

McCarn v. HSBC USA, Inc.: A FEDERAL COURT DISMISSES A PLAINTIFF'S ATTEMPT TO APPLY ANTITRUST-CONSPIRACY PRINCIPLES TO A CONSUMER FINANCIAL PROTECTION STATUTE

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On November 13, 2012, the U.S. District Court for the Eastern District of California, in *McCarn v. HSBC USA, Inc.*, 2012 U.S. Dist. LEXIS 162257, issued an important decision rejecting as inadequate a plaintiff's attempt to apply antitrust-conspiracy principles to a consumer financial protection statute and clarifying the specificity of pleading required to obtain relief from the applicable statute of limitations via the equitable tolling, fraudulent concealment, and delayed discovery doctrines where the plaintiff claims lack of sophistication or expertise sufficient to discover his claims without the assistance of counsel. The Schnader firm represented one of the dismissed defendants in the case.

The Language of RESPA

Section 8 of the Real Estate Settlement Procedures Act ("RESPA"), 12 U.S.C. § 2607, prohibits the payment and receipt of kickbacks in exchange for the referral of real estate settlement service business and the splitting of any fee received in exchange for a real estate settlement service with a person or entity that does not provide a service in exchange for that split fee. A real estate settlement service is defined in 12 U.S.C. § 2602 as including "any service provided in connection with a [residential] real estate settlement, including, but not limited to ... the origination of a federally related mortgage loan" Subsection (d) of Section 8 authorizes a private action by a borrower against alleged participants in an illegal kickback or split fee in connection with the borrower's federally related mortgage loan, but does not contain any language indicating that such a borrower can sue supposed co-conspirators who did not pay or receive a kickback or split fee in connection with the borrower's loan. RESPA contains a one-year statute of limitations for private actions (there is a longer statute of limitations for regulators).

The Plaintiff's Claims in *McCarn*

In *McCarn*, the plaintiff filed a class action lawsuit against a mortgage lender, a reinsurance entity affiliated with the mortgage lender and private mortgage insurers, alleging that reinsurance transactions between the private mortgage insurers and the reinsurance entity affiliated with the mortgage lender violated Section 8 of RESPA, for which all of the defendants were liable. According to the *McCarn* plaintiff, the reinsurance agreements violated RESPA because the premiums ceded by the private mortgage insurers to the lender subsidiary reinsurers allegedly were not commensurate with the amount of reinsurance received in return. The plaintiff in *McCarn* alleged that only one of the defendant mortgage insurers provided private mortgage insurance for his loan, but claimed that he had standing to sue all of the defendant private mortgage insurers because they all entered into virtually identical arrangements with his mortgage lender, which he characterized as an anticompetitive "scheme," tantamount to a conspiracy, to simultaneously violate RESPA. The plaintiff said that this "scheme" increased the price of the mortgage insurance for his loan, giving him standing to sue every participant in the supposed conspiracy. Thus, the plaintiff attempted to establish standing to sue all of the members of the alleged conspiracy by trying to turn his claim under RESPA into essentially an antitrust-conspiracy claim.

The Court's Ruling on Standing

Several of the mortgage insurer defendants in *McCarn* moved to dismiss the plaintiff's amended complaint, claiming that the plaintiff lacked standing to sue them under RESPA because they did not provide mortgage insurance for the plaintiff's loan and the plaintiff's allegations

(continued on page 2)

(continued from page 1)

of a conspiracy to violate RESPA were inadequate. *McCarn*, 2012 U.S. Dist. LEXIS 162257 at *5–6. The court agreed, holding that, even taking the plaintiff’s allegations as true, the plaintiff had alleged multiple, parallel schemes, rather than a single, overarching scheme, because it appeared equally plausible that, rather than entering into a conspiracy with all of the other private mortgage insurers to violate RESPA, each individual private mortgage insurer would “prefer that fewer of its competitors participate in the scheme, as it would then enjoy that much more of the steered business.” *Id.* at *12. The court concluded that the plaintiff lacked standing to sue the non-insuring defendants because he had not sufficiently alleged that they caused him any injury. *Id.* at *13.

The Court’s Ruling on the Statute of Limitations

The court in *McCarn* also granted the motions to dismiss filed by the lender and the mortgage insurer that did insure the plaintiff’s loan, finding that RESPA’s one-year statute of limitations had expired and that the plaintiff had not adequately pled equitable tolling, fraudulent concealment, or delayed discovery. *Id.* at *29. As to equitable tolling, the court emphasized that a plaintiff claiming equitable tolling must demonstrate “extraordinary circumstances” that prevented him from discovering his claim and “reasonable diligence” in attempting to discover that claim. *Id.* at *21–22. The court stated that it is not sufficient for a plaintiff to simply claim that he could not discover his cause of action without the assistance of counsel because this has the potential to toll the statute of limitations “for an indefinite period of time until that the plaintiff retains counsel.” *Id.* As to fraudulent concealment, the court emphasized that such allegations are subject to Federal Rule of Civil Procedure 9(b) and must be pled with specificity. *Id.* at *25. The court rejected the plaintiff’s argument that the defendants’ alleged scheme to violate RESPA constituted fraudulent concealment in itself because of its self-concealing nature and held that the plaintiff had not sufficiently identified specific fraudulent acts defendants allegedly had committed. *Id.* at *24–25. As to delayed discovery, the court again emphasized the plaintiff’s failure to plead diligence, and criticized the plaintiff’s failure to allege the time or manner of discovery of his cause of action. *Id.* at *28–29.

What the *McCarn* Decision Means

The court’s decision in *McCarn* is important to individuals and entities regulated by RESPA and other consumer financial protection statutes because it provides guidance for determining whether a claim of conspiracy to violate such statutes is sufficiently plausible to support a claim of standing. The decision in *McCarn* makes clear that if a plaintiff attempts to draw on antitrust-conspiracy concepts in bringing a claim under a consumer financial protection statute, the plaintiff will need to satisfy the same requirements of plausibility that courts apply to antitrust claims. If the plaintiff’s conspiracy theory makes no economic sense, courts should reject it as implausible. In addition, the *McCarn* decision is important because it shows that while claims under consumer financial protection statutes may sometimes require a level of sophistication that some private plaintiffs may lack, such plaintiffs cannot rely on that lack of sophistication alone to toll the statute of limitations. ♦

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