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RECENT DEVELOPMENT

BEDNAR V. PROVIDENT BANK OF MD., INC.: A CLOSING COST REIMBURSEMENT CHARGE WAS AN INVALID PREPAYMENT CHARGE IN CONNECTION WITH AN EARLIER HOME LOAN FEATURING A CLOSING COST WAIVER REPAYMENT.

By: Ryan McQuighan

The Court of Appeals of Maryland held that when a buyer repays a home loan before the three-year term required by his closing cost waiver, the bank's imposition of the prior closing costs at settlement results in an invalid prepayment charge. *Bednar v. Provident Bank of Md., Inc.*, 402 Md. 532, 937 A.2d 210 (2007). The Court further determined that such a charge violates Maryland's prohibition against prepayment charges if a bank requires a borrower to repay the charge if he closes the account before three years. *Id.* at 532, 937 A.2d at 210.

Andrew Bednar ("Bednar") obtained a second mortgage from Provident Bank of Maryland ("Provident") in August 2003. Along with the loan and security agreement, Bednar signed a "Closing Cost Waiver Certificate." The terms of the certificate provided that if Bednar closed his account during the first three years, the closing cost waiver would be rescinded and closing costs would be added to any balance due on the account. At settlement, the \$681.00 closing costs were paid by Provident, the settlement statement indicated the same, and Bednar did not pay any closing costs in connection with the loan.

Two years later, Bednar refinanced and paid off the Provident loan. At that settlement, Provident collected the outstanding balance of the loan plus the \$681.00 charge Provident waived for Bednar's first loan. Bednar filed a class action complaint in the Circuit Court for Baltimore City, alleging a violation of the Credit Grantor Closed End Credit Provisions ("CLEC") of section 12 of the Commercial Law Article of the Maryland Code; the Consumer Protection Act ("CPA") of section 13-300 of the Commercial Law Article of the Maryland Code; the Interest and Usury laws; and the Secondary Mortgage Loan Law.

On Provident's motion to dismiss, the circuit court dismissed the causes of action under the Interest and Usury laws and the Secondary Mortgage Loan Law and denied Provident's motion to dismiss the CLEC and CPA causes of action. However, the court granted Provident's motion for summary judgment on the CLEC and CPA causes of action and found that the closing fees were not imposed as a penalty for prepayment of the loan. Therefore, Provident did not violate either the CLEC or the CPA.

Bednar filed a notice of appeal with the Court of Special Appeals of Maryland. Before that court considered the case, Bednar petitioned for a writ of certiorari in the Court of Appeals of Maryland. Provident filed a cross-petition for certiorari. The Court of Appeals of Maryland granted Bednar's petition and denied Provident's cross-petition.

The Court began by stating that the parties were free to argue the merits of the Consumer Protection claim because the trial court did not reach the issue of certain CPA violations that were independent of CLEC violations asserted. *Bednar*, 402 Md. at 543, 937 A.2d at 216. After hearing these arguments, the Court determined that the \$681.00 charge was "plainly" a prepayment charge in violation of the CPA. *Bednar*, 402 Md. at 543, 937 A.2d at 216. Section 12-1009(e) of the Commercial Law Article prohibits a lender from imposing any prepayment charge. *Bednar*, 402 Md. at 543, 937 A.2d at 216. The Court stated that reading an exception into section 12-1009(e) to allow Provident to impose a prepayment charge would violate the basic rules of statutory construction. *Bednar*, 402 Md. at 544, 937 A.2d at 216-17.

Next, the Court discussed a similar case entitled *Goldman v. First Federal Savings and Loan Association*, which held that when a charge was conditioned on prepayment, that charge was, in effect, a prepayment charge. *Bednar*, 402 Md. at 544, 937 A.2d at 217 (citing *Goldman v. First Fed. Savs. and Loan Ass'n*, 518 F.2d 1247 (7th Cir. 1975)). The \$681.00 charge was a prepayment charge pursuant to *Goldman* because it would not have been owed if the loan was paid at maturity. *Bednar*, 402 Md. at 545, 937 A.2d at 217. Section 12-1023(b)(3) of the Commercial Law Article states that agreements may not contain provisions purporting to waive rights under the CLEC subtitle, subject to certain exceptions. *Bednar*, 402 Md. at 545, 937 A.2d at 217. In addition, section 12-1023(b)(4)(i) of the Commercial Law Article renders any clause within an agreement or note in violation of section 12-1023(b)(3) unenforceable. *Bednar*, 402 Md. at 545, 937 A.2d at 217. Therefore, the Court held that Provident's

"Closing Cost Waiver Certificate" was unenforceable and Bednar could prepay his loan without the penalty. *Id.* at 545, 937 A.2d at 217.

The Court stated that Provident's theories about the imposition of the charge could not justify the collection. *Id.* at 545, 937 A.2d at 217. The lender waived the charge on the condition that the borrower could not prepay in three years, but the requirement to repay those closing costs was a prepayment charge under the CLEC. *Bednar*, 402 Md. at 546, 937 A.2d at 218. The Court stated that calling the charge a "recapture" was improper because an entity cannot evade a law by using a "different label for the prohibited conduct." *Id.* at 546, 937 A.2d at 218. Normally, the Court gives an administrative agency's interpretation and application of a statute that it administers great weight, but only when statutory language is ambiguous. *Id.* at 546-47, 937 A.2d at 218 (quoting *Macke Co. v. Comptroller*, 302 Md. 18, 22-23, 485 A.2d 254, 256-57 (1984)). The Court noted that Provident's reliance on the Office of the Maryland Commissioner of Financial Regulation's interpretation of section 12-1009(e) was mistaken because the statute is clear and unambiguous. *Bednar*, 402 Md. at 547, 937 A.2d at 218.

The outcome of this case suggests that attorneys conducting settlements ought to take notice of banks that may continue to impose closing costs in accordance with waiver terms. In addition, the Court highlights the deference it usually gives to an administrative agency's interpretation of Maryland law. However, attorneys should be aware that the Court will not follow interpretations that are contrary to a plain reading of such statutes. Finally, attorneys that prepare loan documents for lenders should be aware of the practice and advise lenders that closing cost waivers cannot be charged back to the borrower at a later settlement.