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Lender Ruling May Be A First In The U.S.

By Susan Roberts Boyle

A superior court decision appears to be the first lender-liability case nationwide in which a judge has found a bank to have committed unfair trade practices in a commercial context.

This was the opinion of attorneys who concentrate in lender-liability law about



IZZO

the case, *Sweeney v. ComFed Savings Bank*, a decision by Judge Katherine Lincos Izzo, the digest of which appeared in *Lawyers Weekly* last week.

The judge awarded the plaintiff borrowers a total of \$2,998,931 in double and treble damages under G.L.c. 93A and increased a prior jury verdict for intentional infliction of emotional distress from \$65,000 to \$315,000. She awarded \$97,704 in attorneys' fees and costs.

The attorneys, however, agreed that the validity of the 45-page ruling is subject to dispute. Attorneys for the bank are contending that the timing of the decision, which was issued following the case's removal to the U.S. District Court in Boston, renders it void under federal law.

The case was transferred because the insolvent Lowell-based bank late last year was put under conservatorship by the Resolution Trust Corporation. Plaintiffs contend there was no lawful removal, and the case should stand.

(For a discussion of other issues raised by the case, see story on this page.)

The court found that the bank violated c. 93A by loaning plaintiffs \$1.6 million to develop family-owned land in Hamilton, despite knowing that plaintiffs could never service the debt from their income and other assets; that the land involved was not, unless developed, worth more than \$1.6 million; that plaintiffs anticipated

additional construction financing to develop the property; and that such additional

Removal Raises Validity Question

Attorneys who commented on the lender-liability case, *Sweeney v. ComFed Savings Bank*, did so with caveats about the validity of the decision.

They did so because there is a question whether the decision was rendered after removal of the case to federal court, and, if so, whether Superior Court Judge Katherine Lincos Izzo had the authority to make it.

Another source of dispute between the parties is the effect of the physical removal of the case, which happened when the superior court clerk's office handed over the original case file to a party's attorney for transport to federal

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financing would not be forthcoming.

Evans J. Carter, a lender-liability attorney in Boston and head of the Massachusetts Academy of Trial Attorneys' Lender Liability Group, called the decision "the first reported case that I am aware of where a trial judge has found a bank in a commercial (nonconsumer) context to have committed unconscionable actions which equate to unfair trade practices." He termed the ruling "a fresh breeze for borrowers' counsel who handle lender-liability litigation."

"Frequently," Carter said, "developers who have executed what sometimes appears equivalent to a ream of paper, fresh from the word processor, are deemed to have bargained for and thus are governed by terms that on occasion border or cross over into a type of make-believe world."

Carter said that the court found that a succession of actions or inactions by the bank, which taken individually would not violate a borrower's rights, fell together "to establish a pattern of unfair dealing."

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Lender Rulings Said To Be A First In The U.S.

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Some of these were "permitting the bank's closing counsel to represent both the bank and borrower, escrowing, earmarking or making allocations of proceeds whereby the developer was not obtaining the full use or every benefit of the loan proceeds; and providing a basis for calling in a default where the borrower did nothing wrong except for not being able to meet a term that should not reasonably have been included," Carter said.

"Typing commissions to bank loan officers for obtaining loans again has proven to be an unsound banking practice," Evans added, referring to the facts of the case.

Opposite Jury Finding

Carter noted the judge's conclusion differed "180 degrees" from that of a jury which last spring found the plaintiffs liable to the bank for \$2 million. Izzo's ruling was issued on questions of law involving a 93A which were not submitted to the jury. Izzo, Carter said, found for the plaintiffs

under c. 93A, "as the judge did not seek any advisory expert questions from the jury on this issue." He said her opinion "may be able to overturn the mixed, factual and legal issue of inconsistent decisions."

In addition to providing c. 93A violations in the commercial context, Carter said, the judge "documented a methodology for how to determine legal focus and multiple damages against a bank and what constitutes 'reasonable' bank settlement offers."

A Radical Departure

Alan B. Rubenstein, who represents lenders and is a director of Boston's Rackemann, Sawyer & Brewster, called the decision a radical departure from current lender liability law, saying it will get some "close scrutiny" if it is appealed.

Rubenstein, who was recently named to the editorial board of the national, bi-weekly Lender Liability News, called the ruling a "pretty unusual decision and a fairly radical departure from what I understand to be fairly well-accepted

Lender liability principles

Rubenstein said the bank "was held to commit an unfair, and deceptive act by making a loan that the plaintiffs requested it to make." He said the rationale the court used, "namely, that the bank should have known the borrower didn't have the ability to repay the loan unless construction was completed ... and that it violated certain regulations and its own internal lending policies," suggests that the bank owes some duty to the borrower when it makes a loan to assure that the loan is sound and can be repayed. "I find that to be an unusual holding," Rubenstein said.

"Surely, a bank wants to be careful in assuming it can be paid, but to impose some duty to the borrower, the breach of which gives a borrower a cause of action, is a principle in my knowledge not accepted anywhere yet," he said.

The decision is not the type of lender liability case where a bank refuses to make a loan, or having made one refuses to make additional advances, or where the bank

Damning default accelerates the loan and demands payment before the maturity date

of the loan, Rubenstein said. "There was no issue of premature call, but there was still liability on the theory that the bank should not have made the loan if it was requested to make." A Superior Court verdict in 1990 awarded the plaintiffs over the bank \$2 million. The case was tried originally before a jury which, on March 19, 1990, rendered a verdict in favor of ConnFed, saying that plaintiffs owed the bank \$2 million—the \$1.6 million loan amount plus interest—

for default. At the same time, however, the jury awarded one plaintiff \$65,000 for intentional infliction of emotional distress. The bank had required her to pay the amount necessary to bring her interest payments current during the course of unsuccessful negotiations for a second loan. She borrowed the money to do so from a business associate.

Steven J. Conzel, Attorney at Law, is a partner in the law firm of Sawyer & Brewster, Attorneys at Law, 661 State Street, Boston, Massachusetts 02111.