2014 IL App (1st) 13-1528-U

FOURTH DIVISION
July 31, 2014

No. 1-13-1528

IN THE

APPELLATE COURT OF ILLINOIS

FIRST DISTRICT

IRMA VILLATE, on behalf of herself and others similarly situated, Plaintiff-Appellant, v. SOUTHPORT BANK, COMCOR MORTGAGE, A DIVISION OF SOUTHPORT BANK, Defendants-Appellees, and AMERICAN EQUITY FINANCIAL GROUP, INC., and JORGE FLORS, Defendants.	)	Appeal from the Circuit Court of Cook County, Illinois, County Department, Chancery Division. No. 10 CH 07461 The Honorable Moshe Jacobius, Judge Presiding.
OCWEN LOAN SERVICING, LLC, Plaintiff-Appellee, v. IRMA VILLATE, Defendant-Appellant, and THE LAWNDWALE COURT CONDOMINIUMS ASSOCIATION, UNKONWN HERIS AND LEGATEES OF IRMA VILLATE, IF ANY, UNKNOWN OWNERS AND NON-RECORD CLAIMAINTS, Defendants. IRMA VILLATE, Defendant-Counter-Plaintiff-Appellant v.	)	

)
OCWEN LAON SERVICING, LLC,)
Plaintiff-Counter-Defendant-Appellee.)

JUSTICE FITZGERALD SMITH delivered the judgment of the court.
Presiding Justice Howse and Justice Lavin concurred in the judgment.

ORDER

¶ 1 *Held*: The circuit court correctly found that pursuant to the Illinois High Risk Home Loan Act (IHRHLA) (815 ILCS 137/1 *et seq*. (West 2006)), a yield spread premium does not qualify as a "point and fee payable by the consumer at or before closing." Accordingly, absent the YSP in the calculation of the total points and fees, the plaintiff's loan did not qualify as a "high risk home loan" under the IHRLA, and the plaintiff's claim under that statute was properly dismissed. The circuit court further properly found that the plaintiff had failed to state a cause of action under the Illinois Consumer Fraud and Deceptive Business Practices Act (815 ILCS 505/1 *et seq.* (West 2006)) (ICFA) against both the original lender and the assignee lender, since that action were premised upon the success of her IRHRLA claim.

¶ 2 In this cause of action we are asked to interpret the Illinois High Risk Home Loan Act (815 ILCS 137/1 *et seq*. (West 2006)) (hereinafter IHRHLA) to determine whether a yield spread premium (hereinafter YSP) qualifies as a "point and fee payable by the consumer at or before closing." 815 ILCS 137/10 (West 2006)). Pursuant to the IHRHLA, consumers must be given notice that their loan is a "high risk home loan," where the "total points and fees payable by the consumer at or before closing" exceed 5% of the total loan amount. See 815 ILCS 137/10 (West 2006)). After the plaintiff/defendant/counter-plaintiff/appellant, Irma Villate (hereinafter Villate) defaulted on her home loan, the plaintiff/counter-defendant/appellee, Ocwen Loan Servicing, LLC (hereinafter Ocwen) filed a mortgage foreclosure action against her. Villate answered this action by alleging two affirmative defenses and filing a counterclaim against Ocwen. In her pleadings, Villate alleged: (1) that Ocwen violated the IHRHLA by not providing her with the statutory notice that her loan was a "high risk home loan" and (2) that this violation of the IHRHLA amounted to a violation of the Illinois Consumer Fraud and Deceptive Business

Practices Act (815 ILCS 505/1 *et seq.* (West 2006)) (hereinafter ICFA). In addition, Villate filed a third-party class action complaint against her original lenders, the defendants Southport Bank and Comcor Mortgage (a former and dissolved division of Southport Bank) (hereinafter collectively the Southport defendants) making identical allegations regarding their violations of the IHRHLA and the ICFA.

¶ 3 Ocwen and the Southport defendants each filed section 2-619 motions to dismiss (735 ILCS 5/2-619 (West 2006)), arguing that: (1) Villate's loan was not covered by the IHRHLA because the total "points and fees" of that loan did not exceed 5% of Villate's loan amount, so as to trigger the IHRHLA; and (2) since Villate had no claim under the IHRHLA her ICFA also claim was also without merit. The circuit court agreed and granted the defendants' motions to dismiss. Villate filed a motion to reconsider, which was denied by the circuit court. Villate now appeals, contending that the circuit court erred when it found that the IHRHLA did not apply to her loan, because as a matter of law, a YSP paid to a mortgage broker is a "point and fee" "payable by the consumer at or before closing." 815 ILCS 137/10 (West 2006). For the reasons that follow, we affirm.

¶ 4 I. BACKGROUND

¶ 5 The record reveals the following pertinent facts and procedural history. In December 2007, the Southport defendants refinanced the mortgage on Villate's condominium located at 4425 North Lawndale Avenue, Unit 1B, in Chicago. The loan was arranged by Terris Edwards, an agent of American Equity Financial Group and had a principal amount of $110,000. Under the loan, the mortgage broker was paid $2,123 in the form of a YSP. Ocwen subsequently purchased the note from the Southport defendants.

¶ 6 In July 2009, Villate defaulted on the note, and on February 22, 2010, Ocwen filed a

mortgage foreclosure action against her. In August 2010, Villate filed her answer to the foreclosure complaint alleging two affirmative defenses: (1) a violation of the IHRHLA for failure to advise her that her home loan was a "high risk home loan" (815 ILCS 137/95 (West 2006) and (2) a violation of the ICFA based upon a knowing violation of the IHRHLA's disclosure requirements[1] (see 815 ILCS 505/2 (West 2006); 815 ILCS 137/135 (West 2006)). Villate also filed a counterclaim against Ocwen in the mortgage foreclosure action, as well as a third-party complaint against the Southport defendants, also alleging violations of: (1) the IHRHLA (815 ILCS 137/95 (West 2006); and (2) the ICFA (see 815 ILCS 505/2 (West 2006); 815 ILCS 137/135 (West 2006)).

¶ 7 On October 12, 2010, Villate filed a class action complaint against the Southport defendants reiterating the same causes of action as in her third party complaint against them. On December 21, 2010, Villate amended her class action complaint to add an additional cause of action, alleging that the Southport defendants violated the Illinois Fairness in Lending Act (815 ILCS 120/1 *et seq*. (West 2006)), when they discriminated against her on the basis of her gender and race.

¶ 8 On February 9, 2011, the circuit court consolidated the mortgage foreclosure action with the class action against the Southport defendants.

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[1] Villate contended that the Southport defendants violated the ICFA by making a loan that they knew, at the time of origination, violated the IHRHLA's prohibitions on charging more than 5% in points and fees without providing her with the mandatory special disclosures for "high risk home loans." By extension, she argued that under the ICFA, Ocwen, as the assignee of the original loan, was automatically responsible for those violations. See 815 ILCS 505/2 (West 2006); 815 ILCS 137/135 (West 2006)).

¶ 9 Both Ocwen and the Southport defendants then filed section 2-619 motions to dismiss. 735 ILCS 5/2-619 (West 2006). They argued that Villate's loan was not covered by the IHRHLA because the total "points and fees payable by the consumer at or before closing" were less than 5% of the total loan amount, as required under the IHRHLA to trigger the disclosure requirements. 815 ILCS 137/10 (West 2006). They contended that a YSP is not a point and fee " payable by the consumer at or before closing," and that since the exclusion of the YSP would result in all of the points and fees totaling less than 5% of Villate's loan amount, the IHRHLA could not be triggered.[2] The Southport defendants also argued that because Villate could not state a cause of action under the IHRHLA, her *per se* ICFA claim also necessarily failed.

¶ 10 In its separate section 2-619 motion to dismiss (735 ILCS 5/2-619 (West 2006)) Villate's amended complaint and affirmative defenses, Ocwen further argued that because it was assigned the loan, it could not have violated the ICFA unless its fraud was "active and direct," which Villate did not, and could not, allege.

¶ 11 After hearing arguments, on July 13, 2011, the circuit court dismissed Villate's IHRHLA and ICFA claims against both Ocwen and the Southport defendants.[3] In doing so, the court first noted that at the time of her closing, Villate paid the following: (1) the loan origination fee

[2] In the alternative, the defendants argued that even if the YSP was a point and fee, the IHRHLA would nevertheless be inapplicable since, after excluding the other settlement charges, which they contended should not be considered points and fees, the relevant calculation amounted to less than 5%.

($1350); (2) the underwriting fee ($275); (3) the processing fee ($895); (4) the messenger/courier fee ($15); (5) the closing/settlement fee ($275); (6) the administration fee ($350); (7) the interest for the period between December 8, 2007, through January 1, 2008 ($268.94); (8) the county taxes ($455.65); (9) the State of Illinois policy fee ($3); (10) the appraisal fee ($400); (11) the later date fee ($125); (12) the document preparation ($125); (13) the title insurance ($475); (14) the condo endorsement ($115); (15) the recordings fees ($147.50); and (16) the YSP ($2,123). The court observed that it was uncontested that the loan origination fee, the underwriting fee, the processing fee, the messenger/courier fee, the closing/settlement fee, and the administration fee were points and fees, as well as that the interest, the county taxes, and the State of Illinois policy fee were not points and fees. The parties, however, contested whether the remaining amounts (namely, the appraisal fee, the later date fee, the documentation preparation, the title insurance, the condo endorsement, the recording fees, and the YSP) were points and fees. After doing its own calculation, the court determined that if the YSP were not included as a "point and fee," the total "points and fees" would equal less than 5% of the total loan amount. It therefore concluded that Villate's causes of action hinged on whether a YSP is a point and fee under the IHRHLA, and proceeded to address that claim first.

¶ 12 The court next analyzed the IHRHLA and found that under the plain language of that statute, a YSP did not qualify as a "point and fee payable by the consumer at or before closing," as required under the IHRHLA to trigger the disclosure requirements. Accordingly, the court dismissed the IHRHLA count as to both Ocwen and the Southport defendants.

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[3] The circuit court did not dismiss Villate's claim for racial discrimination but asked the parties for additional briefing on this issue. On September 28, 2011, however, Villate voluntarily dismissed this count of her complaint.

¶ 13 The court then considered the ICFA counts. As to the Southport defendants it found that because the ICFA claim was predicated solely upon an alleged *per se* violation of the IHRHLA, once the IHRHLA claim was dismissed, the ICFA also claim necessarily failed. As to Ocwen, the court found that Villate had failed to state a cause of action under the ICFA against Ocwen because it failed to show that Ocwen's fraud was "active and direct." The court explicitly rejected Villate's invitation to create an ICFA cause of action by extending the successor liability provision of the IHRHLA (815 ILCS 137/135(d) (West 2006)) to an assignee who had not actively engaged in wrongful conduct. Accordingly, it dismissed the ICFA count against Ocwen as well.

¶ 14 On August 12, 2011, Villate filed a motion to reconsider, arguing that the circuit court had misapplied the relevant law. The circuit court denied that motion on December 20, 2011, and subsequently entered a judgment of foreclosure and sale of Villate's property. Villate now appeals the dismissal of her actions.

¶ 15 II. ANALYSIS

¶ 16 A motion to dismiss, pursuant to section 2-619 of the Code, such as the ones filed here, " 'admits the legal sufficiency of the plaintiffs' complaint, but asserts an affirmative defense or other matter that avoids or defeats the plaintiffs' claim.' " *McDonald v. Lipov*, 2014 IL App (2d) 130401, ¶13 (quoting *DeLuna v. Burciaga*, 223 Ill.2d 49, 59 (2006)). When reviewing a dismissal pursuant to section 2-619, a court must accept as true all well-pleaded facts in the plaintiff's complaint and all inferences that can reasonably be drawn in the plaintiff's favor. *McDonald*, 2014 IL App (2d) 130401, ¶14 (citing *Morr-Fitz, Inc. v. Blagojevich*, 231 Ill. 2d 474, 488 (2008)). "The question on appeal is whether the existence of a genuine material fact should have precluded the dismissal, or absent such an issue of fact, whether dismissal is proper as a

matter of law." *Altenheim German Home v. Bank of America, N.A.*, 376 Ill. App. 3d 26, 32 (2007). The standard of review on appeal is *de novo*. *McDonald,* 2014 IL App (2d) 130401, ¶14.

¶ 17 A. IHRHLA Claim

¶ 18 On appeal, Villate first argues that the circuit court erred in dismissing her complaint against the Southport defendants and her affirmative defense and counterclaim against Ocwen when it found that the IHRHLA did not apply to her loan. Villate argues that the circuit court incorrectly found that under the IHRHLA a YSP is not a "point and fee" applicable to the calculation of her loan, so as to trigger the mandatory disclosure requirements. Villate acknowledges that this is a question of first impression in Illinois and urges us to find as a matter of law that a YSP is a "point and fee" under that statute. For the reasons that follow, we decline that invitation.

¶ 19 We begin by noting that the IHRHLA was enacted in 2003 in order to "protect borrowers who enter into high risk home loans from abuse that occurs in the credit marketplace when creditors and brokers are not sufficiently regulated in Illinois." 815 ILCS 137/5 (West 2006). The Act[4] applies to "high risk home loans," which are defined as, in part, "home equity loans[5] in

[4] We note that on appeal the parties dispute the language of the Act as it was in place in 2007 when Villate refinanced her home loan. We note, however, that since then, our legislature has amended the IHRHLA in substantial part. Those amendments became effective on January 1, 2013, long after Villate closed on her loan and after the circuit court dismissed Villate's causes of action. Neither party seeks that we apply the new statutory language retroactively to Villate's case. Accordingly, we proceed only by analyzing the statute as it was in 2007.

which *** the total points and fees payable by the consumer at or before closing will exceed the greater of 5% of the total loan amount or $800." 815 ILCS 137/10 (West 2006). The statute defines "points and fees" as:

> "all items required to be disclosed as points and fees under 12 C.F.R. 226.32 (2000, no subsequent amendments or editions included) [commonly referred to as Regulation Z]; the premium of any single premium credit life, credit disability, credit unemployment, or any other life or health insurance that is financed directly or indirectly into the loan; and compensation paid directly or indirectly to a mortgage broker, including a broker that originates a loan in its own name in a table-funded transaction, not otherwise included in 12 C.F.R. 226.4." 815 ILCS 137/10 (West 2006).

¶ 20 Regulation Z (12 C.F.R. 226.32) defines "points and fees" as:

> "(i) All items required to be disclosed under § 226.4(a) and 226.4(b), except interest or the time-price differential;
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> (ii) All compensation paid to mortgage brokers;
>
> (iii) All items listed in § 226.4(c)(7) (other than amounts held for future payment of taxes) unless the charge is reasonable, the creditor receives no direct or indirect compensation in connection with the charge, and the charge is not paid to an affiliate of the creditor; and
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> (iv) Premiums or other charges for credit life, accident, health, or loss-of-income insurance, or debt-cancellation coverage (whether or not the debt-cancellation coverage is

[5] A "home equity loan" is defined as "any loan secured by the borrower's primary residence where the proceeds are not used as purchase money for the residence." 815 ILCS 137/10 (West 2006).

insurance under applicable law) that provides for cancellation of all or part of the consumer's liability in the event of the loss of life, health, or income or in the case of accident, written in connection with the credit transaction." 12 C.F.R. 226.32(b)(1).

¶ 21 To protect consumers, the IHRHLA prohibits lenders from providing "high risk home loans" where the "points and fees" associated with the loan are in excess of 6%. 815 ILCS 137/55 (West 2006). In addition, where the "points and fees" associated with the loan exceed 5% of the loan amount, the IHRHLA provides that the lender must provide special written notice to the borrower at least three days prior to closing, disclosing, *inter alia*, that: (1) the borrower might be able to obtain a loan with more favorable conditions; (2) the borrower could lose her home if she fails to meet her payment obligations under the loan, and (3) the borrower is advised to consult with an attorney or experienced financial counselor. See 815 ILCS 137/95 (West 2006).

¶ 22 In the present case, it is undisputed that the Southport defendants did not make the IHRHLA disclosures to Villate. It is further undisputed that if the YSP is not included in the "points and fees" calculation, the "points and fees" add up to less than 5% of Villate's total loan amount and the IHRHLA does not apply. Accordingly, the dispute focuses on defining a YSP under the IHRHLA, an issue which has not yet been addressed by any of our courts.

¶ 23 Village urges us to find that a YSP is a "point and fee" under the IHRHLA. She acknowledges that the IHRHLA operates as the state version of the federal Home Ownership and Equity Protection Act (HOEPA)[6], which implements Regulation Z, and that cases interpreting

[6] By Public Act 103-325, in 1994 the HOEPA (Pub. L. 103-325) amended the Truth-In-Lending Act (TILA) (15 U.S.C. § 1601 *et seq*.) in response to increasing reports of abusive practices in home mortgage lending. Just like the IHRHLA, the HOEPA mandates certain disclosures to consumer potentially entering into a predatory loan agreement. However, HOEPA's threshold is

this federal statute have found that a YSP is not a "point and fee." See *e.g., Wolski v. Fremont Inv. & Loan*, 127 Cal App. 4th 347, 351 (4th Dist. 2005); see also *Bank of New York v. Parnell,* 56 So. 3d 160 (La. 2011). She nevertheless argues that the IHRHLA was enacted to give greater protection to consumers, and that by its plain language it defines "points and fees" as "all items required to be disclosed as points and fees under 12 CFR 226.32 [Regulation Z] *** *and compensation paid directly or otherwise to a mortgage broker* *** not otherwise included in 12 CFR 226.4." 815 ILCS 137/10 (West 2006). She contends that because the IHRHLA adds the language "all compensation paid directly or indirectly to a mortgage broker" (815 ILCS 137/10 (West 2006)) to the language "all compensation paid to mortgage brokers" in Regulation Z, it is broader than HOEPA (15 U.S.C. § 1602 (2006))[7] and should be interpreted to include YSPs.

¶ 24 The Southport defendants argue that that even if Villate is correct and the IHRHLA's definition of a "point and fee" includes YSPs as compensation "indirectly paid to a mortgage broker," the IHRHLA is nevertheless inapplicable to Villate's loan, because this particular "point and fee" was not "payable at or before closing" as required under the plain language of the statute. See 815 ILCS 137/10 (West 2006). For the reasons that follow, we agree.

¶ 25 We note that our primary objective in construing a statute is to ascertain and give effect to

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higher, and unlike the IHRHLA, which applies to "points and fees" in excess of 5% of the total loan amount, the HOPEA requires that the total "points and fees" be above 8% to trigger the mandatory disclosures. See 15 U.S.C. § 1602 (2006).

[7] We note that this was the language of HOEPA at the time of Valetta's loan. Many provision of TILA, including 15 U.S.C. § 1602 have since been amended by the Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, H.R. 4173 (July 21, 2010).

the drafter's intent. *Ford Motor Co. v. Chicago Dept. of Revenue*, 2014 IL App (1st) 130597, ¶ 5. The most reliable indicator of this intent is the language of the statute, given its plain, and ordinary meaning. *In re Marriage of Rogers*, 213 Ill. 2d 129, 136 (2004). If the language of the statute is clear and unambiguous, "it becomes our sole basis for discerning the intent of the legislative body" and we may not resort to extrinsic evidence, such as legislative history, or other principles of statutory construction to determine that intent. *Ford Motor Co.*, 2014 IL App (1st) 130597, ¶ 5 (citing *Gem Electronics of Monmouth, Inc. v. Department of Revenue*, 183 Ill. 2d 470, 475 (1998)). In addition, in construing a statute, we may not depart from its plain and ordinary meaning by reading into it an unstated exception, limitation, or condition. *Ford Motor Co.*, 2014 IL App (1st) 130597 ¶ 5. Rather, the language of the statute must be read in context and should be given a reasonable construction without being rendered superfluous. See *Prazen v. Shoop*, 2013 IL 115035, ¶ 21. In interpreting a statute, our review is *de novo*. *Ford Motor Co.*, 2014 IL App (1st) 130597 ¶ 5.

¶ 26 In the present case, the plain language of the IRHRLA provides that the statute applies to loans where the "total points and fees payable by the consumer at or before closing will exceed the greater of 5% of the total loan amount or $800." 815 ILCS 137/10 (2006). The plain language of the statute is clear. In order for the IHRHLA to apply and trigger the mandatory disclosure requirements, a YSP must be both: (1) a "point and fee;" and (2) "payable at or before closing." 815 ILCS 137/10 (West 2006).

¶ 27 A YSP is a bonus paid to a mortgage broker for providing a loan at an interest rate higher than the minimum interest rate approved by the lender for a particular loan. See *Watson v. CBSK Financial Group, Inc.*, No. 01-C-4043 (N. D. Ill. 2002) ("A [YSP] is a payment from the lender

to the broker for delivering a loan with an interest rate above a preset 'par' rate. The amount of the premium is determined from a rate sheet provided by the lender; the higher the interest rate is above the par (or market rate), the higher the yield spread premium that the broker receives."); see also *Howland v. American Title Ins., Co*., 672 F. 3d 525 (7th Cir. 2012) ("A [YSP] is a payment from a lender to a mortgage broker based on the difference between the interest rate accepted by the borrower and the 'par rate' offered by the lender. Such payments enable borrowers to finance up-front closing costs they might otherwise pay to mortgage brokers, but have also been criticized as blatant referral fees that compensate mortgage brokers not for their services but for pushing a higher interest rate on the borrower.") The lender rewards the broker by paying it a percentage of the yield spread (the difference between the interest rate specified by the lender and the actual interest rate set by the broker at the time of origination) multiplied by the amount of the loan. *Wolski*, 127 Cal App. 4th at 351; see also *Parnell*, 56 So. 3d 160. The lender gives this amount to the broker at closing and then recoups it from the borrower in the form of a higher interest rate. See *Willignham v. NovaStar Mortgage, Inc.*, No. 04-CV-2391 (W.D. Tenn. February 7, 2007). Therefore, although the lender pays this fee at the time of closing, the expense is ultimately born by the borrower over time. See *Willignham.*, No. 04-CV-2391 (W.D. Tenn. February 7, 2007).

¶ 28 Villate admits that "it is the borrower who ultimately and literally pays for the YSP over time in the form of a higher monthly payment due to the higher interest rate procured by the lender's YSP" and that as a result" a YSP is generally not "paid" by the borrower at or before closing. She nevertheless contends that because under the IHRHLA the YSP need not be "paid" but only "payable at or before closing" (see 815 ILCS 137/10 (West 2006)), the YSP should be included in the total calculation of points and fees. We disagree.

¶ 29 "Payable" is defined as "that [which is] to be paid. An amount that may be payable without being due." See Black's Law Dictionary 1243 (9th ed.2009); see also 11 Oxford English Dictionary 378 (2d ed.1989) ("1.a. 'Of a sum of money, bill, tax, etc.: that is to be paid; due, owing; falling due (at or on a specified date, or to a specified person).'; 1.b. 'That can be paid; capable of being paid' "). In the statute the word "payable" is explicitly conditioned with a time restraint--the phrase immediately following it "at or before closing." Accordingly, the plain language of the statute clearly requires that the amount "to be paid" by the consumer must be so "at or before closing." As such, contrary to Villate's interpretation, the statute does not cover YSPs, which are derived from the interest on the mortgage over the course of the loan, and become payable only *after* closing. To interpret the language as Villate would have us do, would render the words "at or before closing" superfluous. *People v. Ellis*, 199 Ill. 2d 28, 39 (2002) ("[i]f possible, the court must give effect to every word, clause, and sentence; it must not read a statute so as to render any part inoperative, superfluous, or insignificant; and it must not depart from the statute's plain language by reading into it exceptions, limitations, or conditions the legislature did not express").

¶ 30 An overwhelming majority of decisions, which have considered this same issue have explicitly found that a YSP is neither paid, nor payable at or before closing. See *e.g.*, *In re Balko*, 348 B. R. at 693 ("[T]he payment of the [YSP] to the broker *** is paid and derived from the stream of interest generated over the life of the loan, and is not 'payable by the consumer at or before the time of closing.' Accordingly, the [YSP] is not included in the points and fees test calculation set forth in 15 U.S.C. § 1602); *In re Mourer*, 309 B. R. 502, 506 (W. D. Mich. 2014) ("The bankruptcy court's holding that the YSP is a fee that must be included in the calculation of the 8% trigger of 12 C.F. R. § 226.32(a)(1)(ii) flies in the face of that very provision's express

inclusion only of 'fees payable by the consumer at or before loan closing.' "); *Parnell*, 56 So. 3d 160 ("to find that the YSP paid by the lender to broker, and ultimately to be paid by the borrower to the lender over the course of the loan (in the form of an enhanced interest rate on the borrowed principal), is a fee 'payable by the consumer at or before closing' under 12 C.F. R. § 226.32(a)(1)(ii) would be to over look the letter of the law in order to enforce the spirit of the law."); *In re Canton*, 310 B.R. 299, 3003 (N.D. Miss. 2004) ("While the lender's contribution to the mortgage broker's fee will obviously be more than repaid by the plaintiff over the life of the loan through the elevated interest rate, the plain meaning of the statute, *i.e*., 'payable by the consumer at or before closing,' cannot be ignored."'); *Wingert v. Credit Based Asset Servicing & Securitization, LLC*, No. 1-02-1973, (W.D. Penn., August 26, 2004) ("Even if the court were to assume the Plaintiffs are correct in stating that the yield spread was an indirect finance charge paid by the Plaintiffs, the argument ignores the plain language of the statute, which expressly provides for the inclusion of 'fees payable by the consumer at or before closing[.]' [Citations] That is, even if the Plaintiffs paid the yield spread through a higher interest rate, it would not be paid at or before closing. Rather, it would be paid over the course of the loan."). *In re Collins*, 310 B.R. 299, 301 (Bankr. N.D. Miss. 2004) ("[The YSP] clearly was not paid 'at or before closing' by the plaintiff."); *In re Sigle*, 310 B.R. 303, 306 (Bankr. N.D. Miss. 2004) (same); *Bell v. Parkway Mortgage, Inc*., 309 B.R. 139, 153 (Bankr. E.D. Pen.2004) ("Even if the [YSP] in this case is part of the finance charge, it clearly was not paid by the Debtor at or before closing. Therefore, the [YSP] is not included in the points and fees calculation"); *Wolski*, 127 Cal. App. 4th at 352 ("[The phrase 'at or before closing'] does not include payments made after closing and over the life of the loan, such as interest.").

¶ 31 While Villate is correct that in *Willingham*, the Western District Court of Tennessee held that

that a YSP should be included as a "point and fee payable at the time of closing" in calculating the total loan amount of the consumer's loan, so as trigger the statutory disclosure requirements under HOPEA (*Willignham*, No. 04-CV-2391 (W.D. Tenn. February 7, 2007)), that case represents the minority view, and directly conflicts with other authority within the same district interpreting the same statute. See *Terry v. Cmty Bank of N. Va.*, 255 F. Supp. 2d 811 (W.D. Tenn. 2003) (finding no difference between "paid" and "payable" in the context of HOEPA.) As such, we find it unpersuasive.

¶ 32 Rather, we rely on the rationale of the California appellate court in *Wolski*, 127 Cal App. 4th at 351. In that case, the court was asked to analyze the California Business and Profession Code, which contains California's predatory lending act, and provides, just as the IHRHLA does, that a loan is covered by the statute only if the "total points and fees *payable by the consumer at or before closing* for a mortgage or deed of trust" will exceed a certain percentage of the "total loan amount." (emphasis added.) *Wolski*, 127 Cal App. 4th at 351 (citing Cal. Fin. Code § 4970(b)(1) (B)). Just as Villate, the plaintiffs in *Wolski*, asked the court to note the difference between "paid" and "payable." *Wolski*, 127 Cal App. 4th at 352. They argued that "even though the increased interest is paid over the life of the loan, it is 'payable' at or before closing." The *Wolski* court disagreed, explaining:

> "this is a strained and anomalous reading of the word 'payable' in the context of the remaining language of the section. We may infer from the pleadings that all charges included in points and fees as disclosed by defendants were paid on or before closing. To construe the language to include on payment made over the life of the loan, when all others are paid at closing, would lead to an absurd consequence, in derogation of rules of statutory

interpretation and improperly 'rewrite the law to conform to an intention that has not been expressed.' " *Wolski*, 127 Cal. App. 4th at 352.

¶ 33 We agree with this rationale, and find that the record below supports the conclusion that for the purpose of the IHRHLA, the YSP for Villate's loan was not "payable by the consumer at or before closing." The record below reveals that under the terms of her loan, Villate had a legal right to pay off her loan early. The note on that loan, states in pertinent part:

"Borrower' Right to Prepay: I have the right to make payments of Principal at any time before they are due *** I may make a full Prepayment or pretrial prepayments without paying a Prepayment charge."

By these terms, so long as Villate paid off her loan early, she could entirely avoid reimbursing Ocwen and the Southport defendants, for the amount paid by the Southport defendants original to the mortgage broker. Accordingly, in this case, the YSP never had to become payable, and was, therefore, certainly not "payable at or before closing," as required by the plain language of the statute. See 815 ILCS 137/10 (2006). Therefore, the circuit court did not err in excluding the YSP from the relevant calculation.

¶ 34 Villate next attempts to argue that the legislative history supports the conclusion that a YSP should be included in the calculation of the "total loan amount." Specifically Villate cites to a single statement made by Representative Currie in the Illinois General Assembly, indicating that the IHRHLA was enacted, in part, to curtail the use of YSPs. 93 Gen. Assem., House Rep. Deb. 58-59 (State of Rep. Currie.). However, when the language of a statute is clear, as we have already found the IHRHLA to be, we are not permitted to look to the legislative history to find an ambiguity. See *O'Laughlin v. Village of River Forest*, 338 Ill. App. 3d 189, 191-92 (2003) ("The appellate court cannot restrict or enlarge the plain meaning of an unambiguous statute.

[Citations.] A court may not declare that the legislature did not mean what the plain language imports. [Citations.] The court's only function, where the statutory language is unambiguous, is to enforce the law as enacted by the legislature."). What is more, the legislature's intent is clear from the plain language of the IHRHLA, which does not include YSPs in the definition of "points and fees." If the Illinois legislature had intended that YSPs be included as "a point and fee payable by the consumer at or before closing," it could have included such language in the statute. See *Wolski*, 127 Cal. App. 4th at 354. In fact, several other statutes, which act as the equivalent of the IHRHLA in other jurisdictions, explicitly include YSPs in that definition. See *e.g.*, W. Va. Code § 31-17-8(m)(4) (2011) ("In making any primary or subordinate mortgage loan, no licensee may, and no primary or subordinate mortgage lending transaction, may contain terms which: *** (4) Require the borrower to pay *** combined fees, compensation, or points, *** that exceed, in the aggregate six percent of the loan amount financed, including any [YSP] paid by the lender to the broker."); Ga. Code Ann. § 7-6A-2(12)(B) (2011) (" 'Points and fees' means: *** (B) All compensation paid directly or indirectly to a mortgage broker from any source *** including but not limited to [YSPs] ***"). The IHRHLA, on the other hand, deliberately does not. The drafter's intent to exclude the YSPs from the calculation is further evident in the definition of "points and fees," which includes language defining amounts financed into the loan as points and fees in the area of insurance (see 815 ILCS 137/10 (2006) (defining "points and fees" as, *inter alia*, *** the premium of any single premium credit life, credit disability, credit unemployment, or any other life or health insurance that is *financed* directly or indirectly into the loan")), but deliberately leave out such language in the mortgage broker compensation section (see 815 ILCS 137/10 (2006) (defining "points and fees" as

"compensation paid directly or indirectly to a mortgage broker")). Accordingly, we need not look beyond the plain language of the statute to determine the legislature's intent.

¶ 35 For similar reasons, we reject Villate's reliance on the Illinois Department of Financial and Professional Regulation's interpretation of the IHRHLA. Villate contends that this agency, which has the authority to engage in rule making under the IHRHLA, has "always interpreted 'compensation paid directly or indirectly to a mortgage broker' to include YSPs." However, where the language of a statute is clear and unambiguous, little deference is accorded to any agency interpretation that runs counter to the statute's plain meaning. See *e.g.*, *Cent. Ill. Pub. Serv. Co. v. Pollution Control Bd.*, 165 Ill. App. 3d 354, 363 (1998) ("Where the language of a regulation is clear and certain, an administrative agency's interpretation of the regulation which runs counter to the regulation's plain language is entitled to little, if any, weight in determining the effect to be accorded the regulation"); see also *Van's Material Co. v. Dep't of Rev.*, 131 Ill. 2d 196, 208 (1989) (declining to consider the state agency's regulations as persuasive regarding statutory interpretation, where those regulations ran counter to the statue's plain language). Since, as already discussed above, the IHRHLA's plain language unambiguously requires that the points and fees be payable at or before the time of closing, the Illinois Department's interpretation that includes YSPs into the points and fees calculation is entitled to little deference. See *Wolski*, 127 Cal. App. 4th at 357 (rejecting the agency's interpretation including YSPs in the calculation because it ran contrary to the plain language of the statute).

¶ 36 Lastly, Villate contends that because the IHRHLA mandates that it be "liberally construed to effectuate its purpose" as a "borrower protection statue," (815 ILCS 137/5 (West 2006)), we must construe it so as to include YSPs in the calculation of the points and fees. In Illinois "a statue is liberally construed when its letter is extended to include matters within the spirits or

purpose of the statue." *Bd. of Educ. of Cmty Consol. Sch. Dist. No. 59 v. Ill. State Bd. of Educ.*, 317 Ill. App. 3d 790, 795 (2000). "[L]iberal construction means to give the language of a statutory provision, freely and consciously, its commonly, generally accepted meaning, to the end that the most comprehensive application thereof may be accorded, without doing violence to any of its terms. [Citation.]" (internal quotations omitted). *Price v. Philip Morris, Inc.*, 219 Ill.2d 182, 295-96 (2005) (citing *Board of Education of Community Consolidated School District No. 59 v. State Board of Education*, 317 Ill. App. 3d 790, 795 (2000)).

¶ 37 Nevertheless, this rule of liberal construction has no application where the language of the statute is clear. *DeWig v. Landshire Inc.*, 281 Ill. App. 3d 138, 143 (1996); *In re K.M.*, 274 Ill. App. 3d 189, 195 (1995) (citing *Anderson v. City of Park Ridge*, 396 Ill. 235, 254 (1947)). Since we have already found that the language of the IHRHLA is unambiguous, we find Villate's argument unpersuasive.

¶ 38 For all of the aforementioned reasons, we conclude that under the IHRHLA a YSP is not "payable by the consumer at or before closing" and that it therefore cannot be included in the calculation of the total points and fees.[8] 815 ILCS 137/10 (West 2006). Since the parties concede that without the YSP in the releavnt calculation, the total points and fees of Villate's loan do not add up to 5% of the total loan amount, the IHRHLA does not apply. Accordingly,

[8] In making this decision, we do not fail to recognize the potential abusive practices of YSPs at the disadvantage of borrower. However, this fact in and of itself, has no bearing on the statutory interpretation issue we were asked to decide in this appeal.

the circuit court properly dismissed Villate's IHRHLA claims against both Ocwen[9] and the Southport defendants.

¶ 39 B. ICFA Claim

¶ 40 We next turn to Villate's ICFA claims against both Ocwen and the Southport defendants. We begin by noting that the ICFA is a "regulatory and remedial statue intended to protect consumers, borrowers and business persons against fraud, unfair methods of competition and other unfair and deceptive business practices." *Robinson v. Toyota Motor Credit Corp*., 201 Ill. 2d 403, 416-17 (2002); see also *Cripe v. Leiter,* 184 Ill. 2d 185, 191 (1998). Unfair or deceptive practices are defined in the Act as:

> "including but not limited to the use or employment of any deception, fraud, false pretense, false promise, misrepresentation or the concealment, suppression or omission of any material fact, with intent that others rely upon the concealment, suppression or omission of such material fact *** in the conduct of any trade or commerce ***." 815 ILCS 505/2 (West 2006).

To state a cause of action for consumer fraud under the ICFA, a plaintiff must allege five elements: (1) a deceptive act or unfair practice occurred; (2) the defendant intended for the

[9] We note that Ocwen's liability would have been premised on section 135(d) of the IHRHLA, which states in pertinent part "[a]ny natural or artificial person who purchases or otherwise is assigned or subsequently holds high risk home loan shall be subject to all affirmative claims and defense with respect to the loan that the borrower could asserts against the lender or broker of the loan" and "a borrower *** may assert claims that the borrower could assert against a lender of the home loan against a subsequent holder or assignee of the home loan ***." 815 ILCS 137/135(d) (West 2006).

plaintiff to rely on this deception; (3) the deception occurred in the course of conduct involving trade or comers; (4) the plaintiff sustained actual damages; and (5) such damages were proximately caused by the defendant's deception. *Dubey v. Pub. Storage, Inc*., 395 Ill. App. 3d 342, 353 (2009); see also *Robinson*, 201 Ill. 2d at 417; see also *Cripe*, 184 Ill.2d at 191.

¶ 41 The ICFA also provides that "[a]ny person who knowingly violates the High Risk Home Loan Act [IHRHLA] *** commits an unlawful practice within the meaning of this Act." 815 ILCS 505/2Z (2006).

¶ 42 A. The Southport Defendants

¶ 43 The circuit court found that Villate failed to state an ICFA claim against the Southport defendants because her claim was premised on a *per se* violation of the IHRHLA. The court found that if Villate could not state a claim under the IHRHLA, she could also not state a claim under the ICFA. We agree. The record reveals that in her amended complaint, Villate only alleged that the Southport defendants violated the ICFA by making a loan that they knew violated the IHRHLA's prohibition on charging more than 5% in points and fees without providing her with the mandatory disclosures applicable under that statute to high risk home loans. Since we have already decided above that, without the YSP, the total points and fees do not add up to 5% of the total loan amount, so as to trigger the IHRHLA, Villate has failed to state a claim of a knowing violation of either the IHRHLA or, by extension, the ICFA. Accordingly, we affirm the court's dismissal of the ICFA claim against the Southport defendants. See *e.g*., *Dawkins v. Deutsche Bank Nat. Trust Co.*, No. 13-CV-05464 (N.D. Ill. Sept. 12, 2013) (dismissing an ICFA remedy predicated upon a violation of the IHRHLA, where the plaintiff failed to adequately plead a violation of the IHRHLA in the first instance).

¶ 44 B. Ocwen

¶ 45 On appeal, Villate next challenges the circuit court's dismissal of her ICFA claim against Ocwen. She contends that as an assignee, Ocwen is automatically liable for any knowing violations of the IHRHLA by the originating lender, or other predecessors. In doing so, Villate does not allege any wrongdoing on part of Ocwen. Rather, she relies on the assignee liability provision of the IHRHLA, which states in pertinent part:

> "[a]ny natural or artificial person who purchases or otherwise is assigned or subsequently holds high risk home loan shall be subject to all affirmative claims and defense with respect to the loan that the borrower could asserts against the lender or broker of the loan" and "a borrower *** may assert claims that the borrower could assert against a lender of the home loan against a subsequent holder or assignee of the home loan ***." 815 ILCS 137/135(d) (West 2006).

Villate also relies on section 135(b) of the IHRHLA, which provides that "[a]ny knowing violation of [the IHRHLA] constitutes a violation of the [ICFA]." Villate seeks to combine these two provisions of the IHRHLA to argue that Ocwen, is subject to an ICFA claim based upon its predecessors' "knowing" violation of the IHRHLA.

¶ 46 However, we have already found that Villate has failed to state a claim of a knowing violation of the IHRHLA by the Southport defendants. Accordingly, the assignee liability provisions of the IHRLA are of little avail to her. *C.f.*, *Jackson v. Holland Dodge*, 197 Ill. 2d 39, 52 (2001) (refusing to extend the successor liability provision of the federal TILA and concluding that the ICFA cannot extend liability beyond the limits of that act, except that "a plaintiff would be entitled to maintain a cause of action under the ICFA where the assignee's fraud is active and direct."). Accordingly, we find that the circuit court did not err in dismissing Villate's ICFA claim against Ocwen.

¶ 47 III. CONCLUSION

¶ 48 For all of the aforementioned reasons, we affirm the judgment of the circuit court.

¶ 49 Affirmed.