UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF NEW YORK

IN RE:

RICHARD HALL
MARYBETH HALL

CASE NO. 00-60886

Debtors

Chapter 13

RICHARD HALL
MARYBETH HALL

Plaintiffs

vs.

ADV. PRO. NO. 00-80157A

FIRST UNION HOME EQUITY BANK and
FLEET NATIONAL BANK f/k/a FLEET BANK
OF NEW YORK

Defendants

APPEARANCES:

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Hon. Stephen D. Gerling, Chief U.S. Bankruptcy Judge

MEMORANDUM-DECISION, FINDINGS OF FACT,

CONCLUSIONS OF LAW AND ORDER

Presently before the Court for consideration is a motion filed by Richard Hall and Marybeth Hall ("M. Hall") (hereinafter jointly referred to as "Debtors" or "Plaintiffs") on April 4, 2002, following a trial conducted on March 7, 2002, in the adversary proceeding commenced by the Debtors on July 31, 2000. Debtors seek to amend their complaint to conform to the evidence presented at trial pursuant to Rule 15(b) of the Federal Rules of Civil Procedure ("Fed.R.Civ.P."), incorporated by reference in Rule 7015 of the Federal Rules of Bankruptcy Procedure ("Fed.R.Bankr.P."). Opposition to the Debtors' motion was filed on behalf of defendant Fleet National Bank, f/k/a Fleet Bank of New York ("Fleet") and defendant First Union Home Equity Bank ("First Union") on April 19, 2002 and April 22, 2002, respectively.[1]

JURISDICTIONAL STATEMENT

The Court has core jurisdiction over the parties and subject matter of this adversary proceeding pursuant to 28 U.S.C. §§ 1334(b), 157(a), (b)(1) and (b)(2)(A), (K) and (O).

FACTS

[1] Pursuant to the Court's ruling following the trial, the parties were to delay their submission of memoranda of law in connection with the trial until the Court had the opportunity to rule on the Debtors' motion pursuant to Fed.R.Bankr.P. 7015.

The Debtors filed a voluntary petition ("Petition") pursuant to chapter 13 of the Bankruptcy Code, 11 U.S.C. §§ 101-1330 ("Code"), on March 2, 2000. According to the Debtors' Schedules, First Union was listed as a secured creditor with a claim of $87,200 based on a second mortgage on the Debtors' residence at 111 Beechwood Drive, Groton, New York ("Residence"), and Fleet was listed as a secured creditor with a claim of $63,945.06 with respect to a first mortgage on the Residence. The Debtors estimated the value of the Residence to be $74,000. Under the terms of the Debtors' Plan, Fleet was to be paid $550 per month at an interest rate of 10.50% over the term of the Plan (40 months) on its claim. According to the Plan, the Debtors indicated that "First Union has a second mortgage lien on debtor's residence. This mortgage is treated as unsecured in this plan." The Debtors allege in their Plan that "First Union in this transaction practiced unscrupulous lending in that they relied on a bank appraisal rather than a professional appraisal. A recent professional appraisal indicates the fair market value is $74,000.00. The First Union new mortgage was intended to pay off a higher rate mortgage. . . . unfortunately this Fleet Mortgage was not discharged and remains as the first mortgage of record. * * * The debtor's [sic] herein offer the following solution to settle First Unions' [sic] secured claim: this plan will be amended upon request to pay First Union $9000.00 as a secured claim [at] 8% interest. . . ." The Plan was signed by the Debtors on February 29, 2000.

On May 4, 2000, First Union filed an objection to the Plan's confirmation. On May 5, 2000, First Union filed a proof of claim in the amount of $92,220.81 in which it included $6,331 in arrears on its mortgage for the period from September 1999 through February 2000.

On July 31, 2000, the Debtors commenced an adversary proceeding naming both Fleet and First Union as defendants. On July 6, 2001, the Debtors filed a motion to amend their

complaint to add certain new causes of action and to effect proper service on both defendants.[2] By Order dated September 13, 2001, the Court granted the Debtors' motion. The Amended Complaint was filed on September 27, 2001, and the Summons and Complaint were served on both Defendants on October 2, 2001. First Union filed an Answer to the Amended Complaint on October 30, 2001, and asserted a cross-claim against Fleet, seeking a declaration that First Union held a valid first lien on the Residence. On November 13, 2001, an Answer was filed to the Amended Complaint on behalf of Fleet and a cross-claim was asserted against First Union also requesting a determination that its mortgage lien had first priority with respect to the Debtors' Residence.

As noted previously, a trial of the adversary proceeding was conducted on March 7, 2002, in Utica, New York. The following facts were elicited by way of testimony and exhibits:

According to M. Hall, she and her husband purchased the Residence in 1988. On October 28, 1988, they entered into a Homeloan Line of Credit Agreement with Fleet in the amount of $39,000, payable in full in 15 years and secured by the Debtors' Residence. *See* Debtors' Exhibit 1. The monies were accessed by the Debtors writing checks provided by Fleet. M. Hall testified that on November 20, 1992, she and her husband entered into another credit line agreement with Fleet in the amount of $71,200 using a portion of the funds to pay off the earlier line of credit. *See* Debtor's Exhibit 2.

On January 16, 1996, the Debtors executed a mortgage to secure a loan with First Union in the amount of $89,600 based on an estimated market value for the Residence of $112,000. See

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[2] Fleet had been apprized by Debtors' counsel that it had decided not to name Fleet as a defendant. However, the summons and complaint served on First Union named both entities as defendants and First Union crossclaimed against Fleet.

Defendant's Exhibits E and F. According to M. Hall, the proceeds of the loan were to be used to pay off the loan with Fleet, as well as certain other credit card accounts. Mary Hendel ("Hendel"), an employee of the law firm of Granito & Sondej who handled the mortgage closing for First Union, testified that with respect to the Debtors' loan, First Union had forwarded an initial packet of documents to her on or about January 10, 1996, which included a deed, as well as the Debtors' application. *See* Debtors' Exhibit 14. Listed on the application was a mortgage held by Fleet against the Debtors' Residence in the approximate amount of $70,000, as well as several other obligations. According to the First Union Settlement Statement, signed by the Debtors on or about January 16, 1996, disbursements of $85,072.70, including $71,224.73 to Fleet Bank, were to be made. *See* Defendants' Exhibit D. It was Hendel's testimony that First Union did not have a representative present at the closing, other than herself. According to the closing instruction letter from First Union, dated January 11, 1996, and addressed to Granito & Sondej, $87,474.20 was to be deposited into Granito & Sondej's escrow account "with disbursement to be made after the expiration of any rescission period." *See* Debtors' Exhibit 18. First Union instructed Granito & Sondej to obtain execution of a first mortgage. By check dated January 22, 1996, written on the account of Granito and Sondej, Fleet was paid $71,224.73 from the closing proceeds. *See* Defendants' Exhibit A.

Hendel testified that it was the practice of the law firm handling the closing for such entities as First Union to forward a cover letter to each creditor to whom payment was being made with reference to the account for which payment was being made, a copy of the statement, along with the check paying off the account. *See* Plaintiffs' Exhibit 19 and 20 In this case, the letter, dated January 22, 1996, was addressed to "Fleet Services Corporation, P.O. Box 5058,

Hartford, CT 06102-5058" and referenced the account of Richard H. Hall and Marybeth Hall, #7767999915416000443. *See id.* The letter requests that the account be closed and references an authorization signed by the Debtors. *Id.* It also requested that a satisfaction of the Fleet mortgage be sent to the office of Granito & Sondej. *Id.* Hendel testified that a copy of a statement of the account to be closed normally would have been stapled to the letter, along with the signed authorization. It was the procedure to paperclip the check to the cover letter. She further testified that their office never received or recorded a satisfaction of the Fleet mortgage securing the 1992 credit line with Fleet.[3] She admitted that she had made no further inquiry or follow-up with regard to the satisfaction and explained that the file simply remains in their office until a discharge or satisfaction is received.

According to the testimony of James Spalone, Manager of Consumer Loans for Fleet, he reviewed the records of the Debtors' transactions with Fleet and found that Fleet had received and cashed the check from Granito & Sondej in the amount of $71,224.73. He testified that the post office box in Hartford, Connecticut, was a lockbox location for payments. He had no knowledge whether the people in Hartford had complied with Fleet's procedures in connection with the Fleet Line Paid Loan Processing Procedures, which required that documentation received be sent to the Paid Loan Department if notification to close was included with the payment. *See* Plaintiffs' Exhibit 26. His review of Fleet's records in connection with the Debtors' account did not reveal a copy of the letter from Granito & Sondej or the authorization

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[3] Hendel testified that she received a Discharge of Mortgage from Fleet, dated January 25, 1996, with respect to the prior credit line obtained by the Debtors in 1988, which allegedly had been closed by Fleet in February 1993 using the monies from the credit line obtained in November 1992. *See* Debtors' Exhibit 11.

to close the account signed by the Debtors. Spalone testified that Fleet's records did not reflect any request for a payoff or for a discharge or satisfaction of the mortgage. According to Fleet's processing procedures, without notification accompanying the payment, the people in Hartford were simply to process the payment. *See id.*

M. Hall testified that she was surprised when she received a statement from Fleet subsequent to the closing with First Union indicating that she owed a balance of $82.51. *See* Debtors' Exhibit 4. She acknowledged that the statement for the period from January 27, 1996 to February 26, 1996 still showed available credit of $71,200. It was her understanding that the account could not be closed out until the balance of $82.51 was paid. She testified that when she called and spoke to a representative of Fleet, she was told that the $82.51 represented interest from a late payment. She sent Fleet a check in the amount of $82.51, along with the payment stub from the statement.[4] *See* Debtors' Exhibit 6.

According to a "Speed Memo" completed by an employee of Fleet on February 16, 1996, a call had been received from M. Hall. *See* Plaintiffs' Exhibit 22. The box indicating whether the account was open or closed, was checked "Open." The employee noted that "Customer feels she should not owe a balance of $82.51. Cust. was very persistent. Please send to the cust. a breakdown showing this (CMNT [5]does not show payoff)."

By letter dated February 27, 1996, Fleet provided a response to M. Hall's telephone inquiry explaining the "paydown as of 1/26/96," indicating an ending balance of $70,730.65 on

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[4] The check does not contain any notation or reference in the "Memo" portion.

[5] Spalone testified that "CMNT" refers to the comment screen on the computer accessed by the representative in checking the account.

the 12/28/95 statement and a finance charge of $576.59 for the period 12/29/95 - 1/25/96. *See* Debtors' Exhibit 7. The letter indicated the receipt of $71,224.73 and a balance due of $82.51 as of 1/26/96. *See id.* The statement sent to the Debtors the following month for the period February 27, 1996 through March 28, 1996, showed a new balance of $0.00 and available credit of $71,200. *See* Debtors' Exhibit 8.

Hendel testified that the Debtors had not contacted her after the closing about the additional $82.51 owed on the account. It was also her testimony that no correspondence was received from Fleet indicating a shortfall, despite the fact that it had cashed the check.

According to Fleet's records, the Debtors' account was paid down to zero on March 5, 1996.[6] *See* Debtors' Exhibit 24. On May 7, 1996, there was a draw of $34,000 made and on September 23, 1996, another was made in the amount of $2,500. *See id.* On October 23, 1997, there was an additional draw of $21,000 made by the Debtors.

M. Hall testified that sometime in May 1996 her daughter had encountered financial difficulties and M. Hall contacted Fleet to see about the possibility of borrowing additional funds. She was told that she could borrow additional monies, and she did so by using the checks which she had previously used when accessing the 1992 credit line.[7] She testified that she knew it was a loan, but believed it to be a new loan and "not from those funds [meaning the 1992 credit line]."

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[6] According to the terms of the Fleet Line Note and Agreement executed by the Debtors on November 20, 1992, "This Note and Mortgage securing it will remain in full force and effect even though your loan balance may be reduced to zero from time to time." *See* Debtors' Exhibit 2, Fleet Line Note and Agreement at ¶ 2.

[7] According to the terms of the Fleet Line Note and Agreement, the Debtors could cancel their account at any time "by notifying us in writing. If you do, you must return all unused checks to us." *See* Debtors' Exhibit 2, Fleet Line Note and Agreement, at ¶ 2.

At the same time, she acknowledged that on the previous occasions when they had obtained loans from Fleet, they had had to execute separate documents in connection with each line of credit and had been given different checks each time. She admitted that in May 1996 they had not executed any new documents and had not been provided with new checks. When questioned by the Court about the need for some type of security when Fleet loaned the Debtors additional monies in May 1996, she acknowledged that prior lines of credit had always required that there be some form of security for the loans. However, she testified that in May 1996 she understood that the monies were being made available on an unsecured basis based on their past payment history with Fleet. That it appeared to be a new loan was given further credence, according to M. Hall, when they were sent different statement forms than they had received prior to the closing in 1996 with respect to the 1992 line of credit.[8] *See* Debtors' Exhibit 9. When asked to examine the Fleet statement with a closing date of June 27, 1996, she acknowledged that the credit line listed was the same as that for the 1992 credit line, namely, $71,200. *See id.* When asked whether that raised any questions in her mind about the source of the loan, she explained that she had not examined the statements that had been sent to her and her husband at that time and had simply turned them over to her daughter for payment. Later when the advances were made by her and her husband, she testified that she had not made any inquiry about the account despite the fact that the credit line was in the same amount and was identified by the same account number as that account which she believed had been closed in early 1996.

On April 4, 2002, the Debtors filed a motion seeking to amend their Amended Complaint

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[8] She could not recall whether the statement format had changed between 1992 and 1996 when she previously accessed the credit line. She admitted that if it had changed, it had not caused her to believe that the account had changed and that it was for a different loan.

to conform it to the evidence received at trial pursuant to Fed.R.Bankr.P. 7015. The "Conformed Complaint," filed with the motion, supplements the factual allegations in the Amended Complaint with reference to some of the exhibits admitted into evidence at the trial. The Conformed Complaint proposes to add four new causes of action. The first cause of action asserts a right of recoupment under New York State law "for material breach of contract by Defendant First Union in failing to supply a first mortgage as contracted for." Debtors request damages

> in the form of rescission by recoupment of the mortgage obligation now existing to the defendant, First Union, for breach of contract and return of all moneys or other valuable consideration given by plaintiff as conditions precedent to defendant's performance and all monies paid to the defendant during the life of the mortgage.

Plaintiffs' second cause of action is new and is based on an assertion that First Union breached New York General Business Law Article 22-A, §§ 349 and 350 "in failing to disclose a material term of the mortgage as accepted by plaintiffs." Plaintiffs allege that "had the plaintiffs known prior to or at the time of contracting for a first mortgage with defendant First Union that the mortgage was not as represented by the defendant in all communications, papers and closing documents, the plaintiffs would not have accepted the mortgage or the terms." Plaintiffs allege that the "affirmative representations" by First Union were false or deceptive acts or practices and Plaintiffs seek recoupment and/or actual damages and treble actual damages, as well as reasonable attorney's fees and costs.

The fifth cause of action, as identified in the Conformed Complaint, is also new. In it the Debtors assert a right of recoupment against Fleet under New York State law "as an equitable defense against foreclosure proceedings." Debtors rely on § 1635(g) of the Truth in Lending Act, 15 U.S.C. §§ 1601 et seq., which according to the Conformed Complaint, "allows a consumer

relief other than the right to rescind if the 3 year statute of limitations in the Truth in Lending Act has expired by reference to § 1640 (e) wherein the Act allows the right of recoupment under State Law." *See* ¶ 114 of Conformed Complaint. In this regard, the Debtors request

> [d]amages in the form of rescission by recoupment of the mortgage obligation now existing to the defendant, Fleet, for breach of fiduciary duty and return of all moneys or other valuable consideration given by plaintiffs to defendant Fleet as well as all monies paid to the defendant during the life of the mortgage.

The sixth cause of action is also new and asserts that Fleet violated "New York Real Property Actions and Proceedings Law Article 19 - Discharge or Extinguishment of Encumbrances, Claims and Interests, § 1921 Discharge of Mortgage."[9] It is the Debtors' position that they believed that their credit line account had been paid off and closed and that a satisfaction of mortgage would be issued. Debtors assert that Fleet had an affirmative duty to execute and deliver a satisfaction of mortgage upon written request by the Debtors. As a result of its failure to execute a satisfaction of mortgage, Debtors contend that they have suffered damages by having to commence the adversary proceeding herein and having to delay confirmation of their chapter 13 plan. It is also the Debtors' position that Fleet's claim that it holds a first mortgage claim as against the Debtors would have no basis in fact, law or equity but for Fleet's own negligence and malfeasance. Debtors request either rescission of the mortgage with First Union and/or the mortgage with Fleet, or a bifurcation of the mortgage interest of First Union "wherein the defendant First Union would be paid pro-rata with defendant Fleet up to the secured value of the premises as established by an appraisal done for the purpose of establishing

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[9] A similar claim is identified as the third cause of action in the Conformed Complaint and alleged against First Union.

the market value in the instant proceeding."

Debtors have withdrawn the third, fifth and sixth causes of action identified in the original Amended Complaint.

DISCUSSION

Initially, the Court notes that for the most part the factual allegations which Debtors have added to the Conformed Complaint were known to them prior to trial. *See, e.g.,* ¶¶ 1-3, 21, 28, 30, 39-40. The only new allegations included in the Conformed Complaint are based on the evidence received at the time of trial and are found at ¶¶ 9-16. Those paragraphs set forth the process followed by Hendel in connection with the closing on the First Union mortgage. The Debtors conclude in their preliminary statement that "wherein the plaintiffs sought and paid fees to procure a first mortgage through defendant First Union and payoff and closure of a pre-existing first mortgage open end line of credit mortgage and lien held by the defendant Fleet. . . . the facts in this case will show that the right of rescission by recoupment is applicable in this case as the plaintiff's [sic] did not receive the intended first mortgage with defendant First Union through the negligence of both defendant First Union and defendant Fleet."

Fed.R.Civ.P. 15(b) provides in pertinent part: "When issues not raised by the pleadings are tried by express or implied consent of the parties, they shall be treated in all respects as if they had been raised in the pleadings." In determining whether to permit an amendment, the Court must consider

> whether the new issues were tried by the parties' express or implied consent and whether the defendant 'would be prejudiced

> by the implied amendment, i.e., whether he had a fair opportunity to defend and whether he could offer any additional evidence if the case were to be retried on a different theory.'"

Royal American Managers, Inc. v. IRC Holding Corp., 885 F.2d 1011, 1017 (2d Cir. 1989) (quoting *Browning Debenture Holders' Committee v. DASA Corp.*, 560 F.2d 1078, 1086 (2d Cir. 1977)). Critical to the Court's consideration is a determination of whether the Defendants were aware during the course of the trial that the issues had been introduced by the Plaintiffs. *See United States. v. Certain Real Property and Premises, Known as 890 Noyac Road, Noyac, N.Y.*, 945 F.2d 1252, 1259 (2d Cir. 1991). "Where a party seeks to apply evidence presented on a separate issue already in the case to a new claim added after conclusion of the trial, the opponent may be unfairly prejudiced." *Grand Light & Supply Co., Inc. v. Honeywell, Inc.*, 771 F.2d 672, 680 (2d Cir. 1985).

In their first cause of action in the Conformed Complaint, the Debtors assert a right to recoupment under New York State law, alleging that First Union breached a contract with the Debtors by failing to supply them with a first mortgage. The Debtors do not specify what "New York State law" they are relying on to support their position.[10]

> Recoupment is defined as
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> 1. The recovery or regaining of something, esp. expenses. 2. The withholding for equitable reasons, of all or part of something that is due. . . . 3. Reduction of a plaintiff's damages because of a demand by the defendant arising out of the same transaction. . . . 4. The right of a defendant to have the plaintiff's claim reduced or eliminated because of the plaintiff's breach of contract or duty in the same transaction. 5. An affirmative defense alleging such a breach.

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[10] In the index of McKinney's Consolidated Laws of New York Annotated, "recoupment" is identified as a remedy available in connection with Article 9 of the Uniform Commercial Code, which has no application to the matter herein dealing with mortgages on real property.

BLACK'S LAW DICTIONARY 1280 (7th ed. 1999).

The Plaintiffs did not introduce into evidence a copy of the contract alleged to be dated January 19, 1996, by which First Union was to provide them with a first mortgage. The mortgage dated January 16, 1996, and signed by the Debtors indicates an obligation on the Debtors' part to see that any lien superior to that of First Union is satisfied and promptly paid by them. *See* Defendants' Exhibit F at ¶ 3 of "Uniform Promises." The Debtors' Affidavit, also signed January 16, 1996, states that they will not increase or refinance the balance of any prior mortgage. *See* Defendants' Exhibit B. The Court is at a loss to discern the legal basis for the relief sought in the Debtors' proposed first cause of action and, therefore, will deny the Debtors' request in that regard.

Debtors' proposed second cause of action against First Union is based on §§ 349 and 350 of the New York General Business Law ("NYGBL"). Nothing in the record would indicate that First Union was made aware of any such claim prior to or during the trial. Furthermore, based on the evidence adduced at trial the second cause of action would have to be dismissed for failure to state a claim.

In order to succeed on a claim based on NYGBL § 349 and 350, the Plaintiffs must have alleged that First Union's conduct or practices have a broad impact on consumers at large. *See Oswego Laborers' Local 214 Pension Fund v. Marine Midland Bank, N.A.*, 85 N.Y.2d 20, 25, 647 N.E.2d 741, 623 N.Y.S.2d 529 (N.Y. 1995). "Private contract disputes, unique to the parties, for example, would not fall within the ambit of the statute." *Id.* (citation omitted); *see also Dimovich v. OnBank & Trust Co.*, 242 A.D.2d 922, 923 (N.Y. Sup.Ct. 1997) (noting that the plaintiff had failed to demonstrate "any facts to support a finding that the challenged conduct

consisted of 'acts or practices [that] have a broader impact on consumers at large, rather than a private contract dispute 'unique to the parties.'"); *Wall Street Transcript Corp. v. Cohn,* 243 A.D.2d 341 (N.Y. Sup.Ct. 1997) (indicating that § 349 "is directed at wrongs that have an impact upon consumers at large and does not encompass private contract disputes . . .").

In this case, the evidence does not establish that the matter was anything but a private dispute. Accordingly, because amendment of the complaint with respect to the second cause of action fails to state a claim upon which relief could be granted, the Court will deny the Debtors' request to add that particular cause of action. *See generally id.* at *5.

The proposed fifth cause of action is based on § 1635(g) of the Truth in Lending Act. Debtors assert a right of recoupment against Fleet "as an equitable defense against foreclosure proceedings." The matter of Fleet's foreclosure of its mortgage is a tangential matter for which the Court has no jurisdiction. Any rights to recoupment pursuant to 11 U.S.C. § 1640 the Debtors might have in that regard would more appropriately be asserted against Fleet in an action seeking to foreclose on the Debtors' Residence in the event that the Court were to grant relief from the stay. To the extent that the Debtors seek to rescind the mortgage they have with Fleet, the Court concludes that they are, indeed, barred by the three year statute of limitations set forth in 15 U.S.C § 1635. *See Beach v. Ocwen Federal Bank*, 523 U.S. 410, 118 S.Ct. 1408, 1410-1411, 140 L.Ed. 566 (1998) (addressing whether under federal law the statutory right of rescission provided by § 1635 may be revived as an affirmative defense after its expiration under § 1635(f) and concluding that there is no such federal right to rescind, defensively or otherwise, after the 3-year period of § 1635(f) has run."). Furthermore, the case law indicates that any attempt to seek to void the mortgagee's security interest and to recover finance charges and attorney fees

is conditioned on the tender of payment of whatever principal remains on the outstanding indebtedness. *See In re Lynch*, 170 B.R. 26, 30 (Bankr. D.N.H. 1994); *In re Cox*, 162 B.R. 191, 195 (Bankr. C.D.Ill. 1993) (noting that the purpose of 15 U.S.C. § 1635(b) is to restore the parties as much as possible to the status quo ante."). It does not appear that the Debtors are prepared to pay the full amount of Fleet's mortgage in exchange for rescission of the secured obligation as the case law interpreting the statute requires.

The Court concludes that the fifth cause of action would prove futile and will deny the Debtors' motion to include it in their Conformed Complaint.

The Debtors' sixth cause of action is based on § 1921 of the New York Real Property Actions & Proceedings Law ("NYRPAPL"), which requires that a mortgagee

> [a]fter payment of authorized principal, interest and any other amounts due thereunder or otherwise owed by law has actually been made, and in the case of a credit line mortgage as defined in section two hundred eighty-one of the real property law on written request, a mortgagee of real property situate in this state, unless otherwise requested in writing by the mortgagor or the assignee of such mortgage, must execute and acknowledge before a proper officer, in like manner as to entitle a conveyance to be recorded, a satisfaction of mortgage . . .

NYRPAPL § 1921(1) (McKinney Supp. 2002).

At the trial, the Court heard testimony from Hendel regarding the closing on First Union's mortgage and the procedures normally followed by Granito & Sondej in connection with making disbursements following a closing. The Court also heard testimony from Fleet's representative, Spalone, concerning his review of Fleet's records on the Debtors' credit line account. Fleet is under a statutory duty to comply with NYRPAPL § 1921. The Court finds that the issues forming a basis for a cause of action against Fleet based on NYRPAPL § 1921 were tried with

Fleet's implied consent and should not prejudice it by the Court granting the Debtors' motion to amend their complaint. However, the Court would note that NYRPAPL § 1921(4) limits the Debtors' recovery to the greater of $500 or their economic loss. *See Glatter v. Chase Manhattan Bank*, 239 A.D.2d 68, 72-73 (N.Y. App. Div. 1998) (limiting homeowners' recovery to $500 in actual economic loss and denying recovery of punitive damages or attorney's fees).

Based on the foregoing, it is hereby

ORDERED that the Debtors' motion seeking to amend their Amended Complaint to add the first, second and fifth causes of action as set forth in their Conformed Complaint is denied; and it is further

ORDERED that the Debtors' motion seeking to amend their Amended Complaint to add the sixth cause of action based on NYRPAPL § 1921, as set forth in the Conformed Complaint, is granted to the extent set forth in the Decision herein; and it is further

ORDERED that the Debtors' third, fifth and sixth causes of action identified in the Amended Complaint are withdrawn; and it is further

ORDERED that the Debtors file and serve a Second Amended Complaint within fifteen (15) days of the date of this Order consistent with the Decision herein; and it is finally

ORDERED that the parties file and serve their post-trial memoranda of law within forty-five (45) days of the date of this Order.

Dated at Utica, New York

this 8th day of July 2002

STEPHEN D. GERLING
Chief U.S. Bankruptcy Judge