount" in the Truth in Lending Act (the statute that HOEPA was intended to amend). Id.; see 12 C.F.R. 226.4(c)(7); 15 U.S.C. § 1605(f). Those courts unanimously held that under TILA they would include only the excessive portion of a charge deemed not to be "reasonable in amount." Id. at 27-28 (citing Marquez v. New Century Mortgage Corp., No. 03-7136, 2004 U.S. Dist. LEXIS 5725, 2004 WL 742205, at *3 (N.D. Ill. April 5, 2004); Scott v. IndyMac Bank, FSB, No. 03-6489, 2004 U.S. Dist. LEXIS 1309, 2004 WL 422654, at *2 (N.D. Ill. Feb. 3, 2004); Quinn v.

Ameriquest Mortgage Co., No. 03-5059, 2004 U.S. Dist. LEXIS 1053, 2004 WL 316408, at * 4 (N.D. Ill. Jan. 26, 2004); Walker v. Gateway Fin. Corp., 286 F. Supp. 2d 965, 967-68 (N.D. Ill. 2003); Guise v. BWM Mortgage, LLC, 2003 U.S. Dist. LEXIS 14914, 2003 WL 22019346, at *2 (N.D.Ill. 2003)). Accordingly, the Johnson Court included only the unreasonable portion of the title insurance charge in points and fees calculations under HOEPA. Johnson, at *27-28.

Guise v. BWM Mortgage, LLC is illustrative of the decisions applied in Johnson. 377 F.3d 795 (7th Cir. 2004). There, borrowers argued that under TILA, "if any portion of the title insurance endorsement fee was unreasonable or not bona fide, then the entire [amount] paid" qualifies for TILA calculations. Guise, 377 F.3d 795, 800 (7th Cir. 2004). The Seventh Circuit rejected this claim:

> To deny . . . credit for the portion of the $1145 that represents a reasonable fee for the title insurance and endorsements it provided would render the [statutory] exemption meaningless and would subject lenders to liability beyond TILA's sanction. Second, the [borrowers'] approach artificially inflates the alleged finance charge of $544 by lumping it with the allegedly reasonable fee of $601 charged for the title insurance received. An allegedly partial overcharge does not convert the entire title insurance transaction into a finance charge, it only demonstrates that some amount of the fee was not eligible from exclusion from the finance charge computation.

Guise, 377 F.3d at 800.

Like the Court in Johnson, I find this reasoning persuasive. Appellants do not (and could not) dispute that Appellee reasonably required them to purchase title insurance. Appellants further do not dispute that 90% of the premium they were charged was proper. In these circumstances, it would be unreasonable indeed to hold that the unwarranted 10% renders "unreasonable" the entire premium charge. Accordingly, I rule that the Bankruptcy Court properly included only the unreasonable portion of the title insurance premium in its HOEPA

points and fees calculation.

In light of my decision, I need not address Appellee's alternative grounds for affirming the Bankruptcy Court.

II. Appellee Reasonably Required Transfer of the Property to Joint Ownership

Appellants next argue that the Bankruptcy Court erred in holding that they were not entitled to the refinance rate.

The Bankruptcy Court determined that the recent transfer of the property to joint ownership disqualified Appellants from obtaining the refinance rate. In Appellants' view, because the transfer requirement was unreasonable, the Bankruptcy Court should have declared them eligible for the refinance rate. I disagree.

Appellee's representative, Ann Helder, testified that "[i]f you're going to sign the note, and we're going to use your income to qualify the loan, we would like you to have an interest in the property on title." (N.T. 247); (Brief of Appellee in Response to Amended Statement of Issues at 5-6). Like the Bankruptcy Court, I believe this was a prudent and reasonable requirement.

In these circumstances, Appellants' third and final argument -- that Appellee failed to show that the document preparation fee and deed recording fee (both incidental to the joint ownership transfer) were bona fide or reasonable -- must also fail. Appellants challenge the

existence of these fees, not the reasonableness of the amounts charged. Clearly, because the requirement to transfer the property was appropriate, the fees associated with that transfer were bona fide and reasonable.

An appropriate Order follows.

By The Court

_____
Paul S. Diamond, J.

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_____	:	**Bankruptcy No. 01-35854BIF**
	:	
Albert & Deborah Strong,	:	
Appellants,	:	**Adversary No.: 02-626**
v.	:	
	:	**NO. 04-CV-4699**
Option One Mortgage Corporation	:	
d/b/a H&R Block Mortgage,	:	
Appellee.	:	

Order

AND NOW, this 20th day of June, 2005, upon consideration of Appellants' Brief, Appellee's Brief, Appellants' Amended Statement of Issues, Appellee's Memorandum in Response to Appellants' Statement of Issues, and all related submissions it is **ORDERED** that the decision of the Bankruptcy Court is **AFFIRMED** and the appeal **DENIED.**

The Clerk of Court shall close this matter for statistical purposes.

BY THE COURT:

_____

Paul S. Diamond, J.