United States Court of Appeals, Fourth Circuit.

Patrick BAEHR; Christine Baehr, Plaintiffs–Appellants,

v.

The CREIG NORTHROP TEAM, P.C.; Creighton Edward Northrop, III; Lindell C. Eagan; Lakeview Title Company, Inc., Defendants–Appellees,

and

Carla Northrop; Long & Foster Real Estate, Inc., Defendants.

No. 19-1024

Argued: January 29, 2020 Decided: March 13, 2020

Appeal from the United States District Court for the District of Maryland, at Baltimore. Richard D. Bennett, District Judge. (1:13-cv-00933-RDB)

Attorneys and Law Firms

ARGUED: Gregory T. Lawrence, CONTI FENN & LAWRENCE LLC, Baltimore, Maryland, for Appellants. Jay Norman Varon, FOLEY & LARDNER LLP, Washington, D.C., for Appellees. ON BRIEF: Michael J. Silvestri, CONTI FENN & LAWRENCE LLC, Baltimore, Maryland, for Appellants. Jennifer M. Keas, FOLEY & LARDNER LLP, Washington, D.C.; Timothy G. Casey, LAW OFFICE OF TIMOTHY G. CASEY, PA, Rockville, Maryland, for Appellees The Creig Northrop Team, P.C. and Creighton E. Northrop, III. Andrew C.

White, William N. Sinclair, SILVERMAN THOMPSON SLUTKIN & WHITE LLC, Baltimore, Maryland, for Appellees Lindell C. Eagan and Lakeview Title Company, Inc.

Before GREGORY, Chief Judge, KING, and QUATTLEBAUM, Circuit Judges.

Opinion

Vacated and remanded for dismissal by published opinion. Judge King wrote the opinion, in which Chief Judge Gregory and Judge Quattlebaum joined.

KING, Circuit Judge:

This appeal arises from a purported kickback scheme orchestrated by the defendants, The Creig Northrop Team, P.C., Creighton Northrop, III (the "Northrop Defendants"), the Lakeview Title Company, Inc., and Lindell Eagan (the "Lakeview Defendants"). Homeowners Christine and Patrick Baehr (the "Baehrs"), as representatives of the putative class of plaintiffs, specify in their operative single-count complaint that the kickback scheme, in which the Lakeview Defendants paid the Northrop Defendants for marketing services that were actually illegal business referrals, deprived them and the other class members of "impartial and fair competition between settlement service[s] providers," in contravention of the Real Estate Settlement Procedures Act ("RESPA"), 12 U.S.C. § 2601 *et seq*. *See Baehr v. The Creig Northrop Team, P.C.*, No. 1:13-cv-00933, at ¶¶ 23, 41-47 (D. Md. Aug. 15, 2014), ECF No. 89 (the "Operative Complaint").

After conducting discovery, the Northrop and Lakeview Defendants jointly moved for summary judgment, arguing, inter alia, that the Baehrs had not established that they possessed Article III standing to sue. The district court thereafter awarded summary judgment to the defendants on that ground. More specifically, the court reasoned that the Baehrs had not suffered a concrete injury, and thus could not establish the necessary injury-in-fact for standing. *See Baehr v. The Creig Northrop Team, P.C.*, No. 1:13-cv-00933, slip op. at 21-22 (D. Md. Dec. 7, 2018), ECF No. 244 (the “Summary Judgment Opinion”). Alternatively, the Summary Judgment Opinion barred the Baehrs's claim under RESPA's statute of limitations based on their failure to establish that the claim was equitably tolled. *Id.* at 29. As explained below, we agree that the Baehrs lack standing to sue. Because a federal court cannot exercise jurisdiction in the absence of standing, we vacate and remand for dismissal of this case. *See Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 94, 102, 118 S.Ct. 1003, 140 L.Ed.2d 210 (1998) (recognizing that standing “is part of the common understanding of what it takes to make a justiciable case” and that when jurisdiction does not exist, “the only function remaining to the court is that of announcing the fact and dismissing the cause” (internal quotation marks omitted)).

I.

A.

In July 2008, the Baehrs purchased a home in Glenwood, Maryland (the “Glenwood home”).[1] They hired Maija Dykstra, a real estate agent who was a member of The Creig Northrop Team, P.C. ("The Northrop Team"), to represent them as buyers. The Northrop Team is comprised of real estate agents who independently provide real estate brokerage services under the brokerage license of Long & Foster Real Estate, Inc.[2] Creighton Northrop, III, a real estate agent, is the President of The Northrop Team. As President of The Northrop Team, Northrop splits real estate commissions with the other real estate agents who are independent-contractor members of the Team.

Pursuant to the Exclusive Right to Represent Buyer Agreement between the Baehrs and Long & Foster, Dykstra, as the Baehrs's real estate agent, located the Glenwood home and helped the Baehrs submit an offer to purchase it for $835,000. The sellers of the Glenwood home were represented by Northrop. After the Baehrs's offer was accepted, Dykstra informed them that the Lakeview Title Company would provide the settlement services necessary to complete the purchase of the Glenwood home. The Baehrs were not first-time home buyers and understood that they were free to procure settlement services from any provider thereof, but they "were satisfied" that Dykstra would select the settlement company. *See* J.A. 171.[3] In selecting the Lakeview Title Company, Dykstra informed the Baehrs that The Northrop Team "do[es] all [its] settlements at [the] Lakeview [Title Company]." *Id.* at 172. Despite shopping around for a mortgage lender, the Baehrs proceeded to settle on the Glenwood home with the Lakeview Title Company without investigating the Company or any other settlement services providers.

The Baehrs did not inquire about the Lakeview Title Company's rates, quality of service, or affiliation with The Northrop Team because they had "contracted with a reputable company"—that is, The Northrop Team—and believed that The Northrop Team "would have [their] best interest." *Id.* at 173.

The HUD-1 Settlement Statement prepared for the Baehrs's purchase of the Glenwood home listed, inter alia, the following fees for settlement services provided by the Lakeview Title Company:[4]

Title Examination to Lakeview Title Company:	$375.00
Title insurance binder to Lakeview Title Company:	$50.00
Title Insurance to Chicago Title Insurance Company:	$2,990.00
Recording Services to Lakeview Title Company:	$50.00

[**Editor's Note:** The preceding image contains the reference for footnote[5]].

See J.A. 145. Other than the title insurance premium of $2,990, which was based on a rate filed with the State of Maryland, the Baehrs had paid similar fees for settlement services when purchasing a less-expensive home in Germantown in 2000. *Id.* at 219; *see also* Md. Code, Ins. §§ 11-403, 11-404, 11-407 (requiring that title insurance premiums be filed and approved by Maryland Insurance Administration and prohibiting deviation from filed rates). As they had for the Glenwood home, when purchasing the Germantown home, the Baehrs paid $375 for the title examination and $50 for the title insurance binder. *See* J.A. 219. The Baehrs also paid $75 for document preparation, $10 for notary fees, and $10 for copies. *Id.* In sum, the Baehrs paid $520 in discretionary fees to their settlement services provider for the Germantown home purchase. By contrast, the Baehrs paid only $425 in discretionary fees to the Lakeview Title Company for the Glenwood home purchase.

B.

1.

Almost five years after closing on the Glenwood home, the Baehrs received an unsolicited letter from a lawyer, G. Russell Donaldson, stating that they might have "a legal claim based on illegal kickbacks paid for the referral of [their] business to a title company that settled [their] purchase" of the Glenwood home. *See* J.A. 342. Shortly thereafter, the Baehrs retained Donaldson and the law firm Conti Fenn & Lawrence LLC to pursue a claim that they had been illegally referred to the Lakeview Title Company in contravention of RESPA. Before receiving Donaldson's letter, the Baehrs were satisfied with their experience purchasing the Glenwood home and the settlement services that the Lakview Title Company had provided. Indeed, even after learning of the purported kickback scheme, the Baehrs believed that the Lakeview Title Company was entitled to the fees it charged "for the work that [it] did." *Id.* at 208, 327.

Nevertheless, on March 27, 2013, the Baehrs, as representatives of the putative class of victims in these proceedings, filed suit in the District of Maryland against multiple defendants. *See Baehr v. The Creig Northrop Team, P.C.*, No. 1:13-cv-00933 (D. Md. Mar. 27, 2013), ECF No. 1 (the "Initial Complaint"). The single count of the Initial Complaint alleged that the Northrop and Lakeview Defendants, plus Long & Foster Real Estate, Inc. and Carla Northrop, violated RESPA's prohibition against giving or receiving kickbacks for settlement service referrals. *Id.* ¶ 1. That claim was predicated on a kickback scheme that spanned from 2000 to 2014, and that was perpetrated by the Northrop and Lakeview Defendants, Long & Foster, and Carla Northrop. The Initial Complaint alleged that, between 2000 and 2007, the Lakeview Defendants paid illegal kickbacks for settlement service referrals under the guise of a sham employment agreement between the Lakeview Title Company and Carla Northrop. *Id.* ¶ 17. And the Initial Complaint alleged that, between 2008 and 2014, the Lakeview Defendants paid illegal kickbacks for settlement service referrals under the guise of a sham marketing agreement between the Lakeview Title Company and The Northrop Team. *Id.* ¶ 19. According to the Initial Complaint, as a result of the kickback scheme, the Baehrs and the putative class "were deprived of an impartial and fair competition between settlement service[s] providers in violation of RESPA." *Id.* ¶ 25.

2.

On January 29, 2014, the district court dismissed defendants Long & Foster and Carla Northrop with prejudice. *See Baehr v. The Creig Northrop Team, P.C.*, No. 1:13-cv-00933, slip op. at 16, 18 (D. Md. Jan. 29, 2014), ECF No. 58 (the "Dismissal Opinion"); *see also Baehr v. The Creig Northrop Team, P.C.*, No. 1:13-cv-00933, slip op. at 10 (D. Md. Jul. 24, 2014), ECF No. 84 (confirming that dismissals of Long & Foster and Carla Northrop were with prejudice). The court also granted the Baehrs's motion for class certification, but redefined the putative class thusly:

> All Maryland residents who retained Long & Foster Real Estate, Inc., Creighton Northrop, III, and [T]he Creig Northrop Team, P.C. to represent them in the purchase of a primary residence between January 1, 2008 to the present and settled on the purchase of their primary residence at Lakeview Title Company, Inc.

See Dismissal Opinion 31.[6]

Nearly seven months thereafter, on August 15, 2014, the Baehrs filed their Operative Complaint, which names as defendants the Northrop Defendants and the Lakeview Defendants. According to the Operative Complaint, the Northrop and Lakeview Defendants arranged for The Northrop Team to exclusively refer its clients to the Lakeview Title Company for settlement services. In exchange for The Northrop Team's efforts to steer clients to the Lakeview Title Company, the Lakeview Defendants paid the Northrop Defendants illegal kickbacks in the form of monthly cash payments of up to $12,000. Those illegal kickbacks were concealed using a sham marketing agreement between The Northrop Team and the Lakeview Title Company. *See* Operative Complaint ¶ 16. Pursuant to the marketing agreement, the Northrop Defendants designated the Lakeview Title Company as their exclusive settlement services provider and furnished the Lakeview Title Company with unspecified marketing services. The Lakeview Title Company agreed to remit monthly payments of $6,000 to the Northrop Defendants for those marketing services. Notwithstanding, the Northrop Defendants did not provide "any real joint marketing or services reasonably related to actual amounts paid" by the Lakeview Title Company to the Northrop Defendants. *Id.* ¶ 20. Rather, "the compensation was based on referrals and not for any marketing services rendered pursuant to the [m]arketing [a]greement." *Id.* The Operative Complaint specifies that, under the marketing agreement, the Northrop Defendants have received over $500,000 from the Lakeview Defendants. *Id.* ¶ 19.

The Operative Complaint also alleges that the Northrop and Lakeview Defendants "actively concealed" the marketing agreement from their clients, including the Baehrs. *See* Operative Complaint ¶ 21. More specifically, the Lakeview Title Company provided each client with Long & Foster's Affiliated Business Disclosure that "purported to disclose" "business relationships (e.g., direct or indirect ownership interests, joint ventures and/or contractual relationships including marketing agreements and/or office leases)" between Long & Foster or "its subsidiaries or affiliates" and the entities specified therein. *Id.* (internal quotation marks omitted). Despite the marketing agreement between The Northrop Team and the Lakeview Title Company, the Lakeview Title Company was not among the entities specified in the Affiliated Business Disclosure. Because they "had no reason to doubt the [Affiliated Business Disclosure], and reasonably relied" on its "affirmative representation ... that it included the title companies that Long & Foster, or its affiliates (including [T]he Northrop Team) had a financial relationship with," the Baehrs did not learn of the kickback scheme until March 16, 2013, when they were contacted by Donaldson. *Id.* ¶¶ 21-22.

Predicated on the kickback scheme, the Operative Complaint alleges that the Northrop and Lakeview Defendants deprived the Baehrs of "an impartial and fair competition between settlement service[s] providers in violation of RESPA," 12 U.S.C. § 2607(a). *See* Operative Complaint ¶ 23. To that end, the Operative Complaint seeks, inter alia, statutory treble damages totaling more than $11,200,000. *See* 12 U.S.C. § 2607(d)(2) (authorizing damages equal to "three times" amount paid for settlement services provided in contravention of RESPA).

3.

Following discovery, on June 19, 2015, the Northrop and Lakeview Defendants jointly moved for summary judgment. The Northrop and Lakeview Defendants contended that summary judgment was warranted for two reasons. First, they asserted that the Baehrs's claim was not subject to equitable tolling and thus was barred by RESPA's one-year statute of limitations. Second, they asserted that the Baehrs had not suffered a concrete injury and thus lacked Article III standing to sue. On December 7, 2018, the district court granted the Northrop and Lakeview Defendants' summary judgment motion. The court concluded that the Baehrs lacked Article III standing because they were not overcharged for settlement services and had not otherwise suffered a concrete injury as necessary to establish injury-in-fact. *See* Summary Judgment Opinion 15-22. Alternatively, the court concluded that the Baehrs's claim was barred by RESPA's one-year statute of limitations because the Baehrs were not diligent in investigating The Northrop Team's affiliation with the Lakeview Title Company. *Id.* at 22-29. The Baehrs timely noted this appeal, and we possess jurisdiction under 28 U.S.C. § 1291.

II.

1We review “de novo a district court's award of summary judgment, viewing the facts and inferences reasonably drawn therefrom in the light most favorable to the nonmoving party.” *See United States v. Ancient Coin Collectors Guild*, 899 F.3d 295, 312 (4th Cir. 2018) (internal quotation marks omitted). An award of summary judgment is warranted if “there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law.” *See* Fed. R. Civ. P. 56(a).

III.

Article III standing is "part and parcel of the constitutional mandate that the judicial power of the United States extend only to 'cases' and 'controversies.' " *See Libertarian Party of Virginia v. Judd*, 718 F.3d 308, 313 (4th Cir. 2013) (quoting U.S. Const. art. III, § 2). That constitutional mandate thus "requires a party invoking a federal court's jurisdiction to demonstrate standing." *See Wittman v. Personhuballah*, ––– U.S. –––, 136 S. Ct. 1732, 1736, 195 L.Ed.2d 37 (2016). To that end, the "irreducible constitutional minimum of standing contains three elements": (1) the plaintiff must have suffered an injury-in-fact, which (2) must be causally connected to the conduct complained of, and that (3) will likely be redressed if the plaintiff prevails. *See Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560-61, 112 S.Ct. 2130, 119 L.Ed.2d 351 (1992). As no case or controversy exists without injury-in-fact, it is the "[f]irst and foremost" element of Article III standing. *See Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 103, 118 S.Ct. 1003, 140 L.Ed.2d 210 (1998).

In order to establish injury-in-fact, a plaintiff must show that she suffered "an invasion of a legally protected interest"—i.e., an injury—that is "concrete and particularized." *See Lujan*, 504 U.S. at 560, 112 S.Ct. 2130. Crucially, concreteness and particularization are distinct requirements for injury-in-fact; the former is "quite different" from the latter. *See Spokeo, Inc. v. Robins*, ––– U.S. –––, 136 S. Ct. 1540, 1548, 194 L.Ed.2d 635 (2016). An injury is particularized if it "affect[s] the plaintiff in a personal and individual way." *Id.* And an injury is concrete if it is "*de facto*"—that is, if it "actually exist[s]." *Id.*

Concrete injuries are not, however, limited to those injuries that result in tangible harm. *See Spokeo*, 136 S. Ct. at 1549. Indeed, injury-in-fact is often predicated on intangible harm. *See, e.g., Fed. Election Comm'n v. Akins*, 524 U.S. 11, 24-25, 118 S.Ct. 1777, 141 L.Ed.2d 10 (1998) (informational injury); *Lujan*, 504 U.S. at 562-63, 112 S.Ct. 2130 (aesthetic injury); *Heckler v. Mathews*, 465 U.S. 728, 739-40, 104 S.Ct. 1387, 79 L.Ed.2d 646 (1984) (stigmatic injury). Notwithstanding, a statutory violation is not necessarily synonymous with an intangible harm that constitutes injury-in-fact. *See Spokeo*, 136 S. Ct. at 1549. For that reason, when a plaintiff sues to vindicate a statutory right, she still must establish that she suffered a concrete injury from the violation of that right. That is, a plaintiff cannot merely allege a "bare procedural violation, divorced from any concrete harm" and "satisfy the injury-in-fact requirement of Article III." *Id.*

The strictures of Article III standing are no less important in the context of class actions. *SeeKrakauer v. Dish Network, LLC*, 925 F.3d 643, 652 (4th Cir. 2019). In a class action, "we analyze standing based on the allegations of personal injury made by the named plaintiffs." *See Hutton v. Nat'l Bd. of Exam'rs in Optometry, Inc.*, 892 F.3d 613, 620 (4th Cir. 2018) (internal quotation marks omitted). A putative class thus cannot establish Article III standing "without a sufficient allegation of harm to the named plaintiff in particular." *Id.* (internal quotation marks and alteration omitted). In response to a summary judgment request, the named plaintiff is obliged to "set forth by affidavit or other evidence specific facts" that, when taken as true, establish each element of Article III standing. *See Lujan*, 504 U.S. at 561, 112 S.Ct. 2130 (internal quotation marks omitted); *Judd*, 718 F.3d at 313.

On appeal, the Baehrs contend that the deprivation of impartial and fair competition between settlement services providers is a concrete injury under RESPA. Accordingly, the Baehrs maintain that "an overcharge is not necessary to have standing to bring [their] RESPA kickback claim." *See* Br. of Appellant 33. The Baehrs also advance three concrete injuries not alleged in the Operative Complaint. First, the Baehrs suggest that the Northrop Defendants owed fiduciary duties to remit to the Baehrs any kickback paid by the Lakeview Defendants and to provide impartial advice and advocacy. According to the Baehrs, because those two duties went unfulfilled, the otherwise reasonable fees that they paid to the Lakeview Title Company were an overcharge that caused them to suffer a concrete injury. Second, the Baehrs suggest that they suffered a concrete injury because the Northrop Defendants were unjustly enriched by the Baehrs's engagement of the Lakeview Title Company as their settlement services provider. Third, the Baehrs suggest that they suffered a concrete injury by paying for settlement services provided in contravention of RESPA.

A.

We first take up the Baehrs's contention that, through RESPA, Congress elevated the deprivation of impartial and fair competition between settlement services providers "to the status of [a] legally cognizable injur[y].” *See Lujan*, 504 U.S. at 578, 112 S.Ct. 2130. Because injury-in-fact is a “hard floor” of Article III standing “that cannot be removed by statute,” the question for us is whether the deprivation of impartial and fair competition between settlement services providers—an intangible harm—is nevertheless a concrete injury. *See Summers v. Earth Island Inst.*, 555 U.S. 488, 497, 129 S.Ct. 1142, 173 L.Ed.2d 1 (2009).

1.

The Supreme Court's recent decision in *Spokeo* sets forth two considerations—historical practice and congressional judgment—that are “instructive” for determining whether an intangible harm constitutes a concrete injury. *See* 136 S. Ct. at 1549. The Baehrs have not identified a harm “traditionally ... regarded as providing a basis for a lawsuit in English or American courts” that bears “a close relationship” to the deprivation of impartial and fair competition among settlement services providers. *Id.* Instead, the Baehrs's argument is predicated on Congress's inclusion of a cause of action in RESPA for damages sustained through settlement service referrals sullied by kickbacks.

Cognizant that a statutory cause of action is not a replacement for concrete injury, we recognize that a plaintiff suffers a concrete injury if she shows the harm stemming from the “defendant's statutory violation is the type of harm Congress sought to prevent when it enacted the statute.” *See Curtis v. Propel Prop. Tax Funding, LLC*, 915 F.3d 234, 240-41 (4th Cir. 2019) (internal quotation marks omitted). Congress enacted RESPA to protect consumers from "certain abusive practices" that had resulted in "unnecessarily high settlement charges." *See* 12 U.S.C. § 2601(a); *see also Boulware v. Crossland Mortg. Corp.*, 291 F.3d 261, 267 (4th Cir. 2002) (observing that RESPA is "directed against" things that "increase the cost of real estate transactions"). Relevant here, those abusive practices include "kickbacks or referral fees that tend to increase unnecessarily the costs of certain settlement services." *See* 12 U.S.C. § 2601(b)(2). Accordingly, as codified at 12 U.S.C. § 2607(a), RESPA provides that "[n]o person shall give and no person shall accept any fee, kickback, or thing of value pursuant to any agreement or understanding ... that business incident to or a part of a real estate settlement service ... shall be referred to any person." *Id.* § 2607(a). RESPA's proscription against kickbacks is enforceable by federal agencies, state attorneys general and insurance commissioners, and private citizens. *Id.* § 2607(d)(1) (criminal penalties), (d)(2) (damages), (d)(4) (injunctive remedies). The cause of action for private citizens is limited, however, to claims for damages "equal to three times the amount of any charge paid" for settlement services rendered in contravention of § 2607(a). *Id.* § 2607(d)(2).

Plainly, in proscribing the payment of "formal kickbacks" for referrals of business to settlement services providers, Congress aimed to eliminate a practice that it believed interfered with the market for settlement services. *See Boulware*, 291 F.3d at 266, 268. To say that RESPA protects consumers from kickbacks' interference with the market for settlement services is not to say, however, that interference with the market is the harm to consumers that Congress sought to prevent through RESPA. Indeed, Congress specified in RESPA that by prohibiting kickbacks, the harm it sought to prevent is the increased costs that "tend" to result from kickbacks' interference with the market for settlement services. *See* 12 U.S.C. § 2601(b)(2).

To the extent that the fees charged by the Lakeview Title Company were reasonable, the Baehrs do not contend that they were harmed by being overcharged for settlement services. Instead, the Baehrs contend that they were harmed by being deprived of impartial and fair competition between settlement services providers. Because the deprivation of impartial and fair competition between settlement services providers is not the harm that Congress enacted § 2607(a) of RESPA to prevent, that alleged injury reduces to "a statutory violation divorced from any real world effect." *See Dreher v. Experian Info. Sols.*, 856 F.3d 337, 346 (4th Cir. 2017). The upshot is that the deprivation of impartial and fair competition between settlement services providers—untethered from any evidence that the deprivation thereof increased settlement costs—is not a concrete injury under RESPA.

2.

The Baehrs resist the conclusion that the deprivation of impartial and fair competition is not a concrete injury under RESPA for two reasons. First, the Baehrs emphasize our passing observation in *Boulware* that a violation of § 2607(a)need not involve an overcharge to the consumer. *See* 291 F.3d at 266. Second, they point to out-of-circuit decisions, which purportedly compel the conclusion that the deprivation of impartial and fair competition between settlement services providers is a concrete injury under RESPA. We are not persuaded by either tack.

To begin, *Spokeo* made clear that a statutory violation does not always amount to a concrete injury. *See* 136 S. Ct. at 1549-50. Accordingly, we are satisfied that *Boulware* is not at odds with our conclusion that the mere deprivation of impartial and fair competition does not work concrete injury.[7]

As to the decisions of three other circuit courts upon which the Baehrs rely—specifically, *Edwards v. First American Corp.*, *Alston v. Countrywide Financial Corp.*, and *Carter v. Welles-Bowen Realty, Inc.*—we observe that those decisions preceded *Spokeo*. *See* 610 F.3d 514 (9th Cir. 2010); 585 F.3d 753 (3d Cir. 2009); 553 F.3d 979 (6th Cir. 2009). Indeed, the Supreme Court explicitly recognized that *Spokeo* abrogated *Edwards*' conclusion that a violation of § 2607(a) is a concrete injury regardless of any overcharge. *See Frank v. Gaos*, ––– U.S. ––––, 139 S. Ct. 1041, 1046, 203 L.Ed.2d 404 (2019) (per curiam). Even if *Alston*'s and *Carter*'s similar conclusions remain viable after *Spokeo*—a question that we do not answer herein—those cases stem from circumstances different than the circumstances of this appeal. That is, both decisions concern schemes facilitated by business ownership arrangements that enabled the defendants to receive de facto kickbacks for referrals. *See Alston*, 585 F.3d at 756-57; *Carter*, 553 F. 3d at 982 & n.1. As the Sixth Circuit explained in *Carter*, following RESPA's enactment, Congress was particularly concerned that these so-called affiliated business arrangements could be used to circumvent § 2607. *See* 553 F.3d at 987. By contrast, the Baehrs allege that the Lakeview Defendants were paying the Northrop Defendants direct kickbacks under a sham marketing agreement. Insofar as the conclusions in *Alston* and *Carter* were animated by Congress's concerns about the affiliated business arrangements at issue therein, those conclusions are inapposite to this appeal.

For similar reasons, the Baehrs find no footing in the District of Maryland's pre-*Spokeo* decisions in *Robinson v. Fountainhead Title Group Corp.* and *Fangman v. Genuine Title, LLC*. *See* 447 F. Supp. 2d 478 (D. Md. 2006); Civil Action No. RDB-14-0081, 2015 WL 8315704 (D. Md. Dec. 9, 2015). Like *Alston* and *Carter*, *Robinson* concerned a scheme involving affiliated business arrangements, in which the defendants received de facto kickbacks through their ownership stakes in sham settlement services providers. *See Robinson*, 447 F. Supp. 2d at 482. The Baehrs's reliance on *Robinson*is further undercut by the district court's recognition therein that the plaintiffs had alleged that they were overcharged for settlement services. *Id.* at 487-88. And in *Fangman*, the district court specifically applied *Edwards*' now-abrogated conclusion that a RESPA violation is an injury-in-fact before concluding that the plaintiffs had standing in part because they had alleged an overcharge. *See Fangman*, 2015 WL 8315704, at *3, *5.

Lastly, we emphasize that this record is devoid of evidence that the Baehrs were actually deprived of impartial and fair competition among settlement services providers. *See Lujan*, 504 U.S. at 561, 112 S.Ct. 2130 (requiring plaintiff on summary judgment to establish standing by "set[ting] forth by affidavit or other evidence specific facts" (internal quotation marks omitted)). Besides parroting the Operative Complaint in deposition testimony and affidavits, the Baehrs set forth no evidence that impartial and fair competition between settlement services providers was even relevant to their decision to obtain settlement services from the Lakeview Title Company. *See* J.A. 208, 695, 698; *see also Dreher*, 856 F.3d at 347. On the contrary, the Baehrs did not investigate the Lakeview Title Company or other settlement services providers, were admittedly satisfied with the settlement services that they received, and continue to believe that the Lakeview Title Company deserved to be compensated for those services.

We therefore readily conclude that the Baehrs did not suffer any real-world harm, much less a concrete injury, from the deprivation of impartial and fair competition between settlement providers. Accordingly, the Baehrs's assertion that they were so deprived is insufficient to establish Article III standing.

B.

Because we conclude that the deprivation of fair and impartial competition among settlement providers is not a concrete injury under RESPA, we turn to the Baehrs's three novel theories of standing. We address—and reject—each of those theories seriatim.

1.

First, the Baehrs contend that the Northrop Defendants owed them fiduciary duties to return any kickback paid by the Lakeview Defendants to the Baehrs and to provide impartial advice and advocacy. The Baehrs assert that the Northrop Defendants' failure to fulfill those duties rendered the otherwise reasonable fees that they paid to the Lakeview Title Company an overcharge. This theory fails because the Baehrs have not established that the Northrop Defendants were their fiduciaries.

The Baehrs's contention that the Northrop Defendants were their fiduciaries rests solely on their boilerplate recitation that, under Maryland law, a real estate broker "stands in a fiduciary relationship" to her client. *See Wilkens Square LLLP v. W.C. Pinkard & Co.*, 189 Md.App. 256, 984 A.2d 329, 336 (2009).[8] True enough. But Maryland law also specifies that a real estate broker "is an agent" for her "principal, with incumbent fiduciary duties to that person alone." *See Proctor v. Holden*, 75 Md.App. 1, 540 A.2d 133, 142-43 (1988). Put succinctly, in a real estate transaction, a seller's representative does not owe fiduciary duties to the buyer. *See Lewis v. Long & Foster Real Estate, Inc.*, 85 Md.App. 754, 584 A.2d 1325, 1329 (1991); *see also Yerkie v. Salisbury*, 264 Md.

598, 287 A.2d 498, 500-01 (1972) ("[A] real estate broker is a fiduciary and when a seller employs a broker to sell [her] property [s]he bargains for the disinterested skill, diligence and zeal of the broker for [her] own exclusive benefit."). In the Baehrs's purchase of the Glenwood home, Northrop provided brokerage services to the sellers. As the sellers' representative, Northrop thus did not "stand[ ] in a fiduciary relationship" to the Baehrs for the purchase of the Glenwood home. *See Wilkens Square*, 984 A.2d at 336; *see also Herbert v. Saffell*, 877 F.2d 267, 274 (4th Cir. 1989) (explaining that, in Maryland, real estate agents "do not owe a fiduciary duty to prospective purchasers under most circumstances").

We are similarly unconvinced that The Northrop Team—a real estate team organized as a professional corporation—was the Baehrs's fiduciary in the purchase of the Glenwood home. The Baehrs have not established that an agency relationship existed between The Northrop Team and Dykstra—an independent consultant. *See Brooks v. Euclid Sys. Corp.*, 151 Md.App. 487, 827 A.2d 887, 897 (2003) (setting forth three factors for determining whether agency relationship exists under Maryland law). Nor do the Baehrs identify any authority to support their assertion that, in Maryland, a professional corporation itself can owe fiduciary duties. Absent any such guiding authority, we leave that question of Maryland law to the Maryland courts.

In short, the Baehrs have not established that either Northrop or The Northrop Team were their fiduciaries in the Glenwood home purchase. *See Proctor*, 540 A.2d at 142 (explaining that, in Maryland, "the party alleging the agency has the burden of proving its existence and its nature and extent"). The Baehrs's fiduciary-duty theory of standing is thus unavailing.

2.

2627Second, invoking *Spokeo*'s instruction "to consider whether an alleged intangible harm has a close relationship to a *harm* that has traditionally been regarded as providing a basis for a lawsuit in English or American courts," the Baehrs theorize that they suffered a concrete injury because the Northrop Defendants were unjustly enriched. *See Spokeo*, 136 S. Ct. at 1549 (emphasis added). Of course, the unjust enrichment cause of action is ensconced in our legal traditions. We are satisfied, however, to reject the Baehrs's unjust-enrichment theory because it mistakenly identifies a plaintiff's harm as providing the basis for an unjust enrichment action. Unlike a statutory cause of action that provides a damages remedy based on a plaintiff's loss, the touchstone of unjust enrichment is a defendant's gain. *See Hill v. Cross Country Settlements, LLC*, 402 Md. 281, 936 A.2d 343, 352 (2007) (emphasizing that unjust enrichment "is not aimed at compensating the plaintiff, but at forcing the defendant to disgorge benefits that it would be unjust for [her] to keep" (internal quotation marks omitted)); Restatement (Third) of Restitution and Unjust Enrichment § 1 cmt. b (Am. Law Inst. 2011). That is, unjust enrichment provides a restitutionary remedy where a defendant receives a recognizable benefit that it would be inequitable for her to retain. *See Hill*, 936 A.2d at 351-52 (setting forth three-factor test for claim of unjust enrichment in Maryland).[9] Accordingly, in an action for unjust enrichment, a plaintiff need only establish that the defendant's gain was "without adequate legal basis." *See* Restatement (Third) of Restitution and Unjust Enrichment § 1cmt. b (Am. Law Inst. 2011). The plaintiff need not show that she suffered any harm from the defendant's gain. *Id.*

28On this record, the Baehrs have not demonstrated that the benefit purportedly obtained by the Northrop Defendants—that is, a kickback—worked any harm other than the alleged violation of RESPA. Such a statutory violation, if proven, might give rise to liability in a lawsuit brought under the unjust enrichment cause of action. But because a plaintiff's harm has not "traditionally been regarded as providing" the basis for unjust enrichment actions, we are not persuaded that the Baehrs's bald allegation of unjust enrichment suffices to establish a concrete injury. *See Spokeo*, 136 S. Ct. at 1549. Indeed, concluding that a defendant's unjust enrichment always works a concrete injury to the plaintiff in an action for statutory damages runs counter to *Spokeo*'s mandate that "a bare procedural violation, divorced from any concrete harm" cannot "satisfy the injury-in-fact requirement of Article III." *Id.* At bottom, the Baehrs's unjust-enrichment theory misapprehends the mischief that provides the basis for the unjust enrichment cause of action. Therefore, the unjust-enrichment theory also must fail.

3.

Third, the Baehrs contend that they suffered a concrete injury by paying for settlement services provided in contravention of RESPA. To support this unlawful-transaction theory, the Baehrs cite a single provision of the bankruptcy code, which authorizes damages where a bankruptcy petition preparer improperly renders legal advice. *See* 11 U.S.C. § 110(e)(2), (i)(1). We are satisfied to reject this under-developed theory because it is at odds with *Spokeo*'s mandate that a statutory violation "divorced from any concrete harm" is insufficient to establish injury-in-fact. *See Spokeo*, 136 S. Ct. at 1549. That is, we do not discern from the Baehrs's emphasis on their payment for settlement services any harm other than the Northrop and Lakeview Defendants' purported RESPA violation. The Baehrs received settlement services for which they paid a reasonable rate regardless of whether that payment was thereafter repackaged as a kickback. On this record, the harm suffered by the Baehrs under their unlawful-transaction theory thus reduces to the type of "bare procedural violation" that has long been insufficient for Article III standing. *Id.*; *Summers v. Earth Island Inst.*, 555 U.S. 488, 496, 129 S.Ct. 1142, 173 L.Ed.2d 1 (2009) ("[D]eprivation of a procedural right without some concrete interest that is affected by the deprivation ... is insufficient to create Article III standing."). In the circumstances, we must reject the Baehrs's unlawful-transaction theory of standing.

IV.

Pursuant to the foregoing, the Baehrs have not suffered a concrete injury. The Baehrs accordingly cannot establish injury-in-fact, and we therefore agree with the district court's determination that they lack Article III standing to sue. Because the court was obliged to dismiss upon making that determination, we vacate the summary judgment award and remand for dismissal. *See Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 94, 102, 118 S.Ct. 1003, 140 L.Ed.2d 210 (1998).

VACATED AND REMANDED

Footnotes

1Because the Baehrs appeal the district court's award of summary judgment to the defendants, we recite the facts in the light most favorable to the Baehrs, as the nonmoving party. *See Bauer v. Lynch*, 812 F.3d 340, 342 n.1 (4th Cir. 2016).

2Pursuant to Maryland law, licensed real estate agents must provide real estate brokerage services on behalf of a licensed real estate broker. *See* Md. Code, Bus. Occ. & Prof. § 17-310.

3Citations herein to “J.A. ——” refer to the contents of the Joint Appendix filed by the parties in this appeal.

4The HUD-1 Settlement Statement is a standardized form created by the Department of Housing and Urban Development that lists all fees charged to the buyer and seller in a real estate settlement. *See What is a HUD-1 Settlement Statement*?, Consumer Fin. Prot. Bureau (Sept. 12, 2017), https://www.consumerfinance.gov/ask-cfpb/what-is-ahud-1-settlement-statement-en-178/.

5The Lakeview Title Company collected the title insurance premium to split with the Chicago Title Insurance Company, the title insurance underwriter.

6During oral argument of this appeal, the Baehrs's lawyer specified that the putative class consists of 1,088 members. *See* Oral Argument at 1:16, *Baehr v. The Creig Northrop Team, P.C.*, No. 19-1024 (4th Cir. Jan. 29, 2020),

http://www.ca4.uscourts.gov/oralargument/listen-to-oral-arguments.

7Recognizing that a violation of RESPA does not always result in the type of harm that Congress sought to prevent is not to say that kickbacks that do not cause an overcharge are insulated from liability under RESPA. After all, as explained above, RESPA's private cause of action is only one of several mechanisms for enforcing its proscription of kickbacks. That is, RESPA imposes criminal penalties and authorizes certain federal and state entities to sue to enjoin violations of § 2607(a). *See* 12 U.S.C. § 2607(d)(1), (d)(4).

8A reported decision of the Maryland Court of Special Appeals is binding precedent unless overturned by the high court of Maryland. *See Archers Glen Partners, Inc. v. Garner*, 176 Md.App. 292, 933 A.2d 405, 424 (2007) (observing that a “reported decision” of the Maryland Court of Special Appeals “constitutes binding precedent”).

9Under Maryland law, unjust enrichment "may not be reduced neatly to a golden rule," but does consist of three elements: (1) "[a] benefit conferred upon the defendant by the plaintiff"; (2) "[a]n appreciation or knowledge by the defendant of the benefit"; and (3) "[t]he acceptance or retention by the defendant of the benefit under such circumstances as to make it inequitable for the defendant to retain the benefit without the payment of its value." *See Hill*, 936 A.2d at 351.

United States District Court, D. Maryland.

Patrick BAEHR, et al., Plaintiffs,

v.

The CREIG NORTHROP TEAM, P.C., et al., Defendants.

Civil Action No. RDB-13-0933

Signed 12/07/2018

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MEMORANDUM OPINION

Richard D. Bennett, United States District Judge

The Plaintiffs Patrick and Christine Baehr, individually and on behalf of a class of consumers, bring this single-count class action[1] against the Defendants The Creig Northrop Team, P.C. ("The Northrop Team"), Creighton Edward Northrop, III ("Creig Northrop"), Lakeview Title Company (“Lakeview”), and Lindell Eagan (“Eagan”) (collectively, the “Defendants”), alleging that the Defendants violated the Real Estate Settlement Procedures Act of 1974, as amended, 12 U.S.C. § 2601, *et seq.* (“RESPA”) through an illegal kickback scheme whereby The Northrop Team received unearned fees from Lakeview Title in exchange for referring clients to Lakeview Title for settlement. Currently pending before this Court is the Defendants' Joint Motion for Summary Judgment, arguing that the Plaintiffs do not have standing to bring their claim, and that their claim is barred by RESPA’s one year statute of limitations and equitable tolling does not apply. (ECF No. 158.)

This Court reviewed the parties' submissions and held a motions hearing on November 20, 2018. For the following reasons, Defendants' Joint Motion for Summary Judgment (ECF No. 158) is GRANTED and Judgment is ENTERED in favor of Defendants.[2]

BACKGROUND

In ruling on a motion for summary judgment, this Court reviews the facts and all reasonable inferences in the light most favorable to the non-moving party. *Scott v. Harris*, 550 U.S. 372, 378, 127 S.Ct. 1769, 167 L.Ed.2d 686 (2007); *Hardwick ex rel. Hardwick v. Heyward*, 711 F.3d 426, 433 (4th Cir. 2013). As explained below, in 2008 the named Plaintiffs Patrick and Christine Baehr (the “Plaintiffs” or “Baehrs”) retained Long & Foster Real Estate, Inc. (“Long & Foster”) as their real estate broker to assist them in finding a new home. Maija Dykstra, at the time a Long & Foster agent and member of the Defendant The Creig Northrop Team, P.C. ("The Northrop Team"), led by the Defendant Creighton Edward Northrop, III ("Creig Northrop"), referred the Plaintiffs to the Defendant Lakeview Title Company ("Lakeview Title"), run by its President Defendant Lindell Eagan ("Eagan"), for settlement. The Baehrs closed on the purchase of this home on July 25, 2008.

On March 27, 2013, more than four and a half years after they settled on their home, the Plaintiffs filed the instant suit on behalf of themselves and a putative class, claiming that the Defendants violated Section 8(a) of RESPA by using a "sham" marketing agreement between The Northrop Team and Lakeview Title to disguise an illegal kickback scheme whereby The Northrop Team received unearned fees by referring the Plaintiffs and the putative class to Lakeview Title for settlement. This Court begins with a brief overview of RESPA before detailing the factual and procedural background of this case.

I. The Real Estate Settlement Procedures Act ("RESPA")

Congress enacted the Real Estate Settlement Procedures Act of 1974, as amended, 12 U.S.C. § 2601, *et seq.*("RESPA") after it found that substantial reforms in the real estate settlement process were "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). Accordingly, Congress enacted RESPA to effect "certain changes" that would result "in the elimination of kickbacks or referral fees that tend to increase unnecessarily the costs of certain settlement services."[3] *Id.* at § 2601(b)(2).

One of RESPA's prohibitions is that "[n]o 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." *Id.* at § 2607(a). RESPA then provides for a specific set of remedies, including that "[a]ny person or persons who violate the prohibitions or limitations of this section 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." *Id.*at § 2607(d)(2). RESPA does not provide, however, an individual with a private right to injunctive relief. *See id.* at § 2607(d)(4) ("The Bureau, the Secretary, or the attorney general or the insurance commissioner of any State may bring an action to enjoin violations of this section."); *see also Minter v. Wells Fargo Bank, N.A.*, 593 F.Supp.2d 788, 796 (D. Md. 2009) ("[T]his Court finds that there is no private right to injunctive relief under RESPA.")

II. The Marketing Agreement between The Northrop Team and Lakeview Title

On April 10, 2008, Creig Northrop and The Northrop Team entered into a Marketing and Services Agreement. (ECF No. 210-10.) The Agreement provided that, among other things, Northrop agreed to designate Lakeview Title as its "exclusive preferred settlement and title company" and "to provide certain marketing services." (*Id.* at ¶ 2.1.) In exchange, Lakeview would pay The Northrop Team a flat fee of $6,000 per month, "not predicated on the volume of applications received by Lakeview from Northrop customers for settlement and title services." (*Id.* at 14.) Finally, the parties agreed "that the terms of the transaction described herein is of a confidential nature and shall not be disclosed except to consultants, advisors and Affiliates, or as required by law. Neither the parties shall make any public disclosure of the specific terms of this Agreement, except as required by law." (*Id.* at ¶ 9.21.)

III. The Named Plaintiffs' purchase of their home with Long & Foster and The Northrop Team

The Named Plaintiffs Patrick and Christine Baehr's RESPA claim stems from their purchase of a home in Glenwood, Maryland ("Glenwood home") on July 25, 2008. (ECF No. 158-3.) In April of 2008, the Baehrs entered into an Exclusive Right to Represent Buyer Agreement with Long & Foster to assist them in selling their previous home and finding a new home. (ECF No. 158-8.) The Defendant Creig Northrop is a licensed real estate agent who provides real estate brokerage services under Long & Foster's real estate brokerage license.[4] Creig Northrop also runs The

Northrop Team, a real estate agent team, along with his wife Carla Northrop. Maija Dykstra, a Northrop Team Member at the time, was the Long & Foster real estate agent who assisted the Baehrs in the selling and purchase of their home. (P. Baehr Dep., ECF No. 158-4 at 94.)[5]

When the Baehrs began working with The Northrop Team, they received promotional materials for various companies, including Lakeview Title, and a folder of various forms to be signed. (ECF No. 158-12.) Among the forms to be signed were an Understanding Whom Real Estate Agents Represent Form and an Affiliated Business Arrangement ("ABA") Disclosure Statement. (*Id.* at 8-9; ECF No. 210-31.) The ABA Disclosure Statement, given to the Baehrs by Dykstra, was a Long & Foster form which gave clients "notice that Long & Foster Real Estate, Inc. ('Long & Foster') has business relationships (e.g., direct or indirect ownership interests, joint ventures and/or contractual relationships including marketing agreements and/or office leases) with the following mortgage, title, closing, and insurance service providers."[6](ECF No. 210-31.) Under closing and title insurance companies, the Long & Foster Disclosure Statement listed twelve companies and their affiliates in which Long & Foster had a business relationship.[7] (*Id.*)

Maija Dykstra assisted the Baehrs in finding and ultimately making an offer for the purchase of the Glenwood home for $835,000. (P. Baehr Dep., ECF No. 158-4 at 110; HUD-1, ECF No. 158-3.) From previous experience purchasing a home, the Baehrs understood that once a purchase price was agreed upon, they needed a settlement company and title insurance to complete the purchase.[8] (ECF No. 158-4 at 132; C. Baehr Dep., ECF No. 158-14 at 80, 82.) Both Patrick and Christine Baehr testified that while working with Long & Foster and The Northrop Team, they knew and understood that they could choose their own settlement and title company. (ECF No. 158-4 at 137; ECF No. 158-14 at 82.) Despite knowing that they were free to choose their own company, however, the Baehrs did not take any action to find their own settlement and title company. (ECF No. 158-4 at 134, 137.) Rather, Patrick Baehr testified that he expected his Northrop Team Member, Dykstra, to find him a settlement company. (*Id.* at 138.)

Thereafter in July of 2008, the month the Baehrs closed on their home, Dykstra informed the Baehrs that Lakeview Title would handle their settlement. (P. Baehr Dep., ECF No. 158-4 at 138; C. Baehr Dep., ECF No. 158-14 at 98.) Specifically, Patrick Baehr testified that Dykstra stated "we do all of our settlements at Lakeview." (ECF No. 158-4 at 139.) It is undisputed that when Dykstra informed the Baehrs that "we do all of our settlements at Lakeview," the Baehrs did not ask a single question regarding why a Northrop Team Member, associated with Long & Foster, would refer all settlements to Lakeview Title. They also did not ask whether Dykstra, Long & Foster, or The Northrop Team had an affiliation or some form of an agreement with Lakeview Title. (P. Baehr Dep., ECF No. 158-4 at 138-41.) This was despite the fact that Lakeview Title was not one of the twelve closing or title insurance companies listed on Long & Foster's ABA Disclosure Statement and that Lakeview Title was not the title company the Baehrs used when settling on their previous home. (ECF Nos 210-31; ECF No. 158-4 at 229, 230.)

Rather, the Baehrs elected to proceed with Lakeview Title handling their settlement without objection. Subsequently, on July 25, 2008, the Baehrs obtained title insurance from and settled on the Glenwood home with Lakeview Title. (HUD-1, ECF No. 158-3.) Patrick Baehr testified that despite feeling comfortable and having the opportunity to ask questions during the closing process, he did not recall asking any questions. (ECF No. 158-4 at 167-68.) The Baehrs' HUD-1[9] for the purchase of their home then listed the following fees, among others, paid from borrower's funds at settlement:

Contract sales price:	$835,000.00
Administrative Fee to Long & Foster:	$395.00
Title Examination to Lakeview Title Company:	$375.00
Title insurance binder to Lakeview Title Company:	$50.00
Title Insurance to Chicago Title Insurance Company:	$2,990.00
Recording Services to Lakeview Title Company:	$50.00

(HUD-1, ECF No. 158-3.) As Chicago Title Insurance Company was the title underwriter, that amount was also sent to Lakeview Title. (ECF No. 158-1 at 11 n. 11.)

After the settlement process, Patrick Baehr testified that he was satisfied with the services that Lakeview Title provided. (P. Baehr Dep., ECF No. 158-4 at 164; C. Baehr Dep., ECF No. 158-14 at 128.) Accordingly, he believed that Lakeview Title deserved to be compensated in connection with the settlement services and did not object to paying Lakeview Title or Chicago Title Insurance Company's fee. Satisfied with their services, over the next four and a half years, the Baehrs did not contact Dykstra, Creig Northrop, anyone on the Northrop Team, Lakeview, or Long & Foster about whether The Northrop Team may have had a marketing agreement or other arrangement with Lakeview Title, or whether The Northrop Team may have received anything of value from Lakeview Title in connection with the Baehrs' purchase of the Glenwood home. (P. Baehr Dep., ECF No. 158-4 at 206.)

IV. Four and a half years later, the Plaintiffs file the instant action

On March 15, 2013, four and a half years after the Baehrs purchased their home, the Baehrs received a letter from their current counsel. (ECF No. 158-16.) The letter indicated that counsel was "investigating whether you and other persons similarly situated may have a legal claim based on illegal kickbacks paid for the referral of your business to a title company that settled your purchase.... I believe that you may be entitled to financial recovery under RESPA." (*Id.*)

Subsequently, the Baehrs received a written engagement letter to pursue the instant claim. (ECF No. 158-17.) On March 27, 2013, they filed the instant action, alleging that the Defendants violated Section 2607(a) of RESPA.[10] (Compl., ECF No. 1.)

The Plaintiffs' Complaint named six Defendants: The Northrop Team, Creig Northrop, Carla Northrop, Lakeview Title, Lindell Eagan, and Long & Foster. (*Id.*) The Complaint alleged that Creig Northrop, Carla Northrop, and The Northrop Team—acting as agents on behalf of Long & Foster—referred the Plaintiffs and members of the Class exclusively to Defendant Lakeview Title Company for real estate settlement services as a *quid pro quo* for compensation by Lakeview Title and Lindell Eagan, President of Lakeview. The Plaintiffs alleged that the Defendants concealed this *quid pro quo* or kickback relationship first through a "sham" employment agreement between Carla Northrop and Lakeview Title from around 2001 through 2008, and then through the Marketing and Services Agreement described above from 2008 through 2013.

With respect to the Marketing Agreement, the Plaintiffs' Complaint alleged that rather than Creig Northrop and The Northrop Team receiving a flat fee for marketing services of $6,000 per month from Lakeview Title, the payments they received actually fluctuated from $6,000 to $12,000 based on how many clients The Northrop Team referred to Lakeview.[11] Therefore, the Plaintiffs alleged that the

Marketing Agreement was a sham, designed to hide illegal kickback fees under Section 8(a) of RESPA.

V. This Court's previous rulings

On May 13, 2013, the Defendants filed two Motions to Dismiss the Plaintiffs' Complaint on various grounds. (ECF Nos. 23, 26.) Subsequently, the Plaintiffs filed a Motion to Amend the Complaint and Motion for Class Certification. (ECF Nos. 36, 44.) On January 29, 2014, the Honorable Judge William D. Quarles, Jr. ruled on the Motions. (ECF Nos. 57, 58; *Baehr v. Creig Northrop Team, P.C.*, 2014 WL 346635 (D. Md. Jan. 29, 2014).) The relevant rulings are explained below.[12]

a. The Plaintiffs adequately alleged that equitable tolling applied to their RESPA claim

The Defendants moved to dismiss the Complaint on the ground that the Plaintiffs' claim was barred by RESPA's statute of limitations. *Baehr*, 2014 WL 346635, at *4. As this Court explained, a claim brought pursuant to Section 8 of REPSA, 12 U.S.C. § 2607, is subject to a one-year statute of limitations, which may be equitably tolled. *Id.* (citing 12 U.S.C. § 2614). Because the Plaintiffs closed on their home on July 25, 2008 but did not file their Complaint until March 27, 2013, their claim fell well outside the one-year statute of limitations. *Id.* To determine whether the Plaintiffs adequately pled that their claim was entitled to equitable tolling, this Court applied the following standard:

> To invoke the doctrine of equitable tolling, the Plaintiffs must show that "(1) the party pleading

> the statute of limitations fraudulently concealed facts that are the basis of the plaintiff's claim, and (2) the plaintiff failed to discover those facts within the statutory period, despite (3) the exercise of due diligence."

Id. (citing *Minter v. Wells Fargo Bank, N.A.*, 675 F.Supp.2d 591, 596 (D. Md. 2009)).[13]

Applying this standard, this Court held that the Plaintiffs sufficiently alleged "that the Defendants engaged in affirmative acts to conceal the kickback scheme." 2014 WL 346635, at *5. Specifically, the Plaintiffs alleged that the Defendants concealed the fact that the Northrop Defendants were receiving illegal referral fees by disguising the kickback payments in the sham employment and marketing agreements. *Id.* Moreover, this Court explained that whether the Defendants were required to disclose the "employment or affiliation agreements is irrelevant in determining whether the Defendants fraudulently concealed violations of RESPA by entering into sham agreements. The issue is not whether the agreements were disclosed, but whether they were created as shams to hide payments in violation of RESPA." *Id.* at *5 n. 9. Briefly addressing due diligence, this Court reasoned that reasonable inquiry would not have revealed the RESPA claim because anyone who inquired into the agreements would have discovered only the seemingly valid employment or marketing agreements. *Id.* at *5.

b. The Plaintiffs failed to state a claim against Carla Northrop and Long & Foster

The Defendants also moved to dismiss Long & Foster and Carla Northrop for failure to state a claim. *Baehr*, 2014 WL 346635, at *5-6. As to Long & Foster, this Court held that the Plaintiffs' allegations concerning an agency relationship between the Northrop Defendants and Long & Foster were mere legal conclusions and failed to allege "the basis, nature, or extent of the relationship." *Id.* at *6. As to Carla Northrop, this Court held that the proposed Amended Complaint failed to allege that Carla Northrop in fact gave or accepted a kick back in 2008 when the Baehrs purchased their home. *Id.* at *5. Therefore, this Court dismissed both Long & Foster and Carla Northrop.[14]

c. Class certification was appropriate, but on narrower grounds than requested

Turning to the Plaintiffs' Motion for Class Certification, the Plaintiffs sought to certify the following class:

> All Maryland residents who retained Long & Foster Real Estate, Inc., Creighton Northrop, III, and the Creig Northrop Team, P.C. to represent them in the purchase of a primary residence between January 1, 2000 to present and settled on the purchase of their primary residence at Lakeview Title Company, Inc.

(ECF No. 44.)

Analyzing the factors in Federal Rule of Civil Procedure 23(a), this Court held that the Plaintiffs had met the numerosity and commonality requirements. *Baehr*, 2014 WL 346635, at *8. As to typicality, however, this Court held that the Baehrs' claim was not typical with potential class members' claims originating between 2000 and 2007, when the Defendants were allegedly operating their kickback scheme through Carla Northrop's employment with Lakeview Title. *Id.* at *8-9. Therefore, this Court redefined the class to only include those class members who purchased homes beginning in 2008. *Id.* at *9. This Court then held that the adequacy prong was met, as well as the predominance and superiority requirements of Rule 23(b). *Id.* at *9-11.

Therefore, this Court certified the following amended class:

> All Maryland residents who retained Long & Foster Real Estate, Inc., Creighton Northrop, III, and the Creig Northrop Team, P.C. to represent them in the purchase of a primary residence between January 1, 2008 to the present and settled on the purchase of their primary residence at Lakeview Title Company, Inc.

Id. at *11; ECF No. 58. Defining the class in this time period precluded the Plaintiffs from proceeding with their claim that Defendants' RESPA violations began before 2008 through Carla Northrop's "sham" employment agreement with Lakeview Title. Subsequently, the Plaintiffs filed the Operative Amended Complaint. (ECF No. 89.)

VI. The Defendants' Joint Motion for Summary Judgment

On June 9, 2015, the Defendants filed a Joint Motion for Summary Judgment. (ECF No. 158.) The Motion argues that the Defendants are entitled to judgment as a matter of law on two grounds: (1) Plaintiffs do not have Article III standing to bring their Section 8(a) RESPA claim because they do not satisfied the injury in fact requirement; and (2) discovery has shown that the Plaintiffs failed to file this action within RESPA's one year statute of limitations, and their claim is not entitled to equitable tolling.

STANDARD OF REVIEW

Under Federal Rule of Civil Procedure 56(c), a court must grant summary judgment "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986). A material fact is one that "might affect the outcome of the suit under the governing law." *Libertarian Party of Va. v. Judd*, 718 F.3d 308, 313 (4th Cir. 2013) (quoting *Anderson*, 477 U.S. at 248, 106 S.Ct. 2505). The party seeking summary judgment bears the initial burden of demonstrating the absence of a genuine dispute of material fact, *Celotex Corp. v. Catrett*, 477 U.S. 317, 323, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986), and the court must take all facts and inferences in the light most favorable to the non-moving party. *Scott v. Harris*, 550 U.S. 372, 378, 127 S.Ct. 1769, 167 L.Ed.2d 686 (2007).

The party opposing summary judgment must, however, "do more than simply show that there is some metaphysical doubt as to the material facts." *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586, 106 S.Ct. 1348, 89 L.Ed.2d 538 (1986); *see also In re Apex Express Corp.*, 190 F.3d 624, 633 (4th Cir. 1999). The non-movant " 'may not rest upon the mere allegations or denials of [his] pleadings,' but rather must 'set forth specific facts showing that there is a genuine issue for trial.' " *Bouchat v. Balt. Ravens Football Club, Inc.*, 346 F.3d 514, 522 (4th Cir. 2003) (alteration in original) (quoting Fed. R. Civ. P. 56(e)); *see also Adickes v. S. H. Kress & Co.*, 398 U.S. 144, 160, 90 S.Ct. 1598, 26 L.Ed.2d 142 (1970). A court should enter summary judgment when a party fails to make a showing sufficient to establish elements essential to a party's case, and on which the party will bear the burden of proof at trial. *Celotex Corp.*, 477 U.S. at 322-23, 106 S.Ct. 2548.

ANALYSIS

The Plaintiffs argue that the Defendants violated Section 8(a) of RESPA by using the "sham" Marketing and Services Agreement between The Northrop Team and Lakeview Title to disguise an illegal kickback scheme whereby The Northrop Team received unearned fees from Lakeview Title in exchange for referring the class of Plaintiffs to Lakeview Title for settlement. Specifically, the Plaintiffs assert that half of the "Title Insurance" Fee on every Plaintiffs' HUD, in the Baehrs' case the Title Insurance fee of $2,990.00, was channeled back to The Northrop Team in exchange for the referral to Lakeview. In their Joint Motion for Summary Judgment, the Defendants argue that they are entitled to judgment as a matter of law on Plaintiffs' claim because the Plaintiffs do not have standing under Article III of the Constitution, and discovery has shown that their claim is not entitled to equitable tolling.

I. The Plaintiffs do not have Article III Standing

Federal jurisdiction under Article III of the United States Constitution is limited to "Cases" and "Controversies." U.S. CONST. ART. III, § 2. "One element of the case-or-controversy requirement is that plaintiffs must establish that they have standing to sue." *Clapper v. Amnesty Int'l USA*, 568 U.S. 398, 133 S.Ct. 1138, 185 L.Ed.2d 264 (2013). The "irreducible minimum requirements" of standing that a plaintiff bears the burden of establishing are (1) an injury in fact, (2) that is fairly traceable to the challenged conduct of the defendant, and (3) that is likely to be redressed by a favorable judicial decision. *Spokeo, Inc. v. Robinson*, —— U.S. ——, 136 S.Ct. 1540, 1547, 194 L.Ed.2d 635 (2016) (quoting *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560, 112 S.Ct. 2130, 119 L.Ed.2d 351 (1992)); *David v. Alphin*, 704 F.3d 327, 333 (4th Cir. 2013).

It has been long settled "that Congress cannot erase Article III's standing requirements by statutorily granting the right to sue to a plaintiff who would not otherwise have standing." *Raines v. Byrd*, 521 U.S. 811, 820, 117 S.Ct. 2312, 138 L.Ed.2d 849 (1997). The United States Supreme Court most recently reaffirmed this principle in *Spokeo, Inc. v. Robinson*, —— U.S. ——, 136 S.Ct. 1540, 194 L.Ed.2d 635 (2016) when explaining that "Congress' role in identifying and elevating intangible harms does not mean that a plaintiff automatically satisfies the injury-in-fact requirement whenever a statute grants a person a statutory right and purports to authorize that person to sue to vindicate that right." 136 S.Ct. at 1549. Rather, a plaintiff must still establish " 'an invasion of a legally protected interest' that is 'concrete and particularized' and 'actual or imminent, not conjectural or hypothetical.' " *Id.* at 1548 (citing *Lujan*, 504 U.S. at 560, 112 S.Ct. 2130). In other words, "a bare procedural violation, divorced from any concrete harm" does not satisfy the injury-in-fact requirement. *Id.* at 1549.

The Plaintiffs do not dispute that the $2,990.00 they paid for Title Insurance to Chicago Title Insurance Company—which they assert was in some part channeled back to the Northrop Defendants—was a reasonable fee to pay for title insurance, and therefore they were not overcharged for services. Rather, the Plaintiffs argue that they have standing to bring their RESPA claim because they were "deprived of impartial and fair competition between settlement services." (Am. Compl., ECF No. 89 at ¶ 23; P. Baehr Dep., ECF No. 158-4 at 248.) In response, the Defendants argue that Section 8(a) of RESPA does not protect "impartial and fair competition" in this context and Plaintiffs did not suffer a concrete harm under Article III.

In arguing that being deprived of "impartial and fair competition" is sufficient to establish Article III standing in this case, the Plaintiffs rely on this Court's rulings in *Robinson v. Fountainhead Title Group Corp.*, 447 F.Supp.2d 478 (D. Md. 2006)and *Fangman v. Genuine Title, LLC*, No. RDB-14-0081, 2015 WL 8315704 (D. Md. Dec. 9, 2015). First of all, both of these cases pre-date the Supreme Court's ruling in *Spokeo*. Secondly, both are distinguishable from the facts of this case because they involved allegations of overcharging and the creation of sham companies or a controlled or affiliated business agreement to assist in the kickback scheme.

In *Robinson*, the plaintiff alleged that the defendants Fountainhead Title Group Corporation, Long & Foster, and Mid-States Title Insurance Agency, Inc. established a sham limited liability company, Assurance Title, LLC, to appear on closing documents for allegedly completing title services. 447 F.Supp.2d at 485. The plaintiff alleged that in reality, Fountainhead completed the title services and the fee the borrowers paid Assurance were channeled to Long & Foster and Mid-States pursuant to an agreement to refer closing and settlement services to Fountainhead. *Id.* at 485-86. The defendants moved to dismiss, arguing that the plaintiff was required to allege an "overcharge" in order to have standing under Section 8(a) of RESPA. *Id.* at 486. This Court denied the motion, holding that the plaintiff had standing first because the plaintiff had in fact alleged an overcharge. *Id.* at 488. Second, this Court relied on RESPA's legislative history with respect to concerns regarding controlled business arrangements to conclude that "in addition to the overcharges alleged, the alleged § 8(a) violation presents the possibility for other harm, including a lack of impartiality in the referral and a reduction of competition between settlement service provides." *Id.* at 488-89.

Similarly in *Fangman v. Genuine Title, LLC*, No. RDB-14-0081, 2015 WL 8315704 (D. Md. Dec. 9, 2015), the plaintiffs alleged that the defendant Genuine Title, LLC, by itself and through sham companies, provided cash payments and marketing materials to mortgage brokers who then referred their client to Genuine Title for settlement services. 2015 WL 8315704, at *1. The plaintiffs claimed that the cash payments were concealed from them and not disclosed on their HUD-1s, and Genuine Title failed to disclose their affiliated business relationships. *Id.* at *3. When the defendants moved to dismiss for lack of standing, this Court held that the plaintiffs satisfied the actual injury requirement when they alleged that "as a result of Defendants' kickback scheme, they 'were deprived of kickback free settlement services and process' and that '[b]ut for' the kickback scheme, their settlement fees 'would have been much lower.' " *Id.* at *5.

Unlike in *Robinson* and *Fangman*, it is undisputed from the fully developed record and oral argument at the hearing of November 20, 2018 that the $2,990.00 figure the Plaintiffs allege was in some part channeled back to the Northrop Defendants was a reasonable fee to pay for title insurance. Accordingly, there is no genuine dispute of material fact that the Plaintiffs were not in any way overcharged for services due to the alleged kickback scheme. Therefore, while RESPA was enacted, in part, to result "in the elimination of kickbacks or referral fees that tend to increase unnecessarily the costs of certain settlement services," Plaintiffs have not shown that the costs of settlement services were unnecessarily increased. 12 U.S.C. § 2601(b).

Moreover, it is undisputed that the Defendants did not create a sham company to orchestrate the alleged scheme and there was not a controlled or affiliated business agreement between The Northrop Team and Lakeview Title. The Plaintiffs repeatedly emphasize that Lakeview Title was not one of the twelve closing and title insurance companies listed on Long & Foster's ABA Disclosure Statement. However, that was a form prepared by Long & Foster, not The Northrop Team, in which the Defendants assert Long & Foster voluntarily disclosed "business relationships" it had with twelve closing or title insurance companies. (ECF No. 210-31; Defs.' Rep., ECF No. 212 at 21.) Second, under RESPA, neither Long & Foster nor The Northrop Team had an affiliated business arrangement with Lakeview Title that required disclosure. RESPA defines an affiliated business arrangement as:

> An arrangement in which (A) a person who is in a position to refer business incident to or a part of a real estate settlement service involving a federally related mortgage loan, or an associate of such person, has either an affiliate relationship with or a direct or beneficial ownership interest of more than 1 percent in a provider of settlement services; and (B) either of such

> persons directly or indirectly refers such business to that provider or affirmatively influences the selection of that provider.

12 U.S.C. § 2602(7). RESPA's controlling regulations then define "affiliate relationship" as

> The relationship among business entities where one entity has effective control over the other by virtue of a partnership or other agreement or is under common control with the other by a third entity or where an entity is a corporation related to another corporation as parent to subsidiary by an identity of stock ownership.

12 C.F.R. § 1024.15(c). The Plaintiffs do not direct this Court to any evidence that The Northrop Team, or Long & Foster, had an affiliated business arrangement under RESPA with Lakeview Title that required disclosure.[15] Accordingly, to the extent this Court in *Robinson* and *Fangman* relied on RESPA's concerns regarding controlled or affiliated business arrangements, and therefore credited a deprivation of impartiality and fair competition as a potential injury, those interests are not at issue here.

Looking at the undisputed facts, Plaintiffs knew at the time they put an offer in for the Glenwood home that they could choose their own settlement and title company. Rather than shop for their own company, however, they elected to continue with Lakeview Title even after Maija Dykstra told them that "we do all of our settlements at Lakeview." Therefore, despite the currently alleged interest in "fair and impartial competition between settlement services," the Plaintiffs took no action at the time to find their own settlement company or inquire further into the settlement company recommended to them. Moreover, the Plaintiffs do not claim that they were at all dissatisfied with the services Lakeview Title provided. Finally, the Plaintiffs also do not claim that the fees paid to Lakeview Title, including portions that are alleged to have been channeled to The Northrop Team, were unreasonable or undeserved. Plaintiffs chose to follow the referral to Lakeview Title, were satisfied with the services they received, and paid a reasonable fee. In light of all of these undisputed facts, the Plaintiffs cannot now allege that they satisfy Article III's injury in fact requirement because they were deprived of "impartial and fair competition between settlement services."

Finally, although not asserted in the Amended Complaint, the Plaintiffs also argue in their Response to the Motion for Summary Judgment that they were injured because "they paid for a service—the impartial advice and advocacy of their fiduciaries—that they did not receive." (Pls.' Resp., ECF No. 210 at 33.) This theory, however, also contradicts the undisputed facts for several reasons. First, Patrick Baehr testified that he and his wife did not discuss with anyone on The Northrop Team the topic of finding a settlement and title company. This was consistent with the Exclusive Right to Represent Buyer Agreement with Long & Foster providing that the Baehrs retained Long & Foster "in the acquisition of real property," including "any purchase, option, exchange or lease of property or an agreement to do so," and not for any "other professional service." (ECF No. 158-8.) Accordingly, finding a settlement company was not a service the Plaintiffs actively solicited or bargained for from Long & Foster or The Northrop Team. Second, before choosing to continue with Lakeview Title, Maija Dykstra indicated that a relationship of some nature existed between The Northrop Team and Lakeview Title when she stated "we do all of our settlements at Lakeview." Still, the Plaintiffs did not inquire into why The Northrop Team always referred settlements to Lakeview Title or in any way inquired into the referral. Finally, by electing to proceed with Lakeview Title, the Plaintiffs received settlement services they were satisfied with and thought deserved to be compensated. Therefore, the Plaintiffs cannot now assert that they relied on, or were injured by a deprivation of, "impartial advice and advocacy" with respect to the Lakeview Title referral.[16]

For all of these reasons, there is no genuine dispute of material fact that the Plaintiffs assert only "a bare procedural violation, divorced from any concrete harm" and do not satisfy the injury-in-fact requirement of Article III Standing. Accordingly, Plaintiffs do not have standing to bring their claim, and for this reason alone the Defendants' Joint Motion for Summary Judgment is GRANTED.

II. Alternatively, Plaintiffs' claim is barred by RESPA's statute of limitations

Claims brought pursuant to Section 8 of REPSA, 12 U.S.C. § 2607, are subject to a one year statute of limitations. Specifically, claims brought under Section 8 must be asserted within one year "from the date of the occurrence of the violation." 12 U.S.C. § 2614. In this case, the date of the occurrence of the violation refers to the date the Plaintiffs closed on their home, July 25, 2008. *Fangman v. Genuine Title, LLC*, No. CV RDB-14-0081, 2016 WL 6600509, at *4 (D. Md. Nov. 8, 2016) (quoting *Grant v. Shapiro & Burson, LLP*, 871 F.Supp.2d 462, 470 (D. Md. 2012)). Because the Named Plaintiffs did not file suit until March 27, 2013, their claim falls outside of the one year statute of limitations.

As this Court has consistently held, however, claims brought under RESPA may be equitably tolled. *Fangman v. Genuine Title, LLC*, No. CV RDB-14-0008, 2015 WL 8315704, at *7 (D. Md. Dec. 9, 2015) (citing *United States v. Kwai Fun Wong*, ––– U.S. ––––, 135 S.Ct. 1625, 1630, 191 L.Ed.2d 533 (2015); *Grant v. Shapiro & Burson, LLP, et al.*, 871 F.Supp.2d 462, 470 n.10 (D. Md. 2012)); *Bezek v. First Mariner Bank*, 293 F.Supp.3d 528, 534 (D. Md. 2018). In *Menominee Indian Tribe of Wisconsin v. United States*, ––– U.S. ––––, 136 S.Ct. 750, 193 L.Ed.2d 652 (2016), a unanimous United States Supreme Court held that equitable tolling requires the plaintiff to establish two elements: "(1) that he has been pursuing his rights diligently, and (2) that some extraordinary circumstance stood in his way and prevented timely filing." 136 S.Ct. at 755 (quoting *Holland v. Florida*, 560 U.S. 631, 649, 130 S.Ct. 2549, 177 L.Ed.2d 130 (2010)); *see also Cunningham v. Commissioner of Internal Revenue*, No. 17-1433, 716 F. App'x 182 (4th Cir. Jan. 18, 2018). The Supreme Court emphasized these two requirements as distinct elements, "not merely factors of indeterminate or commensurable weight." 136 S.Ct. at 756 (citing *Pace v. DiGuglielmo*, 544 U.S. 408, 418, 125 S.Ct. 1807, 161 L.Ed.2d 669 (2005)). Accordingly, an insufficient showing of either diligence or extraordinary circumstances is fatal to a claim for equitable tolling. *SeeLawrence v. Florida*, 549 U.S. 327, 127 S.Ct. 1079, 166 L.Ed.2d 924 (2007) (holding that equitable tolling did not apply solely because the petitioner "fell far short of showing extraordinary circumstances").

The extraordinary circumstance element "is met only where the circumstances that caused a litigant's delay are both extraordinary *and* beyond its control." *Menominee*, 136 S.Ct. at 756 (emphasis in original). In other words, the circumstances must combine to render "critical information ... undiscoverable." *Gould v. U.S. H.H.S*, 905 F.2d 738, 745–46 (4th Cir. 1990) (en banc). While courts have consistently held that fraudulent concealment by the defendant is a circumstance that may justify equitable tolling, *see e.g.*, *Supermarket of Marlinton, Inc. v. Meadow Gold Dairies, Inc.*, 71 F.3d 119, 122 (4th Cir. 1995); *Grant v. Shapiro & Burson, LLP*, 871 F.Supp.2d 462, 470 n.10 (D. Md. 2012), a RESPA violation in and of itself, is not a "self-concealing" wrong. *Minter v. Wells Fargo Bank, N.A.*, 924 F.Supp.2d 627, 642 (D. Md. 2013).

As to due diligence, the Supreme Court has held that "the diligence prong ... covers those affairs within the litigant's control." *Menominee Indian Tribe of*

Wisconsin v. United States, ––– U.S. ––––, 136 S.Ct. 750, 756, 193 L.Ed.2d 652 (2016). This element requires "reasonable diligence," not "maximum feasible diligence." *Holland v. Florida*, 560 U.S. 631, 653, 130 S.Ct. 2549, 177 L.Ed.2d 130 (2010). In *Go Computer, Inc. v. Microsoft Corp.*, 508 F.3d 170 (4th Cir. 2007), the United States Court of Appeals for the Fourth Circuit explained that in the context of fraud:

> To be sure, a diligent plaintiff need not engage in ceaseless inquiry when reasonable inquiry does not expose grounds for suit. But nothing in *Supermarket of Marlinton*[, 71 F.3d 119 (4th Cir. 1995)] excuses a negligent plaintiff from the diligence requirement—not even if a fraud is allegedly well-disguised. Fraud by its nature is something perpetrators take pains to disguise, and plaintiffs' notion that allegedly concealed fraud excuses the need for any diligence on plaintiffs' part would permit statutory periods to be tolled indefinitely, even when plaintiffs could reasonably be expected to bring suit.

508 F.3d at 179.[17]

The Fourth Circuit has emphasized that "equitable tolling is appropriate 'in those rare instances where—due to circumstances external to the party's own conduct—it would be unconscionable to enforce the limitation period against the party and gross injustice would result.' " *Cunningham*, 716 F. App'x 182 at 184 (internal quotation marks omitted) (quoting *Whiteside v. United States*, 775 F.3d 180, 184 (4th Cir. 2014) (en banc)). Accordingly, federal courts employ equitable tolling "sparingly," *Irwin v. Dep't of Veterans Affairs*, 498 U.S. 89, 96, 111 S.Ct. 453, 112 L.Ed.2d 435 (1990), as "a rare remedy to be applied in unusual circumstances." *Wallace v. Kato*, 549 U.S. 384, 396, 127 S.Ct. 1091, 166 L.Ed.2d 973 (2007).

The Plaintiffs assert that the Defendants violated Section 8(a) of RESPA by orchestrating a scheme whereby The Northrop Defendants received approximately half of the Title Insurance fee listed on each of the Plaintiffs' HUD-1 in unearned fees for referring the Plaintiffs to Lakeview Title for settlement. The Plaintiffs argue that their claim is entitled to equitable tolling because the Defendants fraudulently concealed this kickback scheme through the Marketing and Services Agreement which The Northrop Team did not disclose to the Plaintiffs. Moreover, the Plaintiffs assert that even if the Defendants had disclosed the Agreement, the Plaintiffs would have only discovered a seemingly valid arrangement between The Northrop Team and Lakeview Title. Under these circumstances, the Plaintiffs argue they exercised reasonable diligence and therefore their claim is entitled to equitable tolling. As explained below, while, like this Court noted in *Bezek v. First Mariner Bank*, 293 F.Supp.3d 528, 540 (D. Md. 2018), the class of Plaintiffs "may have some interest in accountability and financial compensation, Congress firmly expressed an interest in providing certainty to the real estate market when it set the RESPA statute of limitations at one year," and the Plaintiffs have not established that their claim is entitled to equitable tolling.

On the issue of whether the Defendants concealed the Marketing Agreement, Defendants present this Court with ample testimony that both The Northrop Team and Lakeview Employees were aware of the Marketing Agreement. Defendant Lindell Eagan, Corporate Designee for Lakeview Title Company, testified that Lakeview Title freely admitted to having a Marketing Agreement with The Northrop Team, although it was not practice to disclose the terms of the agreement. (ECF No. 158-18 at 157.) Kevin Yungman, a closing attorney for Lakeview from 2005 through September of 2014, testified that "it was common knowledge that Lakeview had some type of relationship with The Northrop Team" and he had "dozens" of communications with persons outside of the Northrop Team or Lakeview regarding the Marketing Agreements. (ECF No. 158-19 at 179, 181.) The Defendants also cite to several other Lakeview and Northrop employees who knew about the marketing relationship between The Northrop Team and Lakeview Title. (Barbara Cohn Dep., ECF No. 158-21 at 36; Tracy Cotty Dep., ECF No. 158-23 at 44-45.) Moreover, the Defendants challenge the Plaintiffs' argument that the Defendants actively concealed the kickback scheme through the Marketing Agreement when the Plaintiffs never inquired into, or were aware of, the Marketing Agreement itself. (Defs.' Rep., ECF No. 212 at 15.)

Even assuming, however, that the Defendants did fraudulently conceal the kickback scheme, there is no genuine issue of material fact that the Plaintiffs failed to exercise reasonable diligence to discover their claim.

The month the Beahrs closed on their home, they knew that they could choose their own settlement and title company. Despite knowing this, and the fact that they now claim that "impartial and fair competition between settlement services" was an important interest to them, the Plaintiffs did not take any action to find their own settlement and title company. Rather, before the Plaintiffs closed on their home, Dykstra informed them that Lakeview Title would handle their settlement. Moreover, she stated "we do all of our settlements at Lakeview." (ECF No. 158-4 at 139.)

Notwithstanding the apparent existence of a business relationship between The Northrop Team and Lakeview Title, the Plaintiffs did not at all inquire about a potential relationship between Lakeview and The Northrop Team. Rather, they elected to use Lakeview without objection or further inquiry. Accordingly, in light of a potential relationship between Lakeview and The Northrop Team—which the Plaintiffs repeatedly emphasize was not disclosed to the Plaintiffs on Long & Foster's ABA Disclosure Statement—the Plaintiffs took no steps to investigate the propriety of such a relationship. Even after closing on their homes, the named Plaintiffs and other members of the class went more than four and a half years satisfied with the services they received from Long & Foster, The Northrop Team, and Lakeview Title, and content with the fees they paid each party. Had they inquired into that relationship, Lindell Eagan, along with multiple Lakeview and The Northrop Team employees, testified that Lakeview and the other parties freely admitted to having the Marketing

Agreement. (Eagan Dep., ECF No. 158-18 at 157; Yungman Dep., ECF No. 158-19 at 179-81.)

The Plaintiffs then argue, however, that the relevant inquiry is not whether the Plaintiffs were aware of a relationship between Lakeview Title and The Northrop Team or the Marketing Agreement, but whether they were aware of the kickbacks. On this note, the Plaintiffs assert that "[t]he Marketing Agreement was designed to look legitimate, so it would not have caused a reasonable person to inquire further, even if the Plaintiffs had known about it." (ECF No. 210 at 16.) This assertion contradicts, however, the Plaintiffs' argument that the Marketing Agreement was clearly a sham for the kickbacks.

The Plaintiffs argue that "the Marketing Agreement itself reveals that it was created solely to conceal the kickbacks." (Pls.' Resp., ECF No. 210 at 20.) They emphasize the fact that the Marketing Agreement begins with the requirement that The Northrop Team refer its clients exclusively to Lakeview, "but then later disclaims any relationship between these referrals and the monthly payments." (*Id.* (citing ECF No. 210-10 at ¶¶ 2.1, 6.1).) Moreover, the Plaintiffs assert that the Marketing Agreement only provided for "unspecified 'marketing services.' " (*Id.* at ¶ 7 (citing ECF No. 210 at ¶ 2.1).) Specifically, the Plaintiffs emphasize that the Marketing Agreement "made no requirements concerning the placement, circulation, volume, size, or medium of the supported advertising." (*Id.* at ¶ 8.) Rather, the only requirement the Marketing Agreement did include was that The Northrop Team website provide a link to Lakeview, which the Plaintiffs assert was not done until well after this action was filed. (*Id.*) Accordingly, on the one hand, the Plaintiffs argue that had the Plaintiffs discovered the Marketing Agreement, they would not have had reason to inquire further, but on the other hand, argue that the Marketing Agreement was clearly a sham on its face for the above reasons.

The Plaintiffs also argue that the Plaintiffs were entitled to relax their guard because The Northrop Defendants were their fiduciaries, and therefore "the Plaintiffs were permitted to rely on their fiduciaries and not undertake additional inquiry until something excited them to inquire." (Pls.' Resp., ECF No. 210 at 26-28.) This Court cannot ignore, however, that when Patrick Baehr was asked during his deposition whether he believed that the Defendants did anything to affirmatively prevent him from discovering his RESPA claim or otherwise concealed his RESPA claim, he responded "no." (ECF No. 158-4 at 214.) In response to "what efforts did you make to discover your claim after you closed on your home in 2008?" he testified "none." (*Id.* at 206.) Accordingly, even if there were merit to the Plaintiffs' claim that, in this context, the Plaintiffs could "relax [their] guard and rely upon the representations by the other in whom they have placed their confidence" with respect to the Lakeview Title referral, (Pls.' Resp., ECF No. 210 at 27 (citing *Brown v. Neuberger, Quinn, Gielen, Rubin & Gibber, P.A.*, 731 F.Supp.2d 443 (D. Md. 2010), *aff'd*, 495 F. App'x 350 (4th Cir. 2012))),[18] the Plaintiffs—through the undisputed record and Patrick Baehrs' own testimony—exercised no diligence whatsoever despite the apparent existence of a business relationship between The Northrop Team and Lakeview Title.

When enacting RESPA, Congress specifically provided that the statute of limitations period would begin to run on "the date of the occurrence of the violation." 12 U.S.C. § 2614. Courts cannot "toll indefinitely the limitations period for claims under RESPA until a lawyer can find the right plaintiff to join a lawsuit and notify other putative plaintiffs" because doing so "would effectively write the statute of limitations out of RESPA." *Cunningham v. M&T Bank Corp.*, 814 F.3d 156, 164 (3d Cir. 2016). Plaintiffs have not demonstrated that their case presents the "rare instance" where enforcing RESPA's statute of limitations would be unconscionable. Therefore, even if the Plaintiffs had standing to bring their claim, the claim would be barred by the statute of limitations and equitable tolling does not apply.

CONCLUSION

For the reasons stated above, Defendants' Joint Motion for Summary Judgment (ECF No. 158) is GRANTED and Judgment is ENTERED in favor of Defendants. A separate order follows.

Footnotes

1As noted *infra* Note 10, this case has been previously assigned to four other Judges of this Court. It was assigned to the undersigned on November 30, 2017 and discovery was ultimately completed giving rise to the filing of dispositive motions.

2Accordingly, Plaintiffs' Motion to Revise Judgment and for Leave to file a Second Amended Complaint (ECF No. 160) and Plaintiffs' Motion to Modify the Class (ECF No. 228) are MOOT.

3The other purposes of RESPA include effecting certain changes to result in: "more effective advance disclosure to home buyers and sellers of settlement costs," "a reduction in the amounts home buyers are required to place in escrow accounts established to insure the payment of real estate taxes and insurance," and "significant reform and modernization of local recordkeeping of land title information." 12 U.S.C. § 2601(b).

4Under Maryland state law, all real estate agents must be licensed and affiliated with a licensed real estate brokerage for the purpose of providing real estate brokerage services. *See* Md. Code. Ann., Bus. Occ. & Prof., § 17-310(b) (salespersons must be affiliated with a real estate brokerage that is headed by a broker, and offer real estate brokerage services through that brokerage).

5"P. Baehr Dep." refers to the deposition testimony of Plaintiff Patrick Baehr while "C. Baehr Dep." refers to the deposition testimony of Plaintiff Christine Baehr.

6As explained in more detail below, RESPA permits affiliated business arrangements so long as certain conditions are met, including disclosure of the existence of such an arrangement to the person being referred. 12 U.S.C. § 2607(c). RESPA defines an ABA as "an arrangement in which (A) a person who is in a position to refer business incident to or a part of a real estate settlement service involving a federally related mortgage loan, or an associate of such person, has either an affiliate relationship with or a direct or beneficial ownership interest of more than 1 percent in a provider of settlement services; and (B) either of such persons directly or indirectly refers such business to that provider or affirmatively influences the selection of that provider." *Id.* at § 2602(7).

7Specifically, the form stated that Long & Foster had business relationships with the following companies to close a purchase or sale and/or for title insurance:

> RGS Title and/or its affiliate Mid-States Title of Virginia, LLC
>
> Brennan Title Company and/or its affiliate Positive Title, LLC
>
> MBH Settlement Group LC and/or its affiliate Eastern Title LLC
>
> Saga Title Group, LLC
>
> Settlement Professionals, LLC
>
> Bon Air Title and/or its affiliate Bon Air/Long & Foster Title Agency, LLC
>
> Shaheen & Shaheen and/or its affiliate Long & Foster Great American Title, LLC
>
> Shaffer Title & Escrow Inc. and/or its affiliate Long & Foster Shaffer Title Services, LLC

Homestead Settlement Services, LLC and/or its affiliate Mid-States Title of Roanoke, LLC

Mid States Title of Southwest Virginia, LLC

Trump & Trump and/or its affiliate Long 7 Foster of WV Title Insurance Agency, LLC

Long & Foster Settlement Services, LLC

8Specifically, in 2000 the Baehrs purchased a home for around $310,000 and paid $375 to the title company Residential Title & Escrow Company. (ECF No. 158-4 at 229, 230.)

9The HUD-1 Settlement Statement is a standard form indicating fees charged to a borrower by a mortgage lender or broker.

10Since this case was initially assigned to Judge Bredar on March 27, 2013, it has been subsequently reassigned to Judge Nickerson that same day, to Judge Quarles on May 6, 2013, to Judge Motz on January 27, 2016, to Judge Russell on October 13, 2016, and finally to the undersigned on November 30, 2017.

11As explained below, the Plaintiffs now assert that discovery has shown that the kickback The Northrop Team received for referrals to Lakeview Title was 50% of the title insurance premium. In the Baehrs' case, that was around $1,495. (Pls' Opp., ECF No. 210 at ¶ 18.)

12In addition to the rulings described below, this Court also held that the Plaintiffs adequately pled a claim against Lindell Eagan.

13This standard for equitable tolling pre-dated the Supreme Court's current equitable tolling standard announced in *Menominee Indian Tribe of Wisconsin v. United States*, —— U.S. ——, 136 S.Ct. 750, 193 L.Ed.2d 652 (2016).

14Although nothing in this Court's Order indicates that the dismissals were with prejudice, the parties assumed—and in a subsequent Opinion this Court indicated—that the dismissals were with prejudice. *See Baehr v. Creig Northrop Team, P.C.*, 2014 WL 3725906, at *4 (D. Md. July 24, 2014) ("The Plaintiffs seek to amend the Court's dismissal of the claim against Long & Foster to be without prejudice.") Subsequently, on February 13 and 14, 2014, the Plaintiffs filed Motions to file a Second Amended Complaint and to Alter/Amend Judgment, seeking to (1) amend this Court's dismissal of the claim against Long & Foster to be without prejudice and (2) filed a second amended complaint to add specific factual allegations against Long & Foster. (ECF Nos. 65, 66.) Judge Quarles denied both Motions, again holding that Plaintiffs failed to state a claim against Long & Foster. (ECF Nos. 84, 85; *Baehr v. Creig Northrop Team, P.C.*, 2014 WL 3725906 (D. Md. July 24, 2014).)

15Rather, the Plaintiffs direct this Court to an email sent to "executives@northropteam.com" which included an internal memo that referred to Lakeview Title as an "affiliate." (ECF No. 210-32.) This internal reference to Lakeview Title as an "affiliate," however, is insufficient to establish a genuine issue of material fact that The Northrop Team had "either an affiliate relationship with" as defined by 12 C.F.R. § 1025.14(c) above, or "a direct or beneficial ownership interest of more than 1 percent in" Lakeview Title. 12 U.S.C. § 2602(7).

16The Plaintiffs also argue that they "did not receive a title fee discount that they were entitled to" and under a theory of unjust enrichment, the Plaintiffs are entitled to the amount that the Defendants were unjustly enriched by with the referral to Lakeview. (Pls' Resp., ECF No. 210 at 33-34.) Beginning with the former theory, the Plaintiffs rely on *Gussin v. Shockey*, 725 F.Supp. 271, 275 (D. Md. 1989), *aff'd*, 933 F.2d 1001 (4th Cir. 1991). In that case, however, this Court granted summary judgment for the plaintiffs on their claim that the defendant violated implied fiduciaries duties as the plaintiffs' agent when he "advised them to pay prices for horses that included a secret benefit for himself and *that was in excess of the price for which he could have purchased the horses* for the [plaintiffs]." 725 F.Supp. at 275 (emphasis added). Here, even if the Plaintiffs had shown that The Northrop Team owed the Plaintiffs a fiduciary duty with respect to referral of settlement services, there is no allegation of overcharging. As to the former theory under unjust enrichment, this theory again relies on the underlying argument that the Plaintiffs paid The Northrop Team for "impartial advice and advocacy" with respect to obtaining settlement services, which this Court rejects as explained above. Moreover, unjust enrichment is an independent cause of action which is not permitted under RESPA. *See, e.g.*, *Minter v. Wells Fargo Bank, N.A.*, 593 F.Supp.2d 788 (D. Md. 2009); *Eslick v. Cenlar, Central Loan Administration and Reporting*, No. 2:17-cv-381, 2017 WL 4836541 (E.D. Va. Oct. 3, 2017).

17Although *Go Computer* was decided in the context of the statute of limitations for federal antitrust claims, like RESPA, that statute of limitations bars any action "unless commenced within four years after the cause of action accrued," which is not when a plaintiff discovers an injury, but "when a defendant *commits an act*that injures a plaintiff's business." 508 F.3d at 173 (citations omitted) (emphasis added).

18Both *Brown* and the other case the Plaintiffs cite to, *Frederick Road Ltd. Partnership v. Brown & Sturm*, 360 Md. 76, 99, 756 A.2d 963 (Md. 2000), involved Maryland state law's "continuation of events theory," which specifically permits a statute of limitations to be tolled during the existence of a fiduciary or confidential relationship. *Brown*, 731 F.Supp.2d at 451 (citing *MacBridge v. Pishvaian*, 402 Md. 572, 937 A.2d 233 (Md. 2007)); *Frederick Road Ltd. Partnership*, 360 Md. at 96-97, 756 A.2d 963 (citing *W., B. & A. Elec. R.R. Co. v. Moss*, 130 Md. 198, 100 A. 86 (Md. 1917)).

FILED: May 12, 2020

UNITED STATES COURT OF APPEALS

FOR THE FOURTH CIRCUIT

No. 19-1024

(1:13-cv-00933-RDB)

PATRICK BAEHR; CHRISTINE BAEHR

Plaintiffs - Appellants

v.

THE CREIG NORTHROP TEAM, P.C.; CREIGHTON EDWARD NORTHROP, III;

LINDELL C. EAGAN; LAKEVIEW TITLE COMPANY, INC.

Defendants - Appellees

and

CARLA NORTHROP; LONG & FOSTER REAL ESTATE, INC.

Defendants

ORDER

The court denies the petition for rehearing and rehearing en banc. No judge requested a poll under Fed. R. App. P. 35 on the petition for rehearing en banc.

Entered at the direction of the panel: Chief Judge Gregory, Judge King, and Judge

Quattlebaum.

For the Court

/s/ Patricia S. Connor, Clerk

12 U.S.C.A. § 2601

§ 2601. Congressional findings and purpose

(a) The Congress finds that significant 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. The Congress also finds that it has been over two years since the Secretary of Housing and Urban Development and the Administrator of Veterans' Affairs submitted their joint report to the Congress on "Mortgage Settlement Costs" and that the time has come for the recommendations for Federal legislative action made in that report to be implemented.

(b) It is the purpose of this chapter to effect certain changes in the settlement process for residential real estate that will result--

(1) in more effective advance disclosure to home buyers and sellers of settlement costs;

(2) in the elimination of kickbacks or referral fees that tend to increase unnecessarily the costs of certain settlement services;

(3) in a reduction in the amounts home buyers are required to place in escrow accounts established to insure the payment of real estate taxes and insurance; and

(4) in significant reform and modernization of local recordkeeping of land title information.

12 U.S.C.A. § 2602
§ 2602. Definitions
Effective: July 21, 2011

For purposes of this chapter--

(1) the term "federally related mortgage loan" includes any loan (other than temporary financing such as a construction loan) which--

(A) is secured by a first or subordinate lien on residential real property (including individual units of condominiums and cooperatives) designed principally for the occupancy of from one to four families, including any such secured loan, the proceeds of which are used to prepay or pay off an existing loan secured by the same property; and

(B)(i) is made in whole or in part by any lender the deposits or accounts of which are insured by any agency of the Federal Government, or is made in whole or in part by any lender which is regulated by any agency of the Federal Government, or

(ii) is made in whole or in part, or insured, guaranteed, supplemented, or assisted in any way, by the Secretary or any other officer or agency of the Federal Government or under or in connection with a housing or urban development program administered by the Secretary or a housing or related program administered by any other such officer or agency; or

(iii) is intended to be sold by the originating lender to the Federal National Mortgage Association, the Government National Mortgage Association, the Federal Home Loan Mortgage Corporation, or a financial institution from which it is to be purchased by the Federal Home Loan Mortgage Corporation;

or

(iv) is made in whole or in part by any "creditor", as defined in section 1602(f) of Title 15, who makes or invests in residential real estate loans aggregating more than $1,000,000 per year, except that for the purpose of this chapter, the term "creditor" does not include any agency or instrumentality of any State;

(2) the term "thing of value" includes any payment, advance, funds, loan, service, or other consideration;

(3) the term "settlement services" includes any service provided in connection with a real estate settlement including, but not limited to, the following: title searches, title examinations, the provision of title certificates, title insurance, services rendered by an attorney, the preparation of documents, property surveys, the rendering of credit reports or appraisals, pest and fungus inspections, services rendered by a real estate agent or broker, the origination of a federally related mortgage loan (including, but not limited to, the taking of loan applications, loan processing, and the underwriting and funding of loans), and the handling of the processing, and closing or settlement;

(4) the term "title company" means any institution which is qualified to issue title insurance, directly or through its agents, and also refers to any duly authorized agent of a title company;

(5) the term "person" includes individuals, corporations, associations, partnerships, and trusts;

(6) the term "Secretary" means the Secretary of Housing and Urban Development;

(7) the term "affiliated business arrangement" means an arrangement in which (A) a person who is in a position to refer business incident to or a part of a

real estate settlement service involving a federally related mortgage loan, or an associate of such person, has either an affiliate relationship with or a direct or beneficial ownership interest of more than 1 percent in a provider of settlement services; and (B) either of such persons directly or indirectly refers such business to that provider or affirmatively influences the selection of that provider;

(8) the term "associate" means one who has one or more of the following relationships with a person in a position to refer settlement business: (A) a spouse, parent, or child of such person; (B) a corporation or business entity that controls, is controlled by, or is under common control with such person; (C) an employer, officer, director, partner, franchisor, or franchisee of such person; or (D) anyone who has an agreement, arrangement, or understanding, with such person, the purpose or substantial effect of which is to enable the person in a position to refer settlement business to benefit financially from the referrals of such business; and

(9) the term "Bureau" means the Bureau of Consumer Financial Protection.

12 U.S.C.A. § 2607

§ 2607. Prohibition against kickbacks and unearned fees

Effective: July 21, 2011

(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.

(c) Fees, salaries, compensation, or other payments

Nothing in this section shall be construed as prohibiting (1) the payment of a fee (A) to attorneys at law for services actually rendered or (B) by a title company to its duly appointed agent for services actually performed in the issuance of a policy of title insurance or (C) by a lender to its duly appointed agent for services actually performed in the making of a loan, (2) 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, (3) payments pursuant to cooperative brokerage and referral arrangements or agreements between real estate agents and brokers, (4) affiliated business arrangements so long as (A) a disclosure is made of the existence of such an arrangement to the person being referred and, in connection with such referral, such person is provided a written estimate of the charge or range of charges generally made by the provider to which the person is referred (i) in the case of a face-to-face referral or a referral made in writing or by electronic media, at or before the time of the referral (and compliance with this requirement in such case may be evidenced by a notation in a written, electronic, or similar system of records maintained in the regular course of business); (ii) in the case of a referral made by telephone, within 3 business days after the referral by telephone,[1] (and in such case an abbreviated verbal disclosure of the existence of the arrangement and the fact that a written disclosure will be provided within 3 business days shall be made to the person being referred during the telephone referral); or (iii) in the case of a referral by a lender (including a referral by a lender to an affiliated lender), at the time the estimates required under section 2604(c) of this title are provided (notwithstanding clause (i) or (ii)); and any required written receipt of such disclosure (without regard to the manner of the disclosure under clause (i), (ii), or (iii)) may be obtained at the closing or settlement (except that a person making a face-to-face referral who provides the written disclosure at or before the time of the referral shall attempt to obtain any required written receipt of such disclosure at such time and if the person being referred chooses not to acknowledge the receipt of the disclosure at that time, that fact shall be noted in the written, electronic, or similar system of records maintained in the regular course of business by the person making the referral), (B) such person is not required to use any particular provider of settlement services, and (C) the only thing of value that is received from the arrangement, other than the payments permitted under this subsection, is a return on the ownership interest or franchise relationship, or (5) such other payments or classes of payments or other transfers as are specified in regulations prescribed by the Bureau, after consultation with the Attorney General, the Secretary of Veterans Affairs, the Federal Home Loan Bank Board, the Federal Deposit Insurance Corporation, the Board of Governors of the Federal Reserve System, and the Secretary of Agriculture. For purposes of the preceding sentence, the following shall not be considered a violation of clause (4)(B): (i) any arrangement that requires a buyer, borrower, or seller to pay for the services of an attorney, credit reporting agency, or real estate appraiser chosen by the lender to represent the lender's interest in a real estate transaction, or (ii) any arrangement where an attorney or law firm represents a client in a real estate transaction and issues or arranges for the issuance of a policy of title insurance in the transaction directly as agent or through a separate corporate title insurance agency that may be established by that attorney or law firm and operated as an adjunct to his or its law practice.

(d) Penalties for violations; joint and several liability; treble damages; actions for injunction by Bureau and Secretary and by State officials; costs and attorney fees; construction of State laws

(1) Any person or persons who violate the provisions of this section shall be fined not more than $10,000 or imprisoned for not more than one year, or both.

(2) Any person or persons who violate the prohibitions or limitations of this section 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.

(3) No person or persons shall be liable for a violation of the provisions of subsection (c)(4)(A) if such person or persons proves by a preponderance of the evidence that such violation was not intentional and resulted from a bona fide error notwithstanding maintenance of procedures that are reasonably adapted to avoid such error.

(4) The Bureau, the Secretary, or the attorney general or the insurance commissioner of any State may bring an action to enjoin violations of this section. Except, to the extent that a person is subject to the jurisdiction of the Bureau, the Secretary, or the attorney general or the insurance commissioner of any State, the Bureau shall have primary authority to enforce or administer this section, subject to subtitle B of the Consumer Financial Protection Act of 2010.

(5) In any private action brought pursuant to this subsection, the court may award to the prevailing party the court costs of the action together with reasonable attorneys fees.

(6) No provision of State law or regulation that imposes more stringent limitations on affiliated business arrangements shall be construed as being inconsistent with this section.

12 C.F.R. § 1024.15

§ 1024.15 Affiliated business arrangements.

Effective: December 30, 2011

(a) General. An affiliated business arrangement is defined in section 3(7) of RESPA (12 U.S.C. 2602(7)).

(b) Violation and exemption. An affiliated business arrangement is not a violation of section 8 of RESPA (12 U.S.C. 2607) and of § 1024.14 if the conditions set forth in this section are satisfied. Paragraph (b)(1) of this section shall not apply to the extent it is inconsistent with section 8(c)(4)(A) of RESPA (12 U.S.C. 2607(c)(4)(A)).

(1) The person making each referral has provided to each person whose business is referred a written disclosure, in the format of the Affiliated Business Arrangement Disclosure Statement set forth in appendix D of this part, of the nature of the relationship (explaining the ownership and financial interest) between the provider of settlement services (or business incident thereto) and the

person making the referral and of an estimated charge or range of charges generally made by such provider (which describes the charge using the same terminology, as far as practical, as section L of the HUD–1 settlement statement). The disclosures must be provided on a separate piece of paper no later than the time of each referral or, if the lender requires use of a particular provider, the time of loan application, except that:

(i) Where a lender makes the referral to a borrower, the condition contained in paragraph (b)(1) of this section may be satisfied at the time that the good faith estimate or a statement under § 1024.7(d) is provided; and

(ii) Whenever an attorney or law firm requires a client to use a particular title insurance agent, the attorney or law firm shall provide the disclosures no later than the time the attorney or law firm is engaged by the client.

(iii) Failure to comply with the disclosure requirements of this section may be overcome if the person making a referral can prove by a preponderance of the evidence that procedures reasonably adopted to result in compliance with these conditions have been maintained and that any failure to comply with these conditions was unintentional and the result of a bona fide error. An error of legal judgment with respect to a person's obligations under RESPA is not a bona fide error. Administrative and judicial interpretations of section 130(c) of the Truth in Lending Act shall not be binding interpretations of the preceding sentence or section 8(d)(3) of RESPA (12 U.S.C. 2607(d)(3)).

(2) No person making a referral has required (as

defined in § 1024.2, "required use") any person to use any particular provider of settlement services or business incident thereto, except if such person is a lender, for requiring a buyer, borrower or seller to pay for the services of an attorney, credit reporting agency, or real estate appraiser chosen by the lender to represent the lender's interest in a real estate transaction, or except if such person is an attorney or law firm for arranging for issuance of a title insurance policy for a client, directly as agent or through a separate corporate title insurance agency that may be operated as an adjunct to the law practice of the attorney or law firm, as part of representation of that client in a real estate transaction.

(3) The only thing of value that is received from the arrangement other than payments listed in § 1024.14(g) is a return on an ownership interest or franchise relationship.

(i) In an affiliated business arrangement:

(A) Bona fide dividends, and capital or equity distributions, related to ownership interest or franchise relationship, between entities in an affiliate relationship, are permissible; and

(B) Bona fide business loans, advances, and capital or equity contributions between entities in an affiliate relationship (in any direction), are not prohibited—so long as they are for ordinary business purposes and are not fees for the referral of settlement service business or unearned fees.

(ii) A return on an ownership interest does not include:

(A) Any payment which has as a basis of calculation no apparent business motive other than distinguishing among recipients of payments on the basis of the amount of their actual, estimated or anticipated referrals;

(B) Any payment which varies according to the relative amount of referrals by the different recipients of similar payments; or

(C) A payment based on an ownership, partnership or joint venture share which has been adjusted on the basis of previous relative referrals by recipients of similar payments.

(iii) Neither the mere labeling of a thing of value, nor the fact that it may be calculated pursuant to a corporate or partnership organizational document or a franchise agreement, will determine whether it is a bona fide return on an ownership interest or franchise relationship. Whether a thing of value is such a return will be determined by analyzing facts and circumstances on a case by case basis.

(iv) A return on franchise relationship may be a payment to or from a franchisee but it does not include any payment which is not based on the franchise agreement, nor any payment which varies according to the number or amount of referrals by the franchisor or franchisee or which is based on a franchise agreement which has been adjusted on the basis of a previous number or amount of referrals by the franchiser or franchisees. A franchise agreement may not be constructed to insulate against kickbacks or referral fees.

(c) Definitions. As used in this section:

Associate is defined in section 3(8) of RESPA (12 U.S.C. 2602(8)).

Affiliate relationship means the relationship among business entities where one entity has effective control over the other by virtue of a partnership or other agreement or is under common control with the other by a third entity or where an entity is a corporation related to another corporation as parent to subsidiary by an identity of stock ownership.

Beneficial ownership means the effective ownership of an interest in a provider of settlement services or the right to use and control the ownership interest involved even though legal ownership or title may be held in another person's name.

Control, as used in the definitions of "associate" and "affiliate relationship," means that a person:

(i) Is a general partner, officer, director, or employer of another person;

(ii) Directly or indirectly or acting in concert with others, or through one or more subsidiaries, owns, holds with power to vote, or holds proxies representing, more than 20 percent of the voting interests of another person;

(iii) Affirmatively influences in any manner the election of a majority of the directors of another person; or

(iv) Has contributed more than 20 percent of the capital of the other person.

Direct ownership means the holding of legal title to an interest in a provider of settlement service except where title is being held for the beneficial owner.

Franchise is defined in FTC regulation 16 CFR 436.1(h).

Franchisor is defined in FTC regulation 16 CFR 436.1(k).

Franchisee is defined in FTC regulation 16 CFR 436.1(i).

FTC means the Federal Trade Commission.

Person who is in a position to refer settlement service business means any real estate broker or agent, lender, mortgage broker, builder or developer, attorney, title company, title agent, or other person deriving a significant portion of his or her gross income from providing settlement services.

(d) Recordkeeping. Any documents provided pursuant to this section shall be retained for 5 years after the date of execution.

(e) Appendix B of this part. Illustrations in appendix B of this part demonstrate some of the requirements of this section.

MD Code, Business Occupations & Professions, § 17-101

§ 17-101. Definitions

Effective: October 1, 2018

In general

(a) In this title the following words have the meanings indicated.

Affiliate

(b) "Affiliate" means, unless the context requires otherwise, to establish between an individual and a real estate broker an employment or other contractual relationship under which the individual is authorized to provide real estate brokerage services on behalf of the real estate broker.

Associate real estate broker

(c) "Associate real estate broker" means an individual:

(1) who meets the requirements for a real estate broker license under § 17-305 of this title but who

applies for and is granted an associate real estate broker license under §§ 17-307 and 17-309 of this title; and

(2) who, under the associate real estate broker license, may provide real estate brokerage services on behalf of a licensed real estate broker with whom the associate real estate broker is affiliated.

Commission

(d) "Commission" means the State Real Estate Commission.

Guaranty Fund

(e) "Guaranty Fund" means a real estate guaranty fund established by the Commission under § 17-402 of this title.

Hearing board

(f) "Hearing board" means a real estate hearing board appointed by the Commission under § 17-325 of this title.

License

(g)(1) "License" means, unless the context requires otherwise, a license issued by the Commission.

(2) "License" includes, unless the context requires otherwise:

(i) a real estate broker license;
(ii) an associate real estate broker license; and
(iii) a real estate salesperson license.

Licensed associate real estate broker

(h) "Licensed associate real estate broker" means, unless the context requires otherwise, an associate real estate broker who is licensed by the Commission to provide real estate brokerage services on behalf of a licensed real estate broker with whom the associate real estate broker is affiliated.

Licensed real estate broker

(i) "Licensed real estate broker" means, unless the context requires otherwise, a real estate broker who is licensed by the Commission to provide real estate brokerage services.

Licensed real estate salesperson

(j) "Licensed real estate salesperson" means, unless the context requires otherwise, a real estate salesperson who is licensed by the Commission to provide real estate brokerage services on behalf of a licensed real estate broker with whom the real estate salesperson is affiliated.

Licensee

(k) "Licensee" means a licensed real estate broker, a licensed associate real estate broker, or a licensed real estate salesperson.

Provide real estate brokerage services

(l) "Provide real estate brokerage services" means to engage in any of the following activities:

(1) for consideration, providing any of the following

services for another person:

(i) selling, buying, exchanging, or leasing any real estate; or

(ii) collecting rent for the use of any real estate;

(2) for consideration, assisting another person to locate or obtain for purchase or lease any residential real estate;

(3) engaging regularly in a business of dealing in real estate or leases or options on real estate;

(4) engaging in a business the primary purpose of which is promoting the sale of real estate through a listing in a publication issued primarily for the promotion of real estate sales;

(5) engaging in a business that subdivides land that is located in any state and sells the divided lots; or

(6) for consideration, serving as a consultant regarding any activity set forth in items (1) through (5) of this subsection.

Real estate

(m)(1) "Real estate" means any interest in real property that is located in this State or elsewhere.

(2) "Real estate" includes:

(i) an interest in a condominium; and

(ii) a time-share estate or a time-share license, as those terms are defined in § 11A-101 of the Real Property Article.

Real estate broker

(n) "Real estate broker" means an individual who provides real estate brokerage services.

Real estate salesperson

(o) "Real estate salesperson" means an individual who, while affiliated with and acting on behalf of a real estate broker, provides real estate brokerage services.

MD Code, Insurance, § 11-401
§ 11-401. Application of subtitle

Kinds and classes of insurance subject to subtitle

(a) This subtitle applies to all kinds and classes of insurance that:

(1) insure or guarantee titles to real or leasehold property or an estate in real or leasehold property;

(2) insure or guarantee against loss by reason of defects, encumbrances, liens, or charges on real or leasehold property or an estate in real or leasehold property;

(3) insure or guarantee the validity, priority, and status of liens on real or leasehold property or an estate in real or leasehold property; or

(4) insure or guarantee the correctness and sufficiency of searches for instruments, liens, charges, or other matters affecting the title to real or leasehold property or an estate in real or leasehold property.

Persons subject to subtitle

(b) This subtitle applies to a person that makes guarantees or issues insurance described in subsection (a) of this section.

MD Code, Insurance, § 11-403
§ 11-403. Rate filings
Effective: October 1, 2017

In general

(a)(1) Except as otherwise provided in this subsection, each title insurer shall file with the Commissioner all rates or premiums, supplementary rate information, forms of contracts, policies, or guarantees of insurance, and all modifications of contracts, policies, or guarantees of insurance that it proposes to use.

(2) A filing is not required for rates or premiums for a special or unusual guarantee as described in § 11-402(e)(2) of this subtitle.

Indication of character or extent of coverage contemplated

(b) Each filing shall indicate the character or extent of coverage contemplated under the rates and premiums for which it is made.

Filing and approval required for changes in rates, premiums, or in forms of contracts

(c) A title insurer may not make a change in rates or premiums or in the forms of contracts, policies, or guarantees of insurance unless a report that indicates the change has been filed with and approved by the Commissioner.

Obligation for filings fulfilled by licensed title rating organization

(d) A title insurer may satisfy its obligation to make filings by:

(1) being a member of or a subscriber to a licensed title rating organization that makes filings; and

(2) authorizing the Commissioner to accept filings on its behalf from the title rating organization.

MD Code, Insurance, § 11-404

§ 11-404. Approval or disapproval of filings by Commissioner

Effective: October 1, 2017

In general

(a)(1) Unless the Commissioner finds that a filing does not meet the requirements of this subtitle or is otherwise contrary to law, the Commissioner shall approve the filing.

(2) As soon as reasonably possible after a filing is made, the Commissioner shall approve or disapprove the filing in writing.

(3) If the Commissioner disapproves a filing, the Commissioner shall specify the ways that the Commissioner finds that the filing fails to meet the requirements of this subtitle or is otherwise contrary to law.

Filings deemed approved if not disapproved by Commissioner

(b)(1) This subsection does not apply to filings by a rating organization on behalf of title insurers that are members or subscribers of the rating organization.

(2) If a filing is not disapproved by the Commissioner within 15 days after the date of filing, or within 30 days after the date of filing if the Commissioner extends the waiting period in writing during the initial 15-day period, the filing is deemed approved and the effective date of the filing is the end of the 15-day or 30-day waiting period.

Hearing to review approval or disapproval of filing

(c)(1) The Commissioner shall hold a hearing to review the approval or disapproval of a filing under this section if:

(i) after approval of the filing, the Commissioner finds that the filing does not meet the requirements of this subtitle or is otherwise contrary to law;

(ii) a person with an interest in the filing makes a complaint to the Commissioner in writing that sets forth specific and reasonable causes for complaint; or

(iii) a title insurer or a rating organization on behalf of its members or subscribers, on notice of disapproval by the Commissioner under this section, requests a hearing.

(2) A hearing under this subsection shall be held within 30 days after the occurrence of an action specified in paragraph (1) of this subsection.

(3) The Commissioner shall give written notice of the hearing to all interested parties.

(4) The Commissioner may confirm, modify, change, or rescind any previous action, if warranted by the facts shown at the hearing.

MD Code, Insurance, § 11-407

§ 11-407. Contracts, policies, or guarantees of insurance outside of filing requirements prohibited

In general

(a) A title insurer may not make or issue a contract, policy, or guarantee of insurance except in accordance with filings approved as provided in this subtitle, except for special or unusual risks for which a filing has not yet been provided.

Rates or premiums approved by Commissioner

(b) Each title insurer must hold to the rates or premiums as approved by the Commissioner and may not deviate from the rates or premiums or allow to or for the account of an insured a rebate or discount on the rates or premiums payable.

Commissions to licensed insurance producers

(c) A title insurer may pay or allow a commission to a licensed insurance producer of the title insurer as compensation for procuring business.