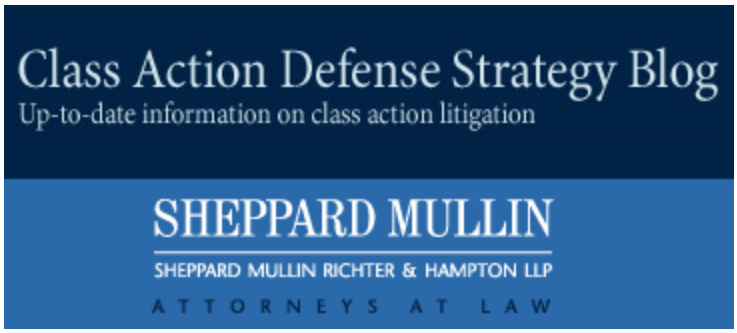

Class Action Defense Strategy Blog

Posted at 11:44 AM on December 22, 2009 by Sheppard Mullin

Fifth Circuit Denies Class Certification Of Kickback Claims Under RESPA

By John Stigi and Martin White

In *Mims v. Stewart Title Guaranty Co.*, 2009 WL 4642631 (5th Cir. Dec. 9, 2009), the United States Court of Appeals for the Fifth Circuit considered whether plaintiffs can bring class claims under Section 8(b) of the Real Estate Settlement Procedures Act of 1974 ("RESPA"), codified in relevant part at 12 U.S.C. § 2607(c), where a service provider's fee "bears no relationship" to the service provided. After careful consideration, the Fifth Circuit concluded that "class issues do not predominate" in such situations, because determining whether the fee charged was reasonable or unreasonable necessarily required a "transaction-by-transaction" analysis, and that a class action is not a "superior method" to trying such individualized claims.

The question before the court in *Mims* involved mandatory discounts on premiums for title insurance policies purchased when borrowers were refinancing their home mortgages. Generally speaking, lenders require borrowers who are refinancing their loans to purchase title insurance to protect the lender against potential defects in title and to ensure that the lender will a have first lien position.

Under Texas's Department of Insurance Rate Rules, a borrower refinancing his or her loan is entitled to a mandatory discount. The mandatory discount starts at "40% on renewals occurring within 2 years of the time a prior policy was issued and decreases by 5% for each additional year after the prior policy up to seven years." Borrowers qualify so long as the pre-existing mortgage had been fully taken up, renewed, extended or satisfied and they had previously insured with the same title insurer.

Class plaintiffs in *Mims* alleged that defendant title insurer, Stewart Title Guaranty Company ("Stewart"), had "consistently failed" to provide plaintiffs with the required discount on their title insurance renewals and that "Stewart and the agents split the illegal, unearned charges on the policies." Plaintiffs sued under state law and under RESPA, claiming that Stewart had violated

RESPA's anti-kickback provision, which prohibits individuals and companies from giving or accepting "any portion, split or percentage of any charge made or received . . . other than for services actually performed." 28 U.S.C. § 2607(c).

Stewart brought a motion to dismiss, which was denied. The district court then certified the class. Stewart appealed, arguing that the district court erred in certifying a class because (1) plaintiffs lacked standing, (2) class issues did not predominate with respect to plaintiffs' RESPA claims and (3) the certified class was overbroad with respect to plaintiffs' state law claims.

As an initial matter, the Fifth Circuit rejected Stewart's first argument that plaintiffs lacked standing. Plaintiffs, the Court found, had alleged "an injury-in-fact (overpayment of premiums for the title insurance issued upon refinancing their mortgage), causation (the defendants overbilled for the premiums) and redressability (if plaintiffs are successful, they will be refunded the overpayment)." The court refused to delve into the question of whether plaintiffs had stated a claim under RESPA, because the question of class certification "does not permit a general inquiry into the merits of plaintiffs' claims."

The Court next turned to the question of whether a class action was "the superior method" by which to try plaintiffs' RESPA claims. Plaintiffs argued that it was, alleging that in failing to provide the discount Stewart had charged an "excess amount" which represented a "charge for which no services were actually provided" under RESPA. The district court agreed, finding that "Stewart's split with the title agents may not have been for services actually performed, and hence, in violation of section 8(b), if the title agent's compensation was not reasonable in relation to the services they performed." The district court's finding was based in large part upon the Department of Housing and Urban Development's ("HUD") interpretation of RESPA's prohibition against giving a split "other than for services actually performed."

HUD's interpretation of this provision required that service providers not charge "a fee that exceeds the reasonable value of . . . services provided." If a payment bore "no relationship to the . . . service provided then the excess is not for services . . . actually provided." In essence then, under HUD's interpretation, whether a service provider violated RESPA's anti-kickback provision, turned on whether there was a rational relationship between the payment and the service provided.

The Fifth Circuit concluded that the class action model was not superior in the instant case because "the district court's liability model for violations of RESPA § 8(b) requires an inquiry into the facts of each individual class member's title insurance transaction." The Fifth Circuit found that its earlier decision in *O'Sullivan v. Countrywide Home Loans, Inc.*, 319 F.3d 732, 740 (5th Cir. 2003), "bar[red] this outcome."

In *O'Sullivan*, the Fifth Circuit "considered whether class certification was proper under a similar fact pattern." Specifically, the *O'Sullivan* class plaintiffs alleged that they paid mortgage preparation fees to firms selected by the defendant loan provider, and that this qualified as a kickback under RESPA. The loan provider contended that it had given plaintiffs "some services in preparation of the mortgage transactions." Therefore, defendant loan provider argued, "in individual cases a reasonable relationship existed between the value of the alleged services

provided and the payments it received." The *O'Sullivan* court agreed; to properly assess whether this was a RESPA violation would require a "transaction-by-transaction" examination "because a single finding of liability on an unreasonable relationship between goods and services does not necessitate the conclusion that such unreasonableness exists on a classwide basis."

The *Mims* court concluded that the same result applied to the facts before it. The Court held: "if we accept the district court's theory of liability, the HUD liability standard requires an inquiry into the reasonableness of the payments for goods and services." Under *O'Sullivan*, that inquiry must be conducted under a "transaction-by-transaction basis." Each plaintiff may have suffered a different harm, depending on whether Stewart's split of the excess proceeds was reasonable in relation to the services actually performed. On this basis, it was clear that "class issues d[id] not predominate and class certification on the RESPA claim was improper."

Finally, the Court turned to the question of whether the district court had abused its discretion in granting class certification on plaintiffs' state law claims. Stewart argued that the class definition — which included all plaintiffs, who, under Stewart's guidelines, would have been eligible for the mandatory discount — was too broad because these guidelines were not identical to Texas's guidelines. The Fifth Circuit rejected this argument, finding that the district court had not abused its discretion. However, in light of its finding that plaintiffs were barred from bringing class claims on their RESPA cause of action, it remanded to the district court to determine if it still had jurisdiction over the case in light of the fact that only state law claims remained.

Mims may prove to be a significant decision for class plaintiffs seeking to bring kickback claims under RESPA. Under *Mims*, district courts in the Fifth Circuit have clear marching orders: if plaintiffs' claims rely, in essence, on whether the defendant charged a reasonable fee for the service provided, class certification should not be granted. As such, plaintiffs in the Fifth Circuit now face what may be a significantly higher bar to obtaining class certification for kickback claims under RESPA.