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Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: HONORABLE AUGUSTUS C. AGATE IA Part 24
Justice

AVROHOM SEBROW, x

Plaintiff,

-against-

FAIRMONT FUNDING, LTD., ET AL.,

Defendants.
x

Index Number 15645 2010

Motion Date May 3, 2011

Motion Cal. Number 26

Motion Seq. No. 2

The following papers numbered 1 to 11 read on this motion defendant Federal National Mortgage Association (FNMA) pursuant to CPLR 2004 and 3012(d) to extend the time of defendant FNMA to appear and serve an answer, and pursuant to CPLR 3211(a)(1) and (7) to dismiss the complaint with prejudice, and for an award of costs and disbursements

Papers Numbered

Notice of Motion - Affidavits - Exhibits.....1-8
Answering Affidavits - Exhibits.....9-11

Upon the foregoing papers it is ordered that the motion is determined as follows:

Plaintiff commenced this action alleging that he entered into a contract for the purchase of real property known as 242 Beach 13th Street, Far Rockaway, New York, and sought a mortgage loan to finance the purchase. He obtained a mortgage loan on July 23, 2004 from defendant Fairmont in the principal amount of $315,000.00, plus interest, to finance the purchase. He alleges that in early July 2004 he had received a good faith estimate of settlement services (GFE) from defendant Fairmont, but that at the closing,

Fairmont gave him a revised GFE dated July 22, 2004, which substantially increased the settlement costs. Plaintiff also alleges that neither GFE mentioned any payment of mortgage broker commissions, and no loan disclosures were provided to him. He further alleges that the HUD-1 settlement statement indicated that a "Broker Premium" had been paid outside the closing, and failed to indicate the amount. Plaintiff additionally alleges that defendant FNMA is claimed to be the assignee of the mortgage and note. In his complaint dated June 14, 2010, plaintiff asserts eleven causes of action, ten of which are asserted against defendant FNMA.[1]

Plaintiff served defendant FNMA with a copy of the supplemental summons and complaint by mail, pursuant to CPLR 312-a, and service was acknowledged by defendant FNMA on November 22, 2010. Counsel for defendant FNMA received a copy of the pleadings on December 2, 2010.

It is undisputed that the time for defendant FNMA to appear, answer or move in relation to the complaint has expired (*see* CPLR 312-a[b][2]). Defendant FNMA nevertheless moves for leave to extend its time to answer or otherwise move in relation to the complaint, and simultaneously, to dismiss the complaint in lieu of serving an answer.[2]

Defendant FNMA has established good cause for its delay in making its motion to dismiss, because its counsel needed to obtain the loan files to complete an analysis of the issues and to frame a proper motion, and plaintiff refused to afford it additional time to make the motion to dismiss. In addition, the relatively short delay was not willful since defendant FNMA also attempted to obtain an order granting it leave to extend its time to answer, move or otherwise respond to the complaint, which ex-parte application was declined. Defendant FNMA has a meritorious defense, and plaintiff will not be prejudiced by an extension of the time for defendant FNMA's motion to dismiss. Plaintiff did not move for a default judgment prior to defendant FNMA's motion, and has not cross moved

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[1] The third cause of action is asserted only against defendant Fairmont.

[2] The notice of motion included a demand pursuant to CPLR 2214(b) that any responding papers be served at least seven days prior to the return date of March 22, 2011. Although plaintiff's counsel complains that the motion papers were not received by him until March 4, 2011, the affidavit of service dated February 25, 2011 indicates they were served by mail on February 25, 2011. In any event, plaintiff had 18 days in which to respond to the motion.

for such relief. Under such circumstances, that branch of the motion to extend defendant FNMA's time to make the motion to dismiss to February 25, 2011 is granted in an exercise of discretion (*see* CPLR 2004; *see A & J Concrete Corp. v Arker*, 54 NY2d 870 [1981]; *see also Harley v United Services Auto. Assn.*, 191 AD2d 768 [1993]).

With respect to that branch of the motion by defendant FNMA to dismiss the complaint,

> "[w]hen determining a motion to dismiss pursuant to CPLR 3211(a)(7), the pleading must be afforded a liberal construction (*see* CPLR 3026; *Leon v Martinez*, 84 NY2d 83, 87 [1994]), the facts as alleged in the complaint are accepted as true, the plaintiff is accorded the benefit of every favorable inference, and the court must determine only whether the facts as alleged fit within any cognizable legal theory (*see Leon v Martinez*, 84 NY2d at 87-88; *Cayuga Partners v 150 Grand*, 305 AD2d 527 [2003]). 'In assessing a motion under CPLR 3211(a)(7) ... a court may freely consider affidavits submitted by the plaintiff to remedy any defects in the complaint,' and if the court does so, 'the criterion is whether the proponent of the pleading has a cause of action, not whether he has stated one' (*Leon v Martinez*, 84 NY2d at 88 [internal quotations marks omitted]).
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> 'A party seeking dismissal on the ground that its defense is founded on documentary evidence under CPLR 3211(a)(1) has the burden of submitting documentary evidence that "resolves all factual issues as a matter of law, and conclusively disposes of the plaintiff's claim"' (*Sullivan v State of New York*, 34 AD3d 443, 445 [2006], quoting *Nevin v Laclede Professional Prods.*, 273 AD2d 453, 453 [2000]; *see Leon v Martinez*, 84 NY2d at 88)"

(*Uzzle v Nunzie Court Homeowners Assn, Inc.*, 70 AD3d 928 [2010]).

The first seven causes of action asserted in the complaint against defendant FNMA are based upon alleged violations of Banking Law § 6-l. Defendant FNMA asserts that the version of Banking Law § 6-l, which was in effect at the time of plaintiff's entry into the mortgage loan, did not apply to the subject loan because the loan exceeded $300,000.00 in the principal amount.

The version of Banking Law § 6-l which was in effect (L 2002, c 626, § 4, eff. April 1, 2003) at the time of plaintiff's entry

into the mortgage loan (on or about July 23, 2004), did not apply to all loans. Rather, it applied to those loans for which application was made on or after the statute's effective date (*see* L 2002, c 626, § 4) and required the loan to be a "home loan" and, once within that category, the statute applied if the loan met the threshold of being considered a "high cost home loan"[3] (*see* Bergman, B., *Predatory Lending for All*, 77-Sep NY State BJ 46 [2005]; *see generally* Keefe, K. and Hasper, E., *New State Law Addresses Mortgage Foreclosure Crisis and Subprime Lending Abuses*, Legal Services J, August 2008, at n 4; *Ng v HSBC Mortg. Corp.*, 2010 WL 889256, 2010 US Dist LEXIS 40109 [ED NY March 10, 2010]). To have been a "home loan" within the meaning of that version of the statute, the principal could not exceed the lesser of the Fannie Mae conforming loan amount or $300,000.00 (*see* former Banking Law § 6-l[1][e][i] [B] [L 2002, ch 626, § 1]; *Wells Fargo Bank, Nat. Assn v Rolon*, 24 Misc 3d 1216(A) [2009]; *Fremont Inv. & Loan v Laroc*, 21 Misc 3d 1124[A] [2008]; *Sutherland v Remax 2000*, 20 Misc 3d 1131[A] [2008]; *Alliance Mtge. Banking Corp. v Dobkin*, 19 Misc 3d 1121[A] [2008]; *DLJ Mortgage Capital, Inc. v Smith*, 2007 Slip Op. 32745(U), 2007 NY Misc LEXIS 8988, 2007 WL 2814513 [Sup Ct Queens Co. 2007]; *see also* Bergman, B., *Predatory Lending for All*, 77-Sep NYSBJ 46 [2005], *supra*).

Contrary to the argument of plaintiff, the restrictions and prohibitions regarding lending practices found in the present version of Banking Law § 6-l may not be considered when evaluating whether the first seven causes of action state a claim (*cf. Ng v HSBC Mortg. Corp.*, 2010 WL 889256, 2010 US Dist LEXIS 40109 [ED NY March 10, 2010]). The original version of Banking Law § 6-1 (L 2002, c 626) was specifically made applicable only to loans for which application was made on or after the law's effective date (October 3, 2002) (L 2002, c 626, § 4). The subsequent amendment to Banking Law § 6-l(1)(e)(i) (L 2007, c 552, § 1) defined a "home loan," as one that the principal amount of the loan "does not exceed the conforming loan size limit for a comparable dwelling as established from time to time by the federal national mortgage association." Such amendment, in effect, dropped consideration of whether the principal amount of the loan exceeded $300,000.00. Although it may be argued that such amendment was for the purpose of expanding the coverage of Banking Law § 6-l, the Legislature specifically limited the amendment's reach to those loans for which

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[3] A "high cost home loan" was defined as "a *home loan* in which the terms of the loan exceed one or more of the thresholds as defined in paragraph g of [subdivision 1]" (former Banking Law § 6-l[1][d]) (L 2002, c 626) (emphasis supplied).

application had been made on or after the amendment's effective date (October 14, 2007) (*see* L 2007, c 552, § 2).

Banking Law § 6-l(1)(e)(i) thereafter was further amended to define a "home loan" as one that the "principal amount of the loan at origination does not exceed the conforming loan size limit *(including any applicable special limit for jumbo mortgages)* for a comparable dwelling as established from time to time by the federal national mortgage association" (L 2009, c 507, § 12) (emphasis supplied) (the "jumbo mortgages" amendment). The Legislature did not specifically state the "jumbo mortgages" amendment was not made applicable to loans prior to the 2009 amendment's effective date (L 2009, c 507, § 25 [December 15, 2009]). Nevertheless, it also did not make any explicit provision for retroactivity of that amendment. Based upon this legislative history where the amendments to Banking Law § 6-l(1)(e)(i) were substantive, and enacted in increments over time, the Legislature intended that the respective statutory amendments to Banking Law § 6-l applied to loans based upon whichever amendment was in effect at the time of the loan application, and not retroactively.

Plaintiff argues that it is premature to determine whether the principal amount of the mortgage loan exceeded $300,000.00, citing defendant FNMA's admission that the "adjusted" original principal balance, when subtracting points and fees, was $307,808.75. Plaintiff contends that the mortgage loan included other settlement costs which have not been disclosed, including, but not limited to, brokerage commissions[4], or a yield spread premium.[5] He points to the HUD-1 settlement statement, at line #808, which indicates that a "Broker Premium" was "p.o.c.," i.e. "paid outside closing," but does not disclose the amount paid.

The version of Banking Law § 6-l in effect at the time of the origination of the loan, however, did not require consideration of "points and fees" when evaluating whether the loan was a "home loan" (*see* former Banking Law § 6-l, L 2002, c 626). It simply called for consideration of the "principal amount" of the loan (*see*

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[4] The HUD-1 statement issued to plaintiff makes no mention of any compensation paid by plaintiff directly to a mortgage broker. Plaintiff makes no allegation that he retained any mortgage broker.

[5] A yield spread premium constitutes fees paid to a mortgage broker for giving the borrower a higher interest rate on the mortgage in exchange for lower up-front costs (*see Granucci v Wells Fargo Bank, N.A.*, 2010 WL 5475613, 2010 US Dist LEXIS 137933, [ED NY, 2010], at n 2).

former Banking Law § 6-l[1][e][i], L 2002, c 626), not the "adjusted" principal amount. That statute included a definition of the phrase "points and fees" (*see* former Banking Law § 6-l[1][f], L 2002, c 626) and called for consideration of "points and fees," only in connection with a determination as to whether the loan was a "high cost home loan" (*see* former Banking Law § 6-l; L 2002, c 626).

Thus, because the principal amount of the loan exceeded $300,000.00, the causes of action asserted by plaintiff against defendant FNMA premised upon the violation of Banking Law § 6-l fail to state a claim and must be dismissed (*see* CPLR 3211[a][1], [7]; *Wells Fargo Bank, Nat. Assn v Rolon*, 24 Misc 3d 1216[A] [2009], *supra*).

The eighth cause of action is premised upon plaintiff's claim that defendant FNMA, as assignee of the mortgage and note, is vicariously liable for misrepresentations allegedly made by its assignor, defendant Fairmont, the original mortgagee. An assignee of a mortgage takes it subject to the equities attending the original transaction (see *Trustees of Union Coll. v Wheeler*, 61 NY 88 [1874]), and thus, the assignee takes the mortgage subject to the mortgagor's action for fraud (*see Hill v Hoole*, 116 NY 299 [1889]; *Siebros Fin. Corp. v Kirman*, 232 App Div 375 [1931]; *Sparling v Wells*, 24 App Div 584 [1898]). This conclusion is true even where the assignee is a bona fide purchaser for value (*see Lapis Enterprises, Inc. v International Blimpie Corp.*, 84 AD2d 286 [1981]). Nevertheless, plaintiff has failed to allege the nature of the purported misrepresentations made by defendant Fairmont with the requisite specificity (*see* CPLR 3016 [b]; *Lanzi v Brooks*, 43 NY2d 778 [1997]; *Morales v AMS Mtge. Servs., Inc.*, 69 AD3d 691 [2010]; *Tarzia v Brookhaven Nat. Lab.*, 247 AD2d 605 [1998]). He simply alleges that defendant Fairmont had a duty to use reasonable care "to impart correct information about rates, terms, and loan options, because of the special relationship" and "[t]he information was incorrect, misleading or false" (*cf. Dobroshi v Bank of America, N.A.*, 65 AD3d 882 [2009]).

In addition, to the extent the eighth cause of action is based upon negligent misrepresentation, plaintiff's allegation that defendant Fairmont has specialized knowledge and experience regarding mortgage financing, is insufficient to establish the existence of a special relationship between plaintiff and Fairmont (*see J.A.O. Acquisition Corp. v. Stavitsky*, 8 NY3d 144, 148 [2007]; *see also Shovak v Long Island Commercial Bank*, 50 AD3d 1118 [2008], *lv to appeal dismissed in part, denied in part*, 11 NY3d 762 [2008]; *cf. Mercado v Playa Realty Corp.*, 2005 WL 1594306 [ED NY 2005]).

An arms-length borrower-lender relationship is not of a confidential or fiduciary nature and therefore does not support a cause of action for negligent misrepresentation (*see Standard Federal Bank v Healy*, 7 AD3d 610, 612 [2004]; *see also Dobroshi v Bank of America, N.A.*, 65 AD3d 882, 886 [2009], *supra*; *Walts v First Union Mtge. Corp.*, 259 AD2d 322 [1999]; *Bank Leumi Trust Co. of N.Y. v Block 3102 Corp.*, 180 AD2d 588, 589 [1992]). As a consequence, plaintiff has failed to state a claim against defendant FNMA based upon a theory of vicarious liability for any purported fraudulent or negligent misrepresentation made by defendant Fairmont (CPLR 3211[a][7], CPLR 3016]).

The ninth cause of action also fails to state a cause of action as against defendant FNMA (CPLR 3211[a][7]). Plaintiff alleges that he was "forced to rely upon Defendant Fairmont's due diligence," and that "[d]efendants Fairmont and its successors have exploited Plaintiff's reliance on their superior knowledge and experience" to obtain "undisclosed profits." Plaintiff also alleges that he, therefore, has the right to receipt of the undisclosed profits. To the extent these allegations can be interpreted to assert a claim for damages against defendant FNMA based upon a claim that plaintiff entered into the mortgage loan under duress, plaintiff has failed to allege the required elements of such a claim (*see Chase Manhattan Bank v State of New York*, 13 AD3d 873 [2004]). In addition, the claim of duress may not be sustained in view of the clear and unambiguous terms of the mortgage documents, and the failure by plaintiff to allege he was under physical duress or had no means of comprehending their terms by the exercise of ordinary intelligence.

Insofar as plaintiff makes this claim against defendant FNMA based upon defendant Fairmont's failure to assure "the appraisal report was prepared consistent with national standards," plaintiff makes no allegation the appraisal was obtained for his benefit, as opposed to the benefit of defendant Fairmont (in the event of the need for recoupment). Furthermore, the relationship between plaintiff and defendant Fairmont, was a contractual one, and a claim of negligence in the performance of contract does not state a cause of action in the absence of a breach of a fiduciary duty (*see Fresh Direct, LLC v Blue Martini Software, Inc.*, 7 AD3d 487 [2004]). Again, plaintiff has failed to allege facts indicating any special or fiduciary relationship existed between him and either defendant Fairmont or FNMA.

Plaintiff also bases his ninth cause of action against defendant FNMA on his allegation that defendant Fairmont failed to

evaluate properly his ability to repay the loan and present him with all reasonable mortgage loan options. As already discussed, the legal relationship between a borrower and a bank is a contractual one of debtor and creditor and does not create a fiduciary relationship between the bank and its borrower (*see Standard Federal Bank v Healy*, 7 AD3d 610, 612 [2004]; *see also Walts v First Union Mtge. Corp.*, 259 AD2d 322 [1999]; *Bank Leumi Trust Co. of N.Y. v Block 3102 Corp.*, 180 AD2d 588, 589 [1992]). (*see Fresh Direct, LLC v Blue Martini Software, Inc.*, 7 AD3d 487 [2004]). Although the present version of Banking Law § 6-l prohibits a lender or mortgage broker from making or arranging a high-cost home loan without due regard to the borrower's repayment ability, that statute is inapplicable to the facts as alleged herein (*see supra* at 3-5).

To the extent plaintiff alleges as part of the ninth cause of action against defendant FNMA, that defendant Fairmont failed to provide him with "necessary disclosures," he has failed to allege facts sufficient to overcome the rule that the legal relationship between a borrower and a bank is a contractual one and does not give rise to a fiduciary relationship (*see Dobroshi v Bank of America, N.A.*, 65 AD3d 882 [2009], *supra*). Although there are disclosure and delivery requirements pursuant to the Truth in Lending Act [TILA] (15 USC § 1601 *et seq.*) and Real Estate Settlement and Procedures Act [RESPA] (12 USC § 2601 *et seq.*), plaintiff has made no allegation that TILA, RESPA or any other statute applies here, or were violated by defendants Fairmont or FNMA.[6] In addition, plaintiff has not shown that defendant

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[6] Failure to make a required disclosure and satisfy the requirements of the TILA may subject a lender to statutory and actual damages that are traceable to the lender's failure (*see* 15 USC § 1640(a)(1)-(2)(A); *Beach v Ocwen Fed. Bank*, 523 US 410, 412 [1998]). TILA also gives the consumer the right to rescind a transaction that results in the creditor taking a security interest in the consumer's principal dwelling (*see* 15 USC § 1635[a]). Plaintiff makes no claim for rescission.

Under RESPA, statutory and actual damages are available to a consumer for certain violations of RESPA (*see e.g.* 12 USC § 2605(f)(1)(A)-(B). However, for other violations, courts have held that RESPA does not permit private rights of action (*see e.g. Bafus v Aspen Realty, Inc.*, 2007 WL 793633, 2007 US Dist LEXIS 18922 [D Idaho, 2007]; *Bloom v Martin*, 865 F Supp 1377 [ND Cal 1994]; *Campbell v Machias Sav. Bank*, 865 F Supp 26 [D Maine 1994]; *Morrison v Brookstone Mortg. Co. Inc.*, 415 F Supp 2d 801 [SD Ohio 2005]; *Byrd v Homecomings Financial Network*, 407 F Supp 2d 937 [ND Ill 2005]; *Reese v 1st Metro. Mortgage Co.*, No. 03-2185-KHV, 2003 WL 22454658, at *4-5, 2003 US Dist LEXIS 19256, at *16-17 [D Kan, Oct. 28, 2003]; *Washington Mut. Bank, FA v*

Fairmont's alleged superior knowledge of essential facts rendered the transaction without disclosure inherently unfair (*see Dobroshi v Bank of America, N.A.*, 65 AD3d 882 [2009], *supra*).

The tenth cause of action to compel an accounting asserted by plaintiff against defendant FNMA is premised upon plaintiff's claim that defendants FNMA and Fairmont improperly applied his mortgage payments. Defendant FNMA has submitted, in support of its motion a document setting forth the "payment history" for the loan. Although plaintiff contends that the document is not "authenticated" and constitutes "hearsay," he makes no claim of any inaccuracy or incompleteness as to the accounting therein of payments received by defendants Fairmont and FNMA, and disbursements made by them from escrow. In addition, plaintiff fails to make any specific objection to the manner in which the payments were credited or applied by defendants FNMA and Fairmont. Under such circumstances, where plaintiff has received an accounting from defendant FNMA, and the claim against defendant FNMA to compel an accounting is now moot.

The eleventh cause of action asserted by plaintiff against defendant FNMA is based upon his claim that defendant Fairmont violated General Business Law § 349. General Business Law § 349 prohibits deceptive business practices and acts. To assert a viable claim under General Business Law § 349(a), a plaintiff must plead (1) that the challenged conduct was consumer-oriented, (2) that the conduct or statement was materially misleading, and (3) damages (*see Stutman v Chemical Bank*, 95 NY2d 24, 29 [2000]; *Shovak v Long Island Commercial Bank*, 50 AD3d 1118 [2008]; *Lum v New Century Mtge. Corp.*, 19 AD3d 558, 559 [2005]). "Whether a representation or omission, the deceptive practice must be likely to mislead a reasonable consumer acting reasonably under the circumstances" (*Oswego Laborers' Local 214 Pension Fund v Marine Midland Bank*, 85 NY2d 20, 26 [2000]; *Smith v Chase Manhattan Bank, USA, N.A.*, 293 AD2d 598, 599 [2002]).

Although an individual mortgagor who has been the victim of misleading practice by a mortgagee has been held to have a remedy under General Business Law § 349 (*see e.g. Popular Financial*

Superior Court, 75 Cal. App. 4th 773 [1999]; *Sturm v Peoples Trust & Savings Bank*, 713 NW2d 1 [Iowa 2006]; *cf. Vega v First Federal Sav. & Loan Assn. of Detroit*, 622 F2d 918, 925, n 8 [6th Cir 1980])). Regardless of whether plaintiff has a private right of action under RESPA, the court is unaware of any remedy available under RESPA or TILA whereby the consumer is entitled to disgorgement of profits earned by the lender.

Services, LLC v Williams, 50 AD3d 660 [2008]; *Delta Funding Corp. v Murdaugh*, 6 AD3d 571 [2004]), plaintiff has failed to allege deceptive acts or practices committed by defendants Fairmont or FNMA which had a broad impact on consumers at large or which were consumer-oriented and directed against the general public (*see Oswego Laborers' Local 214 Pension Fund v. Marine Midland Bank*, 85 NY2d 20, 24-26 [2000], *supra*; *Flandera v AFA America, Inc.*, 78 AD3d 1639 [2010]; *Latiuk v Faber Constr. Co.*, 269 AD2d 820 [2000]). Plaintiff alleges that defendant FNMA failed to provide him with escrow and tax statements, and pay taxes and insurance premiums out of escrow in a timely fashion. Plaintiff also alleges that defendant FNMA claims an amount is owed under the loan which is incorrect, and charges "excessive fees." These allegations are in the nature of claims of breach of contract, unique to the parties, and do not fall within the prohibitions of the statute. In addition, to the degree he asserts that defendant Fairmont obtained a yield spread premium, at the time of the making of the mortgage loan, yield spread premiums were not per se illegal (*see Shovak v Long Island Commercial Bank*, 50 AD3d 1118 [2008], *supra*; *Wint v ABN Amro Mtge. Group, Inc.*, 19 AD3d 588 [2005])[7], and there was no materially misleading statement made to plaintiff, as plaintiff acknowledges the HUD-1 statement indicated payment of a "Broker Premium." Thus, defendant FNMA is entitled to dismissal of the cause of action alleging a violation of General Business Law § 349(a) (see *Shovak v Long Island Commercial Bank*, 50 AD3d 1118 [2008], *supra*; *Lum v New Century Mtge. Corp.*, 19 AD3d 558, 559 [2005], *supra*; *see also Wint v ABN Amro Mtge. Group, Inc.*, 19 AD3d 588, 590 [2005], *supra*; *Fisher v Equicredit*, 19 AD3d 541 [2005]). To the extent plaintiff asserts that defendant Fairmont charged "excessive fees," plaintiff has failed to allege any facts which bring this claim within the purview of the General Business Law § 349.

Accordingly, that branch of the motion by defendant FNMA to dismiss the complaint asserted against it is granted.

Dated: July 28, 2011

[7] The Federal Reserve has since adopted final rules (made effective on April 1, 2011) on loan originator compensation and steering which prohibit a mortgage broker or loan officer from receiving payments directly from a consumer while also receiving compensation from the creditor or another person, or "steering" a consumer to a lender offering less favorable terms in order to increase the broker's or loan officer's compensation (12 CFR Part 226, Regulation Z; Docket No. R-1366, Federal Register: September 24, 2010 [Vol 75, No 185]).

HON. AUGUSTUS C. AGATE, J.S.C.