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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WISCONSIN

DANIEL NOWACKI, et al.,

Plaintiffs,

v. **Case No. 97-C-1380**

FEDERATED REALTY GROUP, INC., et al.,

Defendants,

and

CONTINENTAL CASUALTY CO.

Intervening Defendant.

DECISION AND ORDER

The plaintiffs, who bring this action under the Real Estate Settlement Procedures Act ("RESPA"), 12 U.S.C. §§ 2601-2610, seek to maintain this action as a class action for the benefit of each person who meets the following criteria: 1) sold residential real estate in Wisconsin in a transaction involving a federally related mortgage loan; 2) closed on his or her sale on or after December 31, 1996; 3) contracted with Defendant Federated Realty to act as his or her broker to provide certain settlement services with regard to his or her sale; and 4) paid Defendant Metro Service for title insurance services in connection with his or her sale. The defendants oppose the plaintiffs' request to maintain this case as a class action.

I. Factual Background

In their complaint, the plaintiffs state that they bring this action on behalf of a proposed class of persons, each of whom sold residential real estate in Wisconsin in a transaction involving a federally related mortgage loan, and each of whom contracted with Federated Realty Group, Inc., to act as his or her broker and to provide certain settlement services with respect to the transaction. The plaintiffs allege that Federated and Metro Title Service, a business engaged in providing title insurance products and services, had an "affiliated business arrangement," as defined by 12 U.S.C. § 2602(7). Specifically, the plaintiffs state that Federated and Metro are under control by a common entity–John Does #1 through #25 (various persons whose identities will be ascertained through discovery); that Federated has had a beneficial ownership interest of more than one percent of Metro; and that Federated associates have had a direct ownership interest in Metro. In addition, the plaintiffs allege that Federated referred each class member to Metro for title services in connection with that class member's transaction and that each class member paid Metro a substantially above-market price for title insurance in connection with his or her transaction.

The plaintiffs also contend that Metro has, on occasion, paid a portion of its gross income, including income from the sale of title insurance to each class member, to its principals (John Does #1 through #25) as partnership profits or otherwise. The plaintiffs charge that Metro's payments to John Does #1 through #25 constitute fees, kickbacks, or things of value pursuant to an agreement or understanding that Federated would refer title insurance business to Metro, and that these payments were not for services actually performed by Federated.

Federated distributed to each class member, prior to closing the class member's sale, a business relationship disclosure statement. The plaintiffs contend that the disclosure statement

falsely states that Metro's charges for title insurance were approved by the State of Wisconsin, falsely states that Metro charges the prevailing industry standard rates, and falsely implies that there is an "industry standard." In addition, according to the plaintiffs, the disclosure does not provide an estimate of the charge for title insurance or a range of charges and omits certain language required by RESPA for such statements. Finally, the plaintiffs allege that the disclosure misleads customers into believing that they may only obtain title insurance from a company acceptable to Federated, and that the disclosure statement does not clearly describe the relationship between Federated and Metro.

The plaintiffs charge that the defendants violated 12 U.S.C. §§ 2607(a) and (b), 24 C.F.R. § 3500.14(b) and (c); and 24 C.F.R. § 3500.15(b)(1). Sections 2607(a) and (b) state:

(a) Business referrals

> No person shall give and no person shall accept any fee, kickback, or thing of value pursuant to any agreement or understanding, oral or otherwise, that business incident to or a part of a real estate settlement service involving a federally related mortgage loan shall be referred to any person.

(b) Splitting charges

> No person shall give and no person shall accept any portion, split, or percentage of any charge made or received for the rendering of a real estate settlement service in connection with a transaction involving a federally related mortgage loan other than for services actually performed.

However, the safe-harbor provision contained in § 2607(c)(2) of RESPA provides that "nothing in this section shall be construed as prohibiting the payment to any person of a bona fide salary or compensation or other payment for goods or facilities actually furnished or for services actually performed." § 2607(c)(2). In addition, § 2607(c)(4) allows for affiliated business arrangements, provided certain disclosures are furnished.

II. Analysis

In order to qualify for class certification, the plaintiffs must show that: 1) the class is so numerous that joinder of all members is impracticable; 2) there are questions of law or fact common to the class; 3) the claims or defenses of the representative parties are typical of the claims or defenses of the class; and 4) the parties will fairly and adequately protect the interests of the class. Fed. R. Civ. P. 23(a). In addition, because the plaintiffs elect to base class certification on Rule 23(b)(3), they must show that the questions of law or fact common to members of the class predominate over any questions affecting only individual members, and that a class action is superior to other available methods for the fair and efficient adjudication of the controversy. Relevant considerations include the class members' interests to individually control the prosecution or defense of separate actions, the extent and nature of any litigation concerning the controversy already commenced by or against members of the class, the desirability or undesirability of concentrating the litigation of the claims in the particular forum, and the difficulties likely to be encountered in the management of a class action. Fed. R. Civ. P. 23(b)(3).

A. Numerosity

With regard to the numerosity of the class, the plaintiffs estimate, based on information provided by Federated and based on their own estimates, that the class is between 1,000 and 2,000 members. Continental responds that the plaintiffs' complaint fails to name any class whatsoever because none of the named plaintiffs have been harmed under the provisions of RESPA. However, Continental's response is directed at the underlying merits of the case, not to whether the class is so numerous that joinder of all parties is impracticable. The court finds that the plaintiffs' estimated

class size, which is based on reasonable estimates and not pure speculation, is sufficiently large that joinder would be impracticable.

B. Commonality

Next, the court must determine whether questions of law or fact common to members of the class predominate over any questions affecting only individual members. With respect to the commonality requirement, the plaintiffs identify the following questions of law and fact that are common to the class: 1) whether an "affiliated business arrangement," as defined by RESPA, 26 U.S.C. § 2607(7), existed between Federated and Metro; and, if so, 2) whether the "Business Relationship Disclosure Statement" that Federated provided to each class member fails to comply with the requirements of RESPA. The plaintiffs state that, despite the fact that the proposed class members paid different amounts for title insurance, such differences would only arise during the remedy stage of the case.

Federated responds that a payment only violates § 2607 when the payment is not for "goods or facilities actually furnished or for services actually performed." See § 2607(c)(2). According to Federated, whether a payment violates § 2607 depends on a fact-intensive determination for each plaintiff with respect to how much each plaintiff paid for title insurance, what goods or services were received by each plaintiff, and–based on the foregoing considerations–whether the exchange was reasonable to each plaintiff. Thus, Federated argues that because the plaintiffs can only establish liability and damages based upon individual assessments, class action status is inappropriate. Moreover, Federated maintains that neither of the common issues raised by the plaintiffs are in dispute; in that it does not dispute that it has an "affiliated business relationship" with Metro and it does not dispute that each plaintiff was informed of this relationship. Moreover, Federated asserts

that whether its disclosure form violates RESPA is not a common issue that would predominate in a class action. Rather, Federated states that even if its disclosure form is found to violate RESPA, it would seek protection under the universal exemption offered in § 2607(c)(2) for payments made for actual goods and services. Federated also maintains that even if the plaintiffs overcome the individualized inquiries needed to establish liability under RESPA, the court would still need to conduct approximately 2,000 full-scale trials to determine whether any proposed plaintiff actually suffered damages.

The plaintiffs reply that their complaint is not that Metro overcharged, but that Federated and Metro had an "affiliated business arrangement," that Federated received kickbacks as part of the arrangement, and that Federated and Metro did not adequately disclose this arrangement in writing. The plaintiffs state that the "kickbacks" that occurred when Federated received returns on its ownership interest in Metro, which were inherent to Federated's and Metro's relationship, cannot represent payment to Federated for goods or services actually furnished or for services actually performed. Thus, the plaintiffs contend that no defense is available under § 2607(c)(2) and, therefore, there is no need for an individualized determination of the reasonableness of Metro's charges to class members.

The defendants have failed to proffer any evidence that Metro's payments to Federated were for actual services performed by Federated. As such, the defendants have failed to establish that they have a defense provided by § 2607(c)(2), one which might preclude class certification on the basis that each case would require individual analysis to determine the nature and extent of the actual services provided. Based on the record to date, it appears that the payments to Federated by Metro represent compensation solely as a result of business referrals. The court's conclusion in this regard

is illustrated in Federated's and Metro's motion for summary judgment against Robert and Beatrice Bourgeois; the defendants use nine pages of their brief to argue that they are entitled to summary judgment because they complied with the disclosure requirements for an affiliated business arrangement, while their argument that payments were for actual goods and services occupies less than one page and is not supported by underlying facts. As the plaintiffs argue in their reply brief, whether Metro charged each class member a reasonable premium for title services is irrelevant, because the plaintiffs' complaint focuses on Metro's payments to Federated, which the plaintiffs contend were inherent to Metro's relationship with Federated.

To support their argument against certifying the class, the defendants cite Sicinski v. Reliance Funding Corp., 82 F.R.D. 730 (S.D.N.Y. 1979), where the plaintiff received a mortgage loan from the Reliance Mortgage Corporation and title insurance from the Title Guarantee Company. The plaintiff alleged that Reliance's attorney was authorized to choose the title company, that the attorney chose Title Guarantee which, in turn, retained the attorney as its examining counsel, and paid the attorney 70 percent of its title insurance premium for his services. The plaintiff further alleged that the 70 percent of the premium was more than the going rate for examining counsel, and that the difference between 70 percent and the going rate was a kickback from Title Guarantee to the attorney in return for selecting Title Guarantee to furnish title insurance. The plaintiff alleged two claims against Title Guarantee: 1) that the kickback scheme violated § 2607(a) of RESPA; and 2) that the attorney did not actually perform services in return for his compensation, contrary to § 2607(b) of RESPA. The plaintiff also alleged two claims against Reliance: 1) that the funds Reliance paid to the attorney were not for services the attorney actually performed; and that 2) Reliance failed to

adequately disclose to its borrowers the nature of the relationship among Reliance, its attorney and Title Guarantee, contrary to § 2603 of RESPA and the Federal Truth in Lending Act, 15 U.S.C. § 1606.

The plaintiff sought to certify the case as a class action. However, the district court found that common questions of law and fact did not predominate. With respect to plaintiff's claims against Title Guarantee, the court found that whether Title Guarantee was liable depended on whether its payments to the attorney were reasonably related to the services he rendered as examining counsel. Id. at 733. Because the payments ranged from $104.10 to $264.60 in the 81 transactions encompassed by the proposed class action, common questions did not predominate. Id. Similarly, with respect to the plaintiff's claims against Reliance, common questions did not predominate because the court would have to ascertain what, if any, services the attorneys provided in over 300 separate transactions and whether the fees were reasonably related to their services. Id.

The case at bar is distinguishable from Sicinski because the plaintiffs do not allege, nor have the defendants produced evidence to show, that an intermediary between Federated and Metro arguably performed services in return for reasonable compensation. Thus, unlike the defendants in Sicinski, Federated and Metro have failed to make a credible argument that they are entitled to a defense under § 2607(c)(2).

Another case cited by the defendants to support their position is Marinaccio v. Barnett Banks, Inc., 176 F.R.D. 104 (S.D.N.Y. 1997), where the plaintiffs obtained a mortgage loan from the Barnett Mortgage Company, by way of the Embassy Investment Mortgage Company. The plaintiffs paid Embassy a loan origination fee of $2,587.50. In addition, Embassy received from Barnett a yield spread premium in the amount of $5,433.75. The plaintiffs contended that the yield spread premium

was a kickback paid by Barnett to Embassy for referring mortgage business to Barnett at a higher than market rate, contrary to §§ 2607(a) and (b) of RESPA. The plaintiffs sought class certification, which was denied by the court. The court held that because the trier of fact would need to determine what services were actually performed in exchange for each of the premiums paid in each of approximately 6,700 transactions, questions of law and fact did not predominate. Id. at 107.

Again, this case can be distinguished from Marinaccio because the plaintiffs' action is not based on their payments to Metro; it is based on Metro's payments to Federated. And Barnett and Embassy, unlike Federated and Metro, had no ownership relationship. Moreover, Metro and Federated fail to produce any evidence that the payments Metro made to Federated were in exchange for actual services or goods. In Marinaccio, the defendants could at least present arguable evidence from which to infer that the loan origination fee was for services actually furnished by Embassy to the plaintiffs.

The court therefore concludes that the common questions of fact and law predominate over the distinct factual and legal issues relevant to the proposed class. The central issue in this case is whether Federated's and Metro's affiliated business arrangement was adequately disclosed for purposes of § 2607(c)(4). This issue is common to all class members' claims and the class is therefore entitled to certification. Granted, if the plaintiffs can establish that the defendants are liable, damages may need to be assessed on an individual basis. However, a special master could be appointed to handle such issues. The benefits of determining liability on a class-wide basis–court efficiency and allowing each class member an adequate opportunity to raise their claims–outweigh the costs of assessing damages on an individual basis.

C. **Typicality**

Whether Federated and Metro adequately disclosed their affiliated business relationship, for purposes of RESPA, is the primary factual and legal issue with respect to each class member's claim. Therefore, the plaintiffs' claims are typical of the proposed class.

D. **Interests of the Class**

The named plaintiffs will fairly and adequately protect the interests of the class because, as noted above, each class member's claims share common issues of law and fact. Moreover, as demonstrated in their motion for class certification, the plaintiffs' counsel will vigorously represent the interests of each class member.

IT IS THEREFORE ORDERED that the plaintiffs' motion for class certification is **granted**.

The court will conduct a telephone conference on **April 4, 2000, at 8:30 a.m.** to discuss the briefing schedule regarding the defendants' motion for summary judgment and to discuss the procedures for processing this case as a class action. The court will initiate the telephone call.

Dated at Milwaukee, Wisconsin this 27th day of March, 2000.

AARON E. GOODSTEIN
U.S. MAGISTRATE JUDGE