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SOUTHERN DISTRICT OF IA

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF IOWA
DAVENPORT DIVISION

JOHN AND CYNTHIA KRYENHAGEN, as individuals and representatives of the class of persons who obtained Veterans' Administration loans from defendants, and MICHAEL WILLAHAN and VICKIE JOHNS, as individuals and representatives of the class of persons who obtained Federal Home Administration loans from defendants, Plaintiffs, vs. SGB CORPORATION, d.b.a. WESTAMERICA MORTGAGE, TAMMY SCHMIDT, DOE DEFENDANTS 1-12 (individuals as yet unknown who had knowledge of and participated in the events alleged in this complaint), Defendants.	)	Civil No. 3-01-cv-10024 ORDER

Before the Court is defendants' motion to dismiss filed August 16, 2001, which was later amended by defendants on September 12.[1] Plaintiffs resisted defendants' motion on September 26, and defendants filed a reply on October 23. The Court held a hearing on December 20, 2001.

[1] Plaintiffs filed their initial complaint with the Court on March 2, 2001. An amended complaint was filed on September 20, 2001 and was allowed by October 23, 2001 order of Chief Magistrate Judge Ross A. Walters. At the hearing, counsel agreed that defendants' amended motion to dismiss, although filed before plaintiffs' amended complaint was allowed by the Court, is applicable to the amended complaint.

I. BACKGROUND

Plaintiffs are individuals who obtained residential home mortgage loans from defendant SGB Corporation, doing business as WestAmerica Mortgage (hereinafter "WestAmerica"). Since 1989, WestAmerica has participated in guaranteed loan programs sponsored by the Veterans Administration ("VA") and Federal Housing Administration ("FHA"). *See* First Amended Complaint at ¶¶ 10, 13. Plaintiffs and class representatives[2] John and Cynthia Kryenhagen obtained a VA loan from the Bettendorf branch of WestAmerica, and Michael Willahan and Vickie Johns obtained an FHA loan from the same WestAmerica branch. *Id.* at ¶¶ 4, 5, 12. Co-defendant Tammy Schmidt is a citizen of Illinois and was operations manager at the Bettendorf branch of WestAmerica during all times material to this action. *Id.* at ¶ 2.

Plaintiffs have alleged that defendants charged fees that are prohibited by Iowa Code section 535.8 and federal regulations. Plaintiffs allege that it could not have discovered with reasonable diligence, and did not discover, the alleged unlawful fees until March 7, 2000. *Id.* at ¶ 33. Plaintiffs have alleged ten causes of action in their complaint.

Count I:	Violation of Truth in Lending Act ("TILA"), 15 U.S.C. section 1601 *et seq.*
Count II:	Violation of Real Estate Settlement Procedures Act ("RESPA), 12 U.S.C. section 2601 *et seq.*
Count III:	Fraud
Count IV:	Constructive Fraud
Count V:	Fraudulent Concealment
Count VI:	Non-Disclosure
Count VII:	Negligent Misrepresentation
Count VIII:	Innocent Misrepresentation
Count IX:	Violation of Iowa Code Chapter 535
Count X:	Class Action

[2] A class, or classes, of plaintiffs have not been certified in this case.

In their motion to dismiss, Schmidt and WestAmerica first argue counts I and II of plaintiffs' complaint are barred by applicable one-year statutes of limitations. *See* 12 U.S.C. § 2614 and 15 U.S.C. § 1640(e). Schmidt and WestAmerica request the Court dismiss the remainder of the case based on a lack of federal subject matter jurisdiction.

II. APPLICABLE LAW & DISCUSSION

A. Standard of Review

When considering a motion to dismiss, a court will accept as true all factual allegations in the complaint. *McSherry v. Trans World Airlines, Inc.*, 81 F.3d 739, 740 (8th Cir. 1996) (citing *Leatherman v. Tarrant Co. Narcotics Intelligence & Coordination Unit*, 507 U.S. 163, 163-65 (1993)). A motion to dismiss will be granted "only if no set of facts would entitle the plaintiff to relief.'" *Id.* (citing *Conley v. Gibson*, 355 U.S. 41, 45-47 (1957)).

B. Whether Plaintiffs TILA (Count I) and RESPA (Count II) Claims are Barred by Statutes of Limitations

Plaintiffs' first two claims, their only claims based on federal law, are alleged violations of consumer protection statutes. "Congress stated the purpose of the Truth In Lending Act [is] 'to assure a meaningful disclosure of credit terms so that the consumer will be able to compare more readily the various credit terms available to him and avoid the uninformed use of credit.'" *Fenton v. Citizens Savings Assoc.*, 400 F.Supp. 874, 876 (W.D. Mo. 1975) (quoting 15 U.S.C. § 1601). "RESPA was enacted by Congress in 1974 'to ensure that consumers throughout the Nation are provided with greater and more timely information on the nature and costs of the [real estate] settlement process and are protected from unnecessarily high settlement charges caused by certain abusive practices that have developed in some areas of the country." *Moll v. US Life*

Title Insurance Co. of New York, 654 F.Supp. 1012, 1019 (S.D.N.Y. 1987). There is no dispute in this case that a one year statute of limitations governs both plaintiffs' TILA and RESPA claims under counts I and II of the complaint, respectively. *See* 15 U.S.C. § 1640(e) and 12 U.S.C. § 2614.

It also is clear that TILA actions "must be commenced 'within one year from the date of the occurrence of the violation.'" *See Evans v. Rudy-Luther Toyota, Inc.*, 39 F.Supp. 2d 1177, 1184 (D. Minn. 1999) (quoting 15 U.S.C. § 1640(e)). "[A] TILA claim accrues 'when credit is extended through the consummation of the transaction between the creditor and its customer without the required disclosures being made.'" *Id.* (citing *Dryden v. Lou Budke's Arrow Finance Co.*, 630 F.2d 641, 646 (8th Cir. 1980)). Likewise, the statute of limitations governing RESPA claims begins to run from the time the relevant transaction is made. *See, e.g., Bloom v. Martin*, 865 F.Supp. 1377, 1386 (N.D. Cal. 1994) (holding that statute of limitations on RESPA claim began to run at time plaintiffs signed agreement, despite the fact that the disputed fee was not charged until years later). It is undisputed that the complaint in this case was filed more than a year after the representative plaintiffs had entered into their mortgage contracts with WestAmerica.[3] Therefore, the statute of limitations, on its face, bars counts I and II of plaintiffs' complaint.

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[3] Defendants assert in their brief that Willahan and Johns obtained their FHA loan in August 1997, and the Kryenhagens obtained their VA loan in January 1998. A document entitled "Closing Instructions," showing the date on which loan proceeds must be distributed to Willahan and Johns, is attached to defendants' brief. *See* Defendants' Exhibit A. This exhibit is not an appropriate matter to be considered in a motion to dismiss; however, the Court need not determine whether it will convert this matter into a motion for summary judgment. The exhibit was only submitted by defendant to show that representative plaintiffs obtained their loans more than one year before the complaint was filed, and plaintiffs do not dispute this fact in their complaint or in their resistance to this motion.

However, "the doctrine of fraudulent concealment could equitably toll the limitations period . . . such that the period would begin to run, not at the time that the credit transaction was consummated, but 'from the date on which the borrower discovers or has a reasonable opportunity to discover the fraud involving the complained of TILA violation.'" *See Evans*, 39 F.Supp. 2d at 1184 (quoting *Jones v. TransOhio Sav. Ass'n*, 747 F.2d 1037, 1043 (6th Cir. 1984)); *King v. California*, 784 F.2d 910, 914-14 (9th Cir. 1986). This same equitable tolling doctrine can be applied to the RESPA claim. *See Kerby v. Mortgage Funding Corp.*, 992 F.Supp. 787, 792 (D. Md. 1998) and *Moll v. U.S. Life Title Ins. Co. of New York*, 700 F.Supp. 1284, 1289 (S.D.N.Y. 1988); *see also* WRIGHT & MILLER, 4 FEDERAL PRACTICE & PROCEDURE at § 1056 ("As a general rule, the doctrine of equitable tolling is read into every federal statute . . . .") (citing *Kerby*, 992 F.Supp. at 787). The doctrine of fraudulent concealment allows the statute of limitations to be equitably tolled if plaintiffs can show: 1) defendants engaged in a course of conduct to conceal evidence of their alleged wrongdoing; and 2) that plaintiffs failure to discover the facts giving rise to their claims was not because of their failure to exercise due diligence. *See Evans*, 39 F.Supp. 2d at 1184 (citing *Schaefer v. Arkansas Medical Soc.*, 853 F.2d 1487, 1491-92 (8th Cir. 1988) (other citations omitted)).[4] If the doctrine of fraudulent concealment is applicable, the statute of limitations period would begin to run from the time when the borrower discovers or has a reasonable opportunity to discover the fraud. *Id.* (citing *Jones*, 747 F.2d at 1043 and *King*, 784 F.2d at 915).

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[4] The district court in *Evans* made clear that it found equitable tolling, and specifically the doctrine of fraudulent concealment, applicable to the statute of limitations governing TILA claims. "Put simply, it would border on perverse for us to hold that a consumer's opportunity to file suit, under what is in large part an antifraud statute, would not be preserved by the doctrine of fraudulent concealment . . . ." *Evans*, 39 F.Supp. 2d at 1183.

This Court has examined plaintiffs' amended complaint for allegations that defendants concealed evidence of their wrongdoing, and that plaintiffs acted with due dilligence in attempting to discover such wrongdoing. Plaintiffs have stated in their amended complaint that they "could not have discovered with reasonable diligence, and did not discover, the [d]efendants' unlawful conduct until approximately March 7, 2000." *See* Amended Complaint at ¶ 33. Plaintiffs have asserted that defendants "concealed . . . prohibited fees by hiding them in permitted fees on standardized forms promulgated by HUD [Department of Housing and Urban Development]," *id.* at ¶ 18; defendants included prohibited fees as title insurance or an abstracting fee, *id.* at ¶ 19; and that prohibited fees were hidden within permitted fees and not disclosed to borrowers. *Id.* at ¶ 20.

"The Courts, which have applied the doctrine of fraudulent concealment to TILA *claims that are directed at alleged nondisclosures*, have uniformly held that fraudulent conduct, beyond the nondisclosure itself, is necessary to permit the one-year period to be equitably tolled." *Evans*, 39 F.Supp. 2d at 1184 (emphasis added). In *Evans*, the plaintiff purchased an automobile and financed the purchase by entering into an installment contract with the defendant. *Id.* at 1179. The plaintiff also purchased an extended service contract, and bought life and disability insurance as a part of the same automobile loan. *Id.* at 1180. More than two years after the vehicle's purchase, the plaintiff brought suit and alleged that the defendant had not disclosed the actual amounts of the contracts she was purchasing, nor had the defendant disclosed the yield spread premiums, as required by TILA. *Id.* The district court ruled that the defendant's motion for summary judgment should be granted as the plaintiff's claims were barred by the one-year statute of limiations. *Id.* at 1186. The district court

determined that the doctrine of fraudulent concealment did not equitably toll plaintiff's claims because there was not a material issue of fact that defendant had done anything fraudulent beyond the nondisclosure of information itself. *Id.* at 1184. The district court held that the underlying violation of TILA was the only fraudulent conduct at issue, and that something beyond that was necessary to demand the statute of limitations be equitably tolled. *Id.* at 1184 - 85.[5]

At this stage of the litigation in this case – a motion to dismiss[6] – the Court finds that the above noted statements of law by the district court in *Evans* are not controlling because this case may prove to be factually different. In that case, the plaintiff asserted that the defendants had a duty to tell her certain things under TILA at the time she entered into the installment contract agreement, and they failed to give her this information. It was a case where plaintiff's claims were directed solely at "*alleged nondisclosures*" by the defendant. *Evans*, 39 F.Supp. 2d at 1184 (emphasis added). In this case, plaintiffs have alleged more than nondisclosures as plaintiffs assert that "*[d]efendants concealed certain . . . prohibited fees by hiding them in permitted fees.*" *See* Amended Complaint at ¶ 18 (emphasis added). The Court finds this is an important distinction, as plaintiffs alleged defendants did more than charge prohibited fees and not disclose to plaintiffs the fees were illegal under federal law. The alleged underlying violations of the federal statutes at issue are more than nondisclosures – the defendants allegedly took affirmative

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[5] The district court in *Evans* went on to find that even if the first prong of the fraudulent concealment doctrine had been met, the second prong, due diligence, was not met as the plaintiff took no actions for the first eighteen months of the agreement.

[6] *See King*, 784 F.2d at 915 ("[F]raudulent concealment and equitable tolling involve factual determinations . . . ."). As stated previously, the Court makes no factual determinations in this ruling as it has accepted as true all factual allegations in plaintiffs' amended complaint.

acts to hide the prohibited fees in fees defendants could legally charge. At this stage of the proceedings, the Court finds that allegations defendants hid fees may have created "inequitable circumstances" that require it to equitably toll plaintiffs' claims. *See Bailey v. Glover*, 88 U.S. [21 Wall.] 342, 347 (1874) (stating that the equitable tolling doctrine allows plaintiffs to file suit after the statutory time period has expired if inequitable circumstances otherwise prohibit the suit).

Defendants have argued that to meet the first prong of the doctrine of fraudulent concealment, plaintiffs must allege fraud *beyond* that illegal activity allegedly perpetrated at the time of the underlying transaction. In other words, plaintiffs must allege defendants concealed something at some time after the underlying federal violation was committed to meet the first prong of the doctrine. A simple, hypothetical example of such activity would be a customer service representative lying to a borrower about prohibited charges in a loan agreement. The Court agrees that this type of later concealment is necessary when the underlying violation is a nondisclosure, as there was not an active concealment at the time of the underlying transaction if all defendants did was charge the illegal fees and not tell the customer the fees were illegal. However, the focus of the first prong of the doctrine of fraudulent concealment is on the *concealment* itself. In the present action, defendants' alleged violations were more than mere nondisclosures; they were affirmative acts to hide prohibited fees. Defendants are not shielded from the application of this doctrine merely by engaging in deceptive activities at the time of the

alleged transaction as opposed to waiting until a later point in time.[7]

Further, the Court notes that plaintiffs have alleged due dilligence, *see* Amended Complaint at ¶ 33, and thus the Court finds the motion to dismiss will not be granted.

III. CONCLUSION

For the aforementioned reasons, defendants' motion to dismiss is denied.

IT IS SO ORDERED.

Dated this 27th day of February, 2002.

RONALD E. LONGSTAFF, CHIEF JUDGE
UNITED STATES DISTRICT COURT

[7] In the amended motion to dismiss, filed on September 12, 2001, defendants also argued that plaintiffs failed to state claims under Counts II, IV, VII and VIII. The Court finds that any deficiency in stating a claim on these counts, at this stage of the litigation, was corrected by plaintiffs' amended complaint which was allowed by Order of the Court on October 23, 2001.