4TH CIRCUIT PERMITS UNTIMELY RESPA CLAIMS DUE TO ALLEGED FRAUDULENT CONCEALMENT

On April 26, 2019, a three-judge panel of the U.S. Court of Appeals for the Fourth Circuit revived five putative class actions, which alleged that certain lenders participated in referrals and "kickback schemes" in violation of RESPA. The Fourth Circuit held that the borrowers' claims, which had been dismissed as untimely by the district court, **were eligible to be tolled because the borrowers had alleged that the lenders fraudulently concealed the kickback schemes.**

The borrowers alleged that a title company paid several lenders "unearned fees and kickbacks" in exchange for referring the borrowers for its services. The borrowers further alleged that the title company made these payments through sham companies, which were set up to conceal the nature of the alleged kickbacks.

The lenders contested the claims as untimely because they were filed more than one year after the closings of the borrowers' loans and therefore outside of RESPA's one-year statute of limitations. The borrowers argued that their claims were equitably tolled under the doctrine of fraudulent concealment. The lenders argued that a recent U.S. Supreme Court case, *Menominee Indian Tribe of Wisconsin v. United States*, 136 S. Ct. 750 (2016), prohibited equitable tolling under the circumstances presented. The district court applied the two-part test for equitable tolling set forth by the U.S. Supreme Court in *Menominee*, requiring that plaintiffs 1) exercised reasonable diligence; and 2) faced extraordinary circumstances that prevented them from filing suit. The district court found that the borrowers' claims could not be saved by equitable tolling for a variety of reasons, including that the borrowers should have discovered their claims earlier because of publicly disclosed information in a related case, public state and federal enforcement actions, and media coverage of the title company's alleged wrongdoing.

The Fourth Circuit reversed the district court's order, holding that it had applied the wrong standard because fraudulent concealment is a separate doctrine whose elements differ from equitable tolling. The court of appeals held that *Menominee* was inapplicable to tolling based on fraudulent concealment. Unlike the borrowers here, the *Menominee* plaintiff did not allege that its failure to timely file suit was attributable to wrongful conduct by the defendant. Thus, the panel held that equitable tolling (as applied in *Menominee*) is distinct from tolling based on equitable estoppel or based on fraudulent concealment.

The Fourth Circuit therefore applied **a three-part test for fraudulent concealment, which requires 1) affirmative acts of concealment by the defendant; 2) and the plaintiff failed to discover the cause of action within the statutory period; 3) despite the exercise of due diligence. The borrowers alleged that the title company concealed their causes of action by creating “sham” entities to funnel the kickbacks, which concealed their source.** The borrowers also alleged that after regulators started investigating, the title company and the lenders’ loan officers created “sham” title services agreements and backdated them to further disguise the scheme. Finally, the borrowers alleged that the payments were purportedly concealed because they were not listed on the borrowers’ HUD-1 Settlement Statements.

The court of appeals indicated that, at least at the pleading stage, the borrowers were not required to allege that they had done anything to exercise diligence absent inquiry notice. Here, **there were no indications that the borrowers were aware of any of the press releases, news articles, or related lawsuits, and the borrowers were also not imputed with their attorneys’ knowledge prior to representation.** Rather, the determination of whether any particular plaintiff was diligent was fact-specific and thus not appropriate for determination at the pleading stage.