



The relief described hereinbelow is SO ORDERED.

Signed January 26, 2005.

A handwritten signature in black ink that reads "Robert D. Berger". The signature is written in a cursive style and is positioned above a horizontal line.

ROBERT D. BERGER
United States Bankruptcy Judge

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF KANSAS

IN RE:

RICKY D. POPPITZ and
YVONNE S. POPPITZ,
Debtors.

Case No. 02-23682

RICKY D. POPPITZ and
YVONNE S. POPPITZ,
Plaintiffs,

v.

Adversary No. 02-6129

AMERIQUEST MORTGAGE COMPANY,
Defendant.

MEMORANDUM AND ORDER¹

This matter is before the Court on the plaintiffs' adversary complaint (Doc. No. 1) which seeks a determination that the plaintiffs, Ricky D. Poppitz and Yvonne S. Poppitz ("the

¹ The plaintiffs appear by their attorney, Kenneth M. Gay, Lenexa, Kansas. The defendant appears by its attorneys, Todd W. Ruskamp and Clayton T. Norkey of Shook, Hardy & Bacon, L.L.P., Kansas City, Missouri.

Poppitzes”), are entitled to enforce certain rights under the Truth-in-Lending Act (“TILA”) against the defendant, Ameriquest Mortgage Company (“Ameriquest”). The Court has conducted a trial on this matter, reviewed all the evidence submitted in this case, and is now prepared to rule. The Court has jurisdiction to hear this matter.²

I. FINDINGS OF FACT

Based upon the testimony and evidence presented at trial, the Court makes the following findings of fact:

On May 24, 2002, the parties entered into an agreement wherein Ameriquest loaned the Poppitzes \$99,800.00 to refinance an existing loan secured by their residence. To secure the obligation, the Poppitzes granted the defendant a mortgage on their home (the loan and mortgage events are hereinafter referred to as the “Transaction”).

Gerald D. Luke (“Mr. Luke”), a retired mortgage loan officer and remote loan closer for Ameriquest, met the Poppitzes at their home on May 24, 2002, to close the Transaction on behalf of Ameriquest. At the closing, Mr. Luke brought with him two packets of Transaction documents provided by Ameriquest that he believed were identical. He gave the Poppitzes one of the packets as their copy and went over with them the documents that were contained in the packet that remained in his possession, including certain disclosures required by the TILA. Mr. Luke did not review the packet of Transaction documents he gave to the Poppitzes to determine whether it was identical to the one in his possession.

During the closing and in Mr. Luke’s presence, the Poppitzes signed a declaration on Ameriquest’s copy of a Truth-in-Lending Disclosure Statement (the “Disclosure Statement”)

² The parties do not dispute the Court’s jurisdiction. The Court finds it has jurisdiction over this proceeding under 28 U.S.C. § 1334 and 28 U.S.C. § 157.

that, as required by the TILA, they had received their copy of the Disclosure Statement.

Although Mr. Luke, who closes 50 to 85 mortgages a month, testified that he provided the Poppitzes with a copy of the Disclosure Statement from his packet of Transaction documents, the Court lends little credence to his testimony on the specific details of the Transaction. Mr. Luke was unable to convincingly explain why he could remember with specificity the Poppitzes' Transaction, but could not do the same for any of the other mortgages he closed that day.

After the closing, Mr. Poppitz put the Poppitzes' packet of Transaction documents, which were bound with a large paper clip or binder clip, on a desk in his office where the packet was undisturbed for two or three days. At no time did anyone in the Poppitzes' family or any guests in their home, aside from Mr. and Mrs. Poppitz, handle the packet of Transaction documents.

On or around May 27 and 28, 2002, Mr. Poppitz examined the packet of Transaction documents two or three times, primarily to review the settlement statement included therein. Although Mr. Poppitz's desk was covered with work-related documents and other papers, he took proper care to maintain the original order of the Transaction documents and to avoid confusing the Transaction documents with the other documents and papers on his desk. On or around May 29, 2002, Mr. Poppitz removed the Notice of Right to Rescind from the Transaction document packet for Mrs. Poppitz to sign in case they elected to rescind the Transaction later that day and she was unavailable to sign the document at that time. The signed Notice of Right to Rescind was retained with the other Transaction documents. The Poppitzes did not elect to rescind the Transaction at that time.

Mr. Poppitz eventually contacted an attorney, Bradley D. Dillon ("Mr. Dillon"), because Mr. Poppitz was concerned with inconsistencies in the Transaction settlement statement. Only

through Mr. Poppitz's initial telephone conversations with Mr. Dillon, in which Mr. Dillon directed Mr. Poppitz to look for specific items, did he discover that the set of Transaction documents in their possession did not include a Disclosure Statement. After mailing certain copies of the Transaction documents to Mr. Dillon for further review, Mr. Poppitz agreed to deliver to Mr. Dillon a complete copy of the Transaction documents. They met at a copy shop and Mr. Dillon copied the Transaction documents, which the Court finds were complete and unaltered from the time Mr. Luke delivered them to the Poppitzes.

In addition to the complete and unaltered set of Transaction documents, Mr. Dillon copied a number of documents from the Poppitzes that related to a previous refinancing of their home. The Transaction documents were at all times physically segregated or clearly discernable from the documents related to the previous refinancing. After review of the Transaction document copies, Mr. Dillon concluded that the Poppitzes had not received the Disclosure Statement that was required by the TILA.

On or about July 2, 2002, Mr. Dillon, as counsel for the Poppitzes, notified Ameriquest's counsel by letter of the Poppitzes' intent to rescind the Transaction because Ameriquest had failed to provide the material disclosures required by the TILA. Counsel for Ameriquest received the rescission demand letter. More than 20 days have passed since counsel for Ameriquest received the rescission demand letter, and neither party has taken further action in response thereto outside this adversary proceeding.

The Poppitzes filed for protection under Chapter 13 of the Bankruptcy Code on October 4, 2002. They commenced this adversary proceeding on December 10, 2002, to determine whether they are entitled to certain remedies under the TILA. A trial on the

underlying complaint was held by this Court on October 22, 2004.

II. Conclusions of Law and Discussion

A. TILA Background

Some background knowledge regarding the TILA is helpful when evaluating claims made under it. Congress enacted the TILA to regulate the disclosure of the terms of consumer credit transactions in order “to aid unsophisticated consumers and to prevent creditors from misleading consumers as to the actual cost of financing.”³ Disclosure allows consumers to compare different financing options and their costs.⁴ To encourage compliance, TILA violations are measured by a strict liability standard, so even minor or technical violations impose liability on the creditor.⁵ The consumer-borrower can prevail in a TILA suit without showing that he or she suffered any actual damage as a result of the creditor’s violation.⁶

The TILA is applicable to consumer credit transactions “in which a security interest is or will be acquired in real property... used or expected to be used as the principal dwelling of the consumer, in which the total amount financed exceeds \$25,000.00.”⁷ Because the Poppitzes granted Ameriquest a mortgage on their principal dwelling to secure a loan in the amount of \$99,800.00 and because the parties agree that the Transaction was a consumer credit transaction

³ *Morris v. Lomas & Nettleton Co.*, 708 F. Supp. 1198, 1203 (D. Kan. 1989) (citing *Mourning v. Family Publ’ns Serv., Inc.*, 411 U.S. 356, 363-69 (1973)).

⁴ *See* 15 U.S.C. § 1601(a).

⁵ *See, e.g., Mars v. Spartanburg Chrysler Plymouth, Inc.*, 713 F.2d 65, 67 (4th Cir. 1983) (“To insure that the consumer is protected, as Congress envisioned, requires that the provisions of [TILA and Reg. Z] be absolutely complied with and strictly enforced.”).

⁶ *Herrera v. First N. Sav. & Loan Ass’n*, 805 F.2d 896, 900 (10th Cir. 1986).

⁷ 15 U.S.C. § 1603(3).

within the meaning of the TILA, the Court concludes that the Transaction constituted a consumer credit transaction governed by the TILA and its accompanying regulations (commonly referred to as “Regulation Z”). While certain types of transactions are exempt from the application of the TILA, the Transaction is not one of them.⁸

B. TILA Disclosure Statement

The TILA and Regulation Z require lenders to give the borrower a Disclosure Statement specifying the credit terms in clear and straightforward language that the consumer may examine and retain for reference.⁹ Those required disclosures include: the identity of the creditor required to make the disclosures, the amount financed, the amount of the finance charge, the annual percentage rate, the total of payments, and the number, amount, and due dates or period of the payments scheduled to repay the total of payments.¹⁰ The TILA mandates that the required disclosures must be made before credit is extended and reflect the actual terms of the legal obligation between the parties.¹¹

1. Signed Acknowledgment of Receipt

The Poppitzes concede that they signed an acknowledgment that indicated their receipt of the required TILA Disclosure Statement. However, a written acknowledgment of receipt “does no more than create a rebuttable presumption of delivery” of the documents.¹² Because the

⁸ See 15 U.S.C. § 1635(e).

⁹ 15 U.S.C. § 1638(b)(1) and 12 C.F.R. § 226.17(a)(1); *see also* 15 U.S.C. § 1632(a).

¹⁰ For the complete requirements, see 15 U.S.C. § 1638(a).

¹¹ 15 U.S.C. § 1638(b)(1); 12 C.F.R. § 226.17(b) and (c)(1).

¹² 15 U.S.C. § 1635(c).

Poppitzes' testimony is credible and Mr. Luke's less so, the Court finds that any presumption in favor of delivery has been overcome. The Court also finds that a true and accurate copy of the complete and unaltered packet of Transaction documents presented by Ameriquest to the Poppitzes was admitted into evidence at trial and that the Disclosure Statement was not included with the packet of Transaction documents.

2. Bona Fide Error Defense

Although not specifically mentioned at trial, the Final Pretrial Order (Doc. No. 18) identifies the bona fide error defense as an issue remaining for the Court's consideration. The subsection governing the bona fide error defense provides that:

[a] creditor ... may not be held liable ... for a violation of this subchapter if the creditor ... shows by a preponderance of evidence that the violation was not intentional and resulted from a bona fide error notwithstanding the maintenance of procedures reasonably adapted to avoid any such error.¹³

While it may be inferred from the testimony elicited at trial that Ameriquest did not intentionally violate the TILA by failing to provide the Poppitzes with a Disclosure Statement, Ameriquest otherwise provided no evidence at trial of what maintenance procedures, if any, it has adapted to avoid the violation in question. This is significant because "Congress required more than just the maintenance of procedures which were designed to provide proper disclosure[s] Rather it required procedures designed to avoid and prevent the errors which might slip through procedures aimed at good faith compliance."¹⁴ Accordingly, because Ameriquest did not present evidence of the procedures it has adapted to avoid the violation in

¹³ 15 U.S.C. § 1640(c).

¹⁴ *Davison v. Bank One Home Loan Servs.*, 2003 WL 124542 at * 7 (D. Kan. Jan. 13, 2003) (citing *Mirabal v. General Motors Acceptance Corp.*, 537 F.2d 871, 878-79 (7th Cir. 1976), *cert. denied*, 439 U.S. 1039 (1978), *overruled on other grounds by Brown v. Marquette Sav. and Loan Ass'n*, 686 F.2d 608 (7th Cir. 1982)).

question, it cannot satisfy its burden in establishing its entitlement to the bona fide error defense.

C. Rescission

Although the TILA and Regulation Z ordinarily provide only a three-day period in which a consumer may rescind a transaction, where a Disclosure Statement fails to comply with the TILA's specified disclosure requirements, a consumer has a continuous right to rescind the underlying transaction for as long as the creditor fails to comply, to a maximum of three years.¹⁵

1. Sufficiency of Notice of Rescission

Pursuant to Regulation Z, “[t]o exercise the right to rescind, the consumer shall notify the creditor of the rescission by mail, telegram or other means of written communication.”¹⁶ Here, where Ameriquest failed to provide the Poppitzes with the Disclosure Statement required by the TILA, the Poppitzes timely exercised their right to rescind the Transaction by sending a rescission demand letter on or about July 2, 2002, well within three years of the May 24, 2002, Transaction closing, to counsel engaged by Ameriquest to represent its interests in the Transaction. In addition, even if the Poppitzes' rescission demand letter were insufficient, a complaint against a mortgagor also serves as proper notice of rescission if timely filed and if it specifically addresses rescission.¹⁷ In the case at hand, the Poppitzes filed a complaint against Ameriquest within three years from the date of the mortgage and clearly expressed their intent to rescind the Transaction. Accordingly, the filing of this complaint was timely and effectively notified Ameriquest that the Poppitzes wished to exercise their right to rescind the Transaction.

¹⁵ 15 U.S.C. § 1635(f).

¹⁶ 12 C.F.R. § 226.23(a)(2).

¹⁷ See *In re Rodrigues*, 278 B.R. 683, 689 (Bankr. D.R.I. 2002) (citations omitted).

2. Effecting Rescission

The framework to effect rescission upon a consumer's valid notice of his or her intent to rescind a transaction is provided by 15 U.S.C. § 1635(b). First, when a consumer exercises his right to rescind, he is not liable for any finance or other charge, and any security interest given by the obligor, including any such interest arising by operation of law, becomes void.¹⁸ Second, within 20 days after receipt of a notice of rescission, the creditor must return to the consumer any money or property given as earnest money, down payment, or otherwise, and shall take any action necessary or appropriate to reflect the termination of any security interest created under the transaction.¹⁹ Third, if the creditor has delivered any property to the consumer, the consumer may retain possession of it until the performance of the creditor's obligations.²⁰ Once the creditor has performed its obligations, the consumer must then tender the property to the creditor, except that if return of the property in kind would be impracticable, or inequitable, the consumer shall tender its reasonable value.²¹

However, these procedures may be equitably modified by this Court to ensure that the consumer meets his obligations after the creditor has performed its obligations as required by the Act.²² Because the record is insufficient to determine whether deviating from the TILA's statutory framework is warranted, the parties will be afforded an opportunity to present evidence

¹⁸ 15 U.S.C. § 1635(b).

¹⁹ *Id.*

²⁰ *Id.*

²¹ *Id.*

²² *In re Stanley*, 315 B.R. 602, 615-16 (Bankr. D. Kan. 2004).

at a hearing to be set at a later date on the financial circumstances surrounding the Transaction and the propriety of equitably modifying the rescission procedures set forth in 15 U.S.C. § 1635(b).

D. Statutory Damages

The Poppitzes argue that they are entitled to an award of statutory damages for Ameriquest's failure to honor their notice of rescission. The Court agrees. The TILA entitles borrowers not only to rescission, but also to statutory damages under 15 U.S.C. § 1640 for the creditor's failure to honor a notice of rescission.²³ Section 1640(a)(2)(A)(iii) provides that statutory damages of "not less than \$200.00 or greater than \$2,000.00" may be awarded to the plaintiff for the defendant's failure to honor his notice of rescission. The Court reserves judgment on statutory damages until such time it issues judgment on the equitable modifications, if any, it places on the rescission procedures set forth in 15 U.S.C. § 1635(b).

E. Attorney's Fees and Costs

Pursuant to 15 U.S.C. § 1640(a)(3), the Poppitzes seek to recover the costs of this action together with a reasonable attorney's fee. Having successfully established that Ameriquest violated the TILA in the Transaction, they are entitled to such relief. The Court reserves judgment on an award of attorney's fees and costs until such time it issues judgment on the equitable modifications, if any, it places on the rescission procedures set forth in 15 U.S.C. § 1635(b).

Conclusion

For the reasons set forth above, the Court concludes that Ameriquest did not provide the

²³ 15 U.S.C. § 1635(g) ("[I]n addition to rescission, the court may award relief under section 1640 ... for violations of this subchapter not relating to the right to rescind.").

Poppitzes with a TILA Disclosure Statement. As a result, the Poppitzes effectively exercised their right to rescind the Transaction and are entitled to both statutory damages and to attorney's fees and costs. The Court is unable to determine at this time whether deviating from the TILA's statutory framework and equitably modifying the rescission procedures set forth in 15 U.S.C. § 1635(b) is warranted.²⁴ Therefore, a supplemental order shall be entered forthwith setting an evidentiary hearing on the equitable modifications, if any, that should be made to the rescission procedures set forth in 15 U.S.C. § 1635(b).

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ROBERT D. BERGER
U.S. BANKRUPTCY JUDGE
DISTRICT OF KANSAS

²⁴ This Court may but does not have to impose conditions that run with the voiding of the mortgage.