



## **RESIDENTIAL BORROWER'S NEW DUTY TO PROVE ABILITY TO REPAY LOAN PROCEEDS BEFORE RESCINDING MORTGAGE LOAN**

As a result of a case I recently litigated in the Third Circuit Court of Appeals, residential mortgage borrowers now have an added obligation if they want to rescind their mortgage loan in Pennsylvania and New Jersey. The Court has determined that residential borrowers must first prove that they have the ability and willingness to repay - tender - the loan proceeds before a Court will consider rescinding the mortgage lien under the Truth in Lending Act.

Lender's and borrower's duties, and the timing of those duties, when rescission of a residential mortgage loan is demanded by a borrower, has been a hotly contested issue throughout the nation since the inception of the Truth in Lending Act ("TILA"). The general procedure set out by TILA requires a creditor to return money or property given by the borrower within twenty days of a borrower's notice of rescission. Once the creditor returns the money/property, the borrower then has the obligation to tender the money borrowed back to the creditor.

This generalized procedure, however, may result in great risk to lenders in the event that the borrower is already in bankruptcy or files bankruptcy immediately after the lender is ordered to remove its mortgage lien. In these circumstances, borrowers can force the lender into the position of unsecured creditor with little or no ability to recover the loan proceeds.

Recently, Courts in a few Circuits have been asked to take the borrower's tender obligation one step further by determining whether the borrower has the ability to tender the loan proceeds as a precondition to making a claim for rescission under TILA. The Third Circuit Court of Appeals, in a case of first impression for the Court, addressed the borrower's ability to tender loan proceeds to the lender in the recent case of Jobe v. Argent Mortgage Company, No. 09-3677 (3d Cir. (Pa) April 2, 2010). The borrowers in Jobe sought to rescind their mortgage lien under the Truth in Lending Act. At trial, the borrowers admitted that they did not have the ability to repay the loan proceeds if the mortgage loan was rescinded under TILA. The U.S. District Court found that the borrowers' inability to prove that they could tender the loan proceeds made the relief of rescission inappropriate. The Third Circuit agreed, finding that even if the borrowers could prove a TILA violation, they would not be entitled to rescind the mortgage obligation due to their inability to return the money advanced to them by the lender.

As a result, lenders now have an additional and potentially significant quiver in their defense against TILA rescission claims. A borrower who cannot or will not repay the loan proceeds may be precluded from rescinding the mortgage lien. Borrowers should be questioned throughout the course of litigation about their ability and willingness to repay the loan proceeds. And, these issues should be raised early and often with the Courts.

Please call me if you have any questions or if you would like further information.

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