LexisNexis® Emerging Issues Analysis

Michael Leffel and Matthew Lynch on

Confusion Over RESPA Standing Requirements Continues as Sixth Circuit Holds That Section 8 Plaintiffs Need Not Allege They Were Overcharged

2009 Emerging Issues 4051

Overview. Earlier this year, the United States Court of Appeals for the Sixth Circuit in became the first federal appellate court to squarely address the question of whether a plaintiff has standing to sue a settlement service provider under Section 8 of the Real Estate Settlement Procedures Act ("RESPA") even if he or she was not, in fact, "overcharged" for settlement services. *In re* Carter, 553 F.3d 979 (6th Cir. 2009). RESPA generally prohibits, among other things, kickbacks and improper referral fees in the settlement closing industry. The Sixth Circuit acknowledged a widespread split in the district courts over whether a plaintiff has standing if they were not in fact overcharged for the settlement service in question. The plaintiffs in Carter did not allege in their complaint that they were overcharged in any way, but rather merely alleged a RESPA violation based solely on allegations that a portion of the fees they were charged for title insurance and settlement services was improperly used to pay a kickback to a third party in exchange for a referral of business. The Sixth Circuit held the plaintiffs had standing because they alleged they suffered an "individual, rather than collective harm" for the purposes of the standing requirement because "they themselves were given referrals sullied by kickbacks in violation of RESPA." *Id.* at 989. With the other United States Courts of Appeals yet to weigh in on the issue,[1] the *Carter* decision and the split in the lower courts demonstrates that, at least for now, a settlement service provider's potential exposure to private claims under RESPA depends not only on its actions, but on where in the country it operates.

The Legal Question Facing the *Carter* Court. RESPA clearly prohibits real estate settlement service providers from giving "kickbacks" for referrals and, similarly, from charging and splitting fees for unperformed services. 12 U.S.C. § 2607(a)–(b). Confusion arises, however, when individuals (not HUD) seek to enforce these provisions through a private cause of action. RESPA provides a private right of action for a plaintiff who is "charged for the settlement service involved in the violation[.]" 12 U.S.C. § 2607(d)(2). In private actions, courts often face a straightforward but difficult question: if the plaintiff does not allege any direct financial harm from the kickbacks—because the settlement service rates were at or below the market rate, or at or below the provider's filed insurance rate, for example—does the plaintiff have standing to sue? In other words, can a plaintiff suffer an "injury-in-fact" if the kickback did not result in some overcharge to him or her?

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1. This issue is currently pending before the Third Circuit in *Alston v. Countrywide Fin. Corp.*, No. 08-4334.

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The question of what constitutes an "injury-in-fact" sufficient to convey standing upon a Section 8 RESPA plaintiff has vexed courts for nearly a decade. Some courts hold a plaintiff lacks standing unless the rates charged for settlement services, including any unearned fees or kickbacks, exceeded the service provider's filed rate or the fair market value for the services. *See, e.g.*, *Moore v. Radian Group, Inc.*, 233 F. Supp. 2d 819, 825–826 (E.D. Tex. 2002) (no standing when fees did not exceed fair market value); *Morales v. Attorneys' Title Ins. Fund*, 983 F. Supp. 1418, 1427 (S.D. Fla. 1997) (no standing when fees did not exceed filed rates); *see also Alston v. Countrywide Fin. Corp.*, 2008 U.S. Dist. LEXIS 76763, at *14–*19 (E.D. Pa. 2008) (same). Other courts hold there is standing present even if a plaintiff is not overcharged. In doing so, those courts have utilized a variety of theories for finding standing satisfied, ranging from causing general harm to market competition, to promoting a market-wide deterrent to unnecessarily high settlement costs, to potentially harming the plaintiff based on a lack of impartiality in the referral to the settlement service. *See, e.g.*, *Capell v. Pulte Mortgage, L.L.C.*, 2007 U.S. Dist. LEXIS 82570, at *9–*15 (E.D. Pa. Nov. 7, 2007); *Robinson v. Fountainhead Title Group Corp.*, 447 F. Supp. 2d 478, 489 (D. Md. 2006).

The conclusion a court reaches in any given case will have a tremendous impact on damages and settlement negotiations, regardless of the truth of the allegations. RESPA's private remedy provides for damages "in an amount equal to three times the amount of any charge paid for such settlement service." 12 U.S.C. § 2607(d)(2). If a judge takes the no-standing-without-an-overcharge approach, and the plaintiff does not allege an overcharge, the case may be dismissed without any discovery into whether kickbacks actually occurred. If the plaintiff alleges and proves an overcharge, damages could be limited to three times *the amount of the overcharge*, not the total amount paid for settlement services, because the plaintiff would only have standing to assert the overcharge portion of the settlement costs. *Durr v. Intercounty Title Co. of Ill.*, 826 F. Supp. 259, 260–261 (N.D. Ill. 1993), *aff'd*, 14 F.3d 1183 (7th Cir. 1994). If a judge takes the *Carter* approach, however, then the overcharge becomes irrelevant and the provider may be held liable for three times the amount of the total charge, *Kahrer v. Ameriquest Mortgage Co.*, 418 F. Supp. 2d 748, 755 (W.D. Pa. 2006), which in some cases could amount to thousands of dollars per plaintiff, *Robinson*, 447 F. Supp. 2d at 486–488.

The *Carter* Court's Analysis. The question facing the *Carter* Court has been well-framed by a variety of legal authorities—statutory, administrative, constitutional, and judicial—and the Court's analysis addressed each.

At the statutory level, the Court noted that RESPA's private remedy provision contains no overcharge prerequisite. Instead, the statute states that those "who violate the prohibitions or limitations of [Section 8 of RESPA] shall be jointly and severally liable to the person or persons charged for the settlement service involved in the violation in an amount equal to three times the amount of any charge paid for such settlement service." 12 U.S.C. § 2607(d)(2). The Court found the term "any" instructive, and held that the plain language of the statute would hold a defendant "liable for the charges assessed the home buyer for settlement services *as a whole*, and not just for overcharges." *In re* Carter, 553 F.3d at 986.

Buttressing this conclusion was the agency interpretation of the issue provided by the U.S. Department of Housing and Urban Development. The Court pointed out that HUD had promulgated a regulation, codified at 24 C.F.R. § 3500.14(g)(2), stating that the mere fact that a kickback "does not result in an increase in any charge made by the [service provider] is irrelevant in determining whether the act is prohibited." Some may point out that whether the act is prohibited is not at issue; the question is whether a plaintiff who has not been the victim of overcharges has standing to bring a private cause of action. Nonetheless, HUD filed an amicus curiae brief in *Carter* asserting that this regulation establishes an agency interpretation that liability to private plaintiffs attaches "regardless of whether the consumer alleges that he was charged too much for the service." *In re Carter*, 553 F.3d at 987 (citing HUD's amicus brief).

Of course, neither Congress nor executive agencies can unilaterally remove the constitutional barrier to standing. The *Carter* Court acknowledged that "Congress may confer standing to redress injuries only on parties who actually have been deprived of the newly established statutory rights" and that while “an injury need not be economic in nature, it still must cause individual, rather than collective, harm.” *Id.* at 988–989. The Court found this was met in the *Carter* case, noting that the Carters had allegedly paid for settlement services from a provider that had provided kickbacks and/or split fees; therefore, the Carters "themselves were given referrals sullied by kickbacks in violation of RESPA." *Id.* at 989. It likened the Carters to "market testers" bringing claims under the Fair Housing Act, who the Supreme Court found to have standing even though they merely fished for false information without any actual intent to buy or rent a home. *Id.* at 989 (citing *Havens Realty Corp. v. Coleman*, 455 U.S. 363, 373 (1982)).

While the *Carter* Court recognized the split among district courts on the issue, it found the no-overcharge-required courts' reasoning on this issue more persuasive. Specifi-

cally, it found the general harm to the marketplace and the likely lack of referral impartiality sufficient to confer standing upon the plaintiffs. *Id.* at 988.

The Counter-Point to *Carter*. While the *Carter* Court rejected one side of the district court split on whether an overcharge is necessary to show standing, it did not discuss in-depth the reasoning of those courts that reached a contrary conclusion. The strongest arguments against the *Carter* approach appear in the *Moore* and *Morales* decisions.

The *Moore* Court examined the legislative history of RESPA and other sources in as much depth as the *Carter* Court did, but reached a different conclusion. The *Moore* Court read the congressional intent more narrowly, noting that the goals of RESPA were to protect consumers from "*unnecessarily high settlement charges* caused by certain abusive practices that have developed in some areas of the country" and observing that the plaintiff in its case did not allege that the settlement charges were too high, but rather that Congress "conferred upon borrowers a statutory right to be free from any unlawful referral or kickback arrangement, without regard to whether the borrower alleges he or she has suffered any injury as a result[.]" *Moore*, 233 F. Supp. 2d at 823, 825. The court rejected the contention that RESPA "implies a private right to truthful information" about settlement services, instead noting that RESPA's private cause-of-action provisions are "devoid of any reference to disclosures to be made at the settlement or closing of a mortgage loan." *Id.* at 826–827. In short, *Moore* examined RESPA and rejected the very argument *Carter* adopted—that RESPA was targeted at anything other than the potential economic harms arising out of kickbacks.

Morales reached the same result based on the "filed rate doctrine," a legal principle adopted by some courts dealing with RESPA claims which holds that when a state engages in a comprehensive regulation of title insurance rates, for example, consumers "have no legal right to pay anything other than the promulgated rates" and therefore "have suffered no cognizable injury by paying said rates." *Morales*, 983 F. Supp. at 1429. In other words, the defendants in some cases have charged exactly what state law required them to charge. The *Morales* Court noted that Congress in adopting RESPA "declined to adopt rates for settlement charges, leaving this area to the states" and therefore a plaintiff who did not pay more than the filed rate could not have standing to pursue a RESPA claim. *Id.* at 1429.

Moore and *Morales* rely upon a different reading of legislative intent than *Carter*. In passing RESPA, Congress expressly noted that "reforms in the real estate settlement process are needed to insure that consumers throughout the Nation are provided with greater and

more timely information on the nature and costs of the settlement process and are protected from unnecessarily high settlement charges caused by certain abusive practices that have developed in some areas of the country." 12 U.S.C. § 2601(a). Courts following *Moore* and *Morales* read this language to say that there is one evil at which RESPA was aimed (unnecessarily high settlement charges) that is caused by a lack of information giving rise to abusive practices. Courts adhering to the same approach as *Carter* assume that unnecessarily high settlement costs and a lack of information were two independent concerns, either or both of which can give rise to a RESPA claim.

***Carter's* Open Questions.** Even if a court adopts the *Carter* approach, *Carter's* reasoning leaves openings for future factual disputes over standing.

First, if the "injury in fact" giving rise to standing is a financial one, as the Court seems to suggest when it talks of harms to competition and the marketplace, what happens when those harms to the marketplace accrue to any given plaintiff's benefit? Say, for example, a settlement service provider obtains a higher volume of business through kickbacks, and is therefore able to offer its services below the market rate. The long-term potential for harm to the market generally is clear. But what of the harm to a plaintiff who takes advantage of this provider's RESPA violations to obtain a bargain on settlement services? In such a circumstance, while there may be some antitrust or general competition benefit, the *Carter* Court's specific rationale for its holding appears to dissolve—there is no harm to the marketplace *as to that particular consumer of settlement services*. That consumer would actually benefit from the "unfair market competition." Competitors of this provider may be able to allege individualized harm, but Congress was explicit in giving consumers a private right of action and not competition. Moreover, in antitrust parlance, if the courts are going to rely on antitrust harm, they should be mindful of the oft-quoted antitrust statement that the antitrust laws protect competition not competitors. *See, e.g.*, *Brunswick Corp. v. Pueblo Bowl-O-Mat*, 429 U.S. 477, 488 (1977). In other words, while one or two competitors (and frequent RESPA HUD complainants) might be hurt, that is a long way from saying competition is hurt and the lower prices that could flow from the kickbacks can hardly support this type of injury to competition. This statement is not included as a defense of improper kickbacks, but rather merely as a comment on the Court's purported standing rationale. Thus, many may question whether the consumer could only assert "an abstract, self-contained, noninstrumental 'right' to have the Executive observe the procedures required by law" and have that suffice to meet the constitutional requirements of standing. *Id.* at 989 (quoting *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 572 (1992)). In short, the *Carter* Court's

assumptions of market harm leave much to be desired and at a minimum could present complex factual issues on a case-by-case, customer-by-customer basis.

Second, if the "injury in fact" is the non-economic lack of information—being "given referrals sullied by kickbacks in violation of RESPA," *id.* at 989—what of customers who are not particularly offended by such practices, or who are told the truth regarding any split fees or kickbacks by their brokers, and given the option to reject that referral after receiving such information? Such customers would not have suffered from any "lack of timely information on the nature and costs of the settlement process." 12 U.S.C. § 2601(a). Therefore, one could argue that they are not proper plaintiffs in a RESPA suit.

This list of questions is not exhaustive, and in most situations such factual disputes are unlikely to be at issue. But they do illustrate that any given court's decision to follow *Carter* will not necessarily end the discussion regarding standing for a RESPA claim; it could only commence a new round of litigation to determine whether the plaintiff was actually subject to the general harms *Carter* describes.

Conclusion. *Carter* will almost certainly encourage the continued proliferation of RESPA class actions that has occurred over the past decade. Courts following *Carter* will remove one potential obstacle to class certification—the determination of fair value for a particular service on a market-by-market basis—while at the same time promising greater damages in most cases. In addition, the *Carter* approach reduces defendants' likelihood of success on motions to dismiss, thus increasing the pressure on defendants to strike early settlements.

Carter may have been the first Court of Appeals case to squarely confront the issue of whether a plaintiff has standing to bring a Section 8 RESPA claim absent any overcharge, but it is unlikely to be the last. The near-even split on this issue among district courts on this issue, as well as a renewed interest in pursuing RESPA cases, will assuredly promote further debate. At least until a trend develops based on decisions from the other Courts of Appeals, expect a continued lively (and costly) debate about standing in RESPA cases.

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