

# Alert: Louisiana Supreme Court Confirms Yield Spread Premiums Are Not Included In the HOEPA Points and Fees Calculation

November 30, 2010

*The Bank of New York, Acting Solely in Its Capacity As Trustee for EQCC Trust 2001-2 v. Kathleen Johnson Parnell*, No. 2010-C-0435 (La. 11/30/2010)

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On Tuesday, November 30, 2010, the Louisiana Supreme Court unanimously reversed a lower court ruling and granted summary judgment to The Bank of New York in a case of national importance involving “yield spread premiums,” the Truth In Lending Act and the federal Home Ownership and Equity Protection Act (“HOEPA”). This decision is the result of a determined effort by the Bank to correctly apply the HOEPA points and fees calculation despite attempts by the plaintiff and amicus curiae, the National Consumer Law Center, Center for Responsible Lending and the Southeastern Louisiana Legal Services, to ignore and misconstrue the Federal Reserve Board’s Official Staff Commentary and to depict the lender as “predatory.”

In 2001, the plaintiff, Kathleen Johnson Parnell, executed an adjustable rate promissory note secured by her home. This loan was accomplished through the assistance of a mortgage broker. The HUD-1 Settlement Statement prepared in connection with the closing of the loan stated that the lender paid the mortgage broker a yield spread premium (“YSP”) in the amount of \$1,264, which was paid outside closing. In 2003, Parnell attempted to rescind the security interest under the Truth In Lending Act claiming that her loan was governed by HOEPA because the points and fees charged in connection with her loan exceeded eight percent of the total loan amount and claiming that she had not been given the requisite disclosures. Parnell’s rescission demand was denied because her loan did not meet the threshold requirement of HOEPA – the total amount of points and fees was only 6.7 percent. The difference between these calculations rested on the inclusion of the YSP.

After Parnell defaulted on her note, the Bank filed a petition for executory process seeking to seize and sell her home. Parnell filed a petition to suspend the seizure and sale of her home, alleging, among other things, a violation of HOEPA for failing to provide statutorily-required disclosures. The Bank filed a motion for summary judgment, seeking the dismissal of all claims asserted by Parnell primarily on the basis that Parnell’s loan was not subject to HOEPA because a YSP paid by a lender is not included in the points and fees calculation. Parnell opposed the Bank’s motion arguing that the YSP was ultimately paid by her over the life of the loan and that “all

compensation paid to mortgage brokers” constitute “points and fees” under HOEPA. The trial court granted the Bank’s motion for summary judgment, but that decision was reversed on appeal by the Louisiana Court of Appeal for the Fifth Circuit.

In today’s decision, the Louisiana Supreme Court correctly held that a yield spread premium paid by a lender to a mortgage broker is not part of the “total points and fees payable by the consumer at or before closing” within the meaning of 15 U.S.C. § 1602(aa)(1)(B) of HOEPA. The Louisiana Supreme Court recognized the Federal Reserve Board’s designation by Congress as the primary source for interpretation and application of the Truth In Lending Act and relied on a provision in the Board’s Official Staff Commentary of Regulation Z to find that mortgage broker fees that are not paid by the consumer are not included in the HOEPA “points and fees” calculation. Official Staff Commentary, 12 C.F.R. Part 226, Supp. I § 226.32(b)(1)(ii). The Louisiana Supreme Court found the Board’s interpretation to be rational and consistent with the express language of HOEPA and Regulation Z. The Louisiana Supreme Court held “[b]ecause the YSP in this case was paid by the lender not the borrower/consumer, the YSP is not included in the calculation for determining the applicability of HOEPA.”

Bennet Koren, head of McGlinchey Stafford’s consumer financial services practice who assisted with this matter, noted: “This decision is a great victory for all creditors who made HOEPA loans in Louisiana.”

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