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# Conover v. Patriot Land Transfer: RESPA's Statute of Limitations and Equitable Tolling Clash Again

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A recent decision in *Conover v. Patriot Land Transfer LLC*[1] involves what appears to be a run-of-the-mill Section 8 RESPA claim that a title agency supplied borrower leads and data lists in return for lender referrals to the title company. Given that this decision was issued in the context of a motion to dismiss, the well-pleaded allegations were accepted as true and the merits of the allegations (and any Section 8(c) defenses) have not been evaluated, and we don't know whether the allegations are in fact true or whether section 8(c) defenses exist. The decision sheds some light, however, on how lower courts are approaching RESPA's statute of limitation and what is a sufficient pleading to pursue an equitable tolling argument for plaintiffs.[2]

The problem for the *Conover* plaintiffs—and, indeed, most RESPA section 8 plaintiffs—is that Congress enacted a very short one-year statute of limitations that is generally deemed to run from the date of the real estate closing (and thus is generally not subject to the discovery rule[3]), but the *Conover* action was not filed within that limitation period. Accordingly, as is often done, the *Conover* plaintiffs sought to rely on the doctrine of equitable tolling to try to avoid the statute of limitations.

Equitable tolling is a doctrine that permits plaintiffs to "toll" (*i.e.*, stop the running of) a statute of limitations. It is available only if the plaintiffs diligently sought to pursue and investigate their claim (often referred to as the exercise of due diligence) ***and*** some extraordinary circumstance stood in plaintiffs' way. Often, the claimed extraordinary circumstance is that defendant affirmatively and fraudulently concealed the violation from the plaintiffs through some act separate and apart from the alleged RESPA violation.[4]Despite plaintiffs' regular attempts to argue that the claimed extraordinary circumstance should excuse a complete lack of diligence, the United States Supreme Court has held that these are two separate and independent requirements to toll the statute of limitations.[5] In other words, a failure to meet either the diligence prong ***or*** the extraordinary circumstances prong dooms an equitable tolling claim.

In *Conover*, the plaintiffs (unsurprisingly) alleged that the defendants actively misled them, preventing them from discovering their claim, by not including the kickbacks the title company paid to the lender (*i.e.*, the free leads and data lists) on loan documents like the GFE (loan estimate) and HUD-1 (closing disclosure). The plaintiffs alleged that that they had engaged in due diligence by virtue of their basic review of the loan documents, but that because such documents did not reflect the payment of a "thing of value" between the defendants, the plaintiffs supposedly had no reason to believe there was a RESPA violation—even though the plaintiffs' theory was that the defendants were systematically overcharging their customers.

In moving to dismiss, the defendants argued that this equitable tolling claim was deficient because rather than alleging some affirmative act of concealment, plaintiffs have simply alleged non-disclosure of the claimed violation, especially because there is no duty to disclose alleged kickbacks on the closing forms at issue.[6] Nevertheless, the *Conover* court had a different view, holding that the plaintiffs had alleged more than non-disclosure because of their claim that the defendants had intentionally selected leads and data lists as the form of the kickback and intentionally failed to disclose this so that the kickbacks and the coordinated business

relationship of the parties would remain concealed.[7]

This non-probing analysis of whether plaintiffs' allegations met the required equitable tolling elements and plausibility standards of *Twombly* and *Iqbal* is surprising. One wonders if the result would be the same, for example, if the kickback claim was that the title company entertained mortgage loan officers, advertised in their loan publications, made presentations to their loan officers about title insurance and closing practices, rented office space from the lenders, or did any of a dozen other things to build a relationship where the alleged impropriety or payment would not appear on the loan documents. If so, the "intentional" choice of Congress to provide for a one-year statute of limitations for RESPA Section 8 claims would be significantly undermined.

The *Conover* court's acceptance of conclusory due diligence allegations is also noteworthy. Despite an allegation of systematic overcharging, nothing was alleged in the case other than that plaintiffs had reviewed their own loan documents and noticed nothing amiss.

On the other hand, perhaps the trial court took a deliberate cautionary view of dismissing claims as time- barred given the typically factual nature of such issues, and the trend in the Third Circuit to resolve these questions through targeted discovery and summary judgment briefing.[8] If this is the process to be employed (and the *Conover* opinion is silent about what will occur next in the case), the result is somewhat more understandable. But one can legitimately ask what should happen if, on summary judgment (as has been known to happen[9]) the plaintiffs have no proof that the defendants acted with intent to deceive or conceal the claimed violation and/or if plaintiffs admit that they did nothing to investigate the circumstances underlying their claim. Courts are reluctant to avoid sanctions for bad faith allegations and despite RESPA's language providing that the prevailing party may be awarded attorney's fees,[10] this fee award language has been (wrongly) disregarded for most prevailing defendants on the basis of one poorly reasoned Ninth Circuit decision[11]that somehow analogizes section 8 of RESPA to the civil rights statutes. However, if courts are going to approach the pleadings by initially giving a significant benefit of the doubt to plaintiffs' marginal allegations that turn out to be spurious, plaintiffs may find that courts will be more open to scrutinizing the good faith supporting those allegations, as they should be.

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[1] No. 17-4625, 2019 U.S. Dist. Lexis 15471 (D.N.J. Jan. 31, 2019).

[2] *Id*. at *4-5.

[3] *See Snow v. First Am. Title Ins. Co*., 332 F.3d 356, 359 (5th Cir. 2003) (RESPA claims accrue upon closing); *see also Perkins v. Johnson*, 551 F. Supp. 2d 1246, 1254 (D. Colo. 2008) ("[T]he federal discovery rule is inapplicable to ... RESPA ... because Congress explicitly denoted that the statute [of limitations] begins to run 'from the date of the occurrence.'") (quoting 12 U.S.C. § 2614).

[4] *See, e.g., Supermarket of Marlinton, Inc. v. Meadow Gold Dairies, Inc*., 71 F.3d 119, 122 (4th Cir. 1995) (the doctrine of equitable tolling based on fraudulent concealment requires proof of an affirmative act of concealment (as opposed to simply choosing not to disclose) the facts that are the basis of the claim, in addition to due diligence).

[5] *Menominee Indian Tribe of Wis. v. United States*, 136 S. Ct. 750, 756 (2016) (holding that the two prongs of the equitable tolling test—diligence and extraordinary circumstances—are two distinct elements that must be satisfied separately, not factors to be weighed with or against each other).

[6] For example, loan estimate simply requires an estimate of loan charges that a buyer will be asked to pay, whereas the closing disclosure requires an itemization of the settlement services actually charged at closing.

[7] 2019 U.S. Dist. Lexis 15471, at *9.

[8] *See, e.g., Riddle v. Bank of Am. Corp.*, No. 12-1740, 2013 U.S. Dist. LEXIS 163526 (E.D. Pa. Nov. 18, 2013), *aff'd*, 588 F. App'x 127 (3d Cir. 2014).

[9] *See Baehr v. Creig Northrop Team, P.C.*, No. RDB-13-0933, 2018 U.S. Dist. LEXIS 206721, 2018 WL 6434502 (Dec. 7, 2018).

[10] 12 U.S.C. § 2607(d)(5).

[11] *Lane v. Residential Funding Corp.*, 323 F.3d 739, 746-48 (9th Cir. 2003).

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