

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

ROBERT J. RENDLER; LORI J. : CIVIL ACTION
SCHUMACHER, Individually and on :
Behalf of all Other Persons :
Similarly Situated :
 :
 vs. :
 :
GAMBONE BROTHERS DEVELOPMENT :
COMPANY; GAMBONE BROS., INC., : NO. 97-1156
GAMBONE BROTHERS CONSTRUCTION :
CO.; GAMBONE BROS. ENTERPRISES, :
INC., CONTINENTAL REALTY COMPANY, :
INC., and CENTRAL MONTGOMERY :
COUNTY ABSTRACT COMPANY, INC. :

ORDER AND MEMORANDUM

ORDER

AND NOW, to wit, this 27th day of April, 1999, upon consideration of Plaintiffs' Motion To Approve Class Action Settlement And Petition For Attorney's Fees And Reimbursement Of Costs, and after notice and hearing, for the reasons set forth in the attached Memorandum, **IT IS ORDERED** that:

1. The Class Action Settlement Agreement dated January 29, 1999 (the "Settlement Agreement") is hereby **APPROVED** as being fair, reasonable and adequate, and in the best interest of the Plaintiff Class (as that term is defined in the Settlement Agreement); and

2. The payment to Smolow & Landis of attorney's fees plus reimbursement of costs and expenses in the total amount of \$175,000.00 pursuant to the Settlement Agreement is hereby **APPROVED**; and

3. The parties are directed to carry out the terms of the Settlement Agreement as set forth therein; and

4. Pursuant to the Settlement Agreement, Plaintiffs, acting individually and on behalf of the Plaintiff Class, have released and discharged Gambone Brothers Development Company, Gambone Brothers Enterprises, Inc., Gambone Brothers Construction Company, Continental Realty Co., Inc., and their officers, directors, shareholders, agents, employees, parents, subsidiaries, affiliates, successors and assigns (the "Released Parties") from any and all federal, state, local and administrative causes of action, suits, defenses, debts, sums of money, accounts, covenants, controversies, agreements, promises, losses, damages, orders, judgments, claims and demands, in law or in equity, based on or arising from the allegations contained in the Class Action Complaint, particularly including all claims under the Real Estate Settlement Procedures Act of 1974, as amended, 12 U.S.C. §§ 2601, et seq., demands, liabilities and obligations, known or unknown, suspected or unsuspected, fixed or contingent, and whether or not concealed or hidden, that Plaintiff and members of the Plaintiff Class (except those persons timely excluding themselves from the Plaintiff Class as identified in the Affidavit of Exclusions filed on November 5, 1998) did assert or could have asserted in connection with all Class title insurance transactions including the selection, use, compensation paid, and participants to such title insurance transactions (the "Released Claims"); and

5. The Released Parties are not being released or discharged from any claims, demands, liabilities and obligations of any other nature, including but not limited to claims relating to

issues of title, claims under a title insurance policy, claims based upon the construction of the improvements purchased by members of the Plaintiff Class, claims under any homeowner's warranty or similar insurance coverage, and claims arising under the Settlement Agreement; and

6. The members of the Plaintiff Class, other than those who have excluded themselves, are deemed to have settled and released the Released Claims as against the Released Parties and shall not file suit against the Released Parties with respect to any of the Released Claims; and

7. Each member of the Plaintiff Class is hereby barred from prosecuting any action in state or federal court or otherwise against the Released Parties with respect to any Released Claims; and

8. This action is **DISMISSED WITH PREJUDICE**; and

9. The Court retains jurisdiction over the interpretation, effectuation and implementation of the Settlement Agreement.

MEMORANDUM

I. INTRODUCTION

Plaintiffs, Robert J. Rendler and Lori Schumacher, filed a Class Action Complaint on February 18, 1997 alleging violations of the Real Estate Settlement Procedures Act of 1974, as amended, 12 U.S.C. §§ 2601, et seq. ("RESPA").¹ Plaintiffs claimed that the

¹ RESPA provides in pertinent part:

§ 2608. Title companies, liability of seller

Gambone defendants² and their sales agent, Continental Realty Co., Inc. ("Continental"), unlawfully required plaintiffs and the Plaintiff Class to purchase title insurance from a particular title insurance company in violation of 12 U.S.C. § 2608. Plaintiffs also claimed that the authorization in the standard Gambone Agreement of Sale which permitted Continental to order title insurance for the buyer violated RESPA. The Complaint sought treble damages pursuant to 12 U.S.C. § 2608(a), declaratory and injunctive relief, and reasonable attorney's fees and costs.

The Gambone defendants and Continental each filed Answers to the Complaint denying all liability. They asserted several affirmative defenses challenging the propriety of this action as a class action, asserting that they were not a "seller" of real property as used in 12 U.S.C. § 2608(a), and alleging that the use of any particular title company was not required as a condition of the sale.

(a) No seller of property that will be purchased with the assistance of a federally related mortgage loan shall require directly or indirectly, as a condition to selling the property, that title insurance covering the property be purchased by the buyer from any particular title company.

(b) Any seller who violates the provisions of subsection (a) of this section shall be liable to the buyer in an amount equal to three times all charges made for such title insurance.

12 U.S.C. § 2608(a-b)(1997).

² The Gambone defendants in this case include Gambone Brothers Development Company, Gambone Brothers Enterprises, Inc. and Gambone Brothers Construction Company.

After the pleadings were closed, defendants each moved for summary judgment on the ground that they were not a "seller" under RESPA because plaintiffs purchased their home and took title from a separate entity called Lakeside Associates. On July 17, 1997, the Court entered an Order denying these motions for summary judgment.

On November 17, 1997, plaintiffs filed a motion asking the Court to certify this case as a class action. Defendants opposed this motion. After a hearing and oral argument, the Court, by Order and Memorandum dated June 18, 1998, certified the case as a class action. The Class, as certified by the Court, was defined as follows:

All persons and entities (excluding defendants and their subsidiaries, affiliates, divisions, parent entities and the employees thereof) who (a) from on or after February 18, 1996 closed on the purchase of a residential dwelling from Gambone Brothers Development Company, Gambone Brothers Construction Company, Gambone Brothers Enterprises, Inc. or their parent, subsidiary and affiliated corporations, partnerships and entities; (b) purchased that dwelling with the assistance of a "federally-related mortgage loan" as defined by the Real Estate Settlement Procedures Act; (c) obtained title insurance from a title company suggested by defendants where such authorization was contained in the Agreement of Sale; and (d) paid their own title insurance charges.

Rendler v. Gambone, 182 F.R.D. 152, 154 (E.D. Pa. 1998).

Notice of class certification was given to the class as directed by this Court's Order dated August 14, 1998. On November 5, 1998, plaintiffs filed an Affidavit Of Exclusions identifying those persons who requested exclusion from the

Plaintiff Class.

II. THE SETTLEMENT

The principal terms of the Settlement Agreement dated January 29, 1999, are as follows:

(a) For purposes of settlement, the Plaintiff Class is defined as:

All persons and entities (excluding defendants and their subsidiaries, affiliates, divisions, parent entities and the employees thereof) who (a) from on or after February 18, 1996 until December 1, 1998, closed on the purchase of a new residential dwelling from Gambone; (b) purchased that dwelling with the assistance of a "federally-related mortgage loan" as defined by RESPA; (c) obtained title insurance pursuant to a buyer's authorization contained in the Agreement of Sale; and (d) paid their own title insurance charges.

As used in the Plaintiff Class definition, "Gambone" includes the named Gambone defendants and all parent, subsidiary and affiliated corporations, partnerships and entities.

(b) Defendants have revised their Agreements of Sale for the purchase of new homes to delete any authorization to place or order title insurance. The revised Agreements of Sale became effective December 1, 1998.

(c) Beginning December 1, 1998, defendants have notified new home purchasers of their right under RESPA to choose their own title insurer and that this selection should be made within 30 days after signing the Agreement of Sale. Also, defendants have agreed not to directly or indirectly require the purchaser to use a

particular title insurance company as a condition of the sale.

(d) Effective December 1, 1998, defendants have modified their sales and marketing practices to conform to these changes, and have notified their sales and marketing personnel of these changes.

(e) Where a home buyer has signed an Agreement of Sale as of December 1, 1998, but closing has not yet occurred, Gambone has notified the purchaser of their right under RESPA to select their own title insurer, and will allow the purchaser to change title insurers at no charge if they so elect.

(f) Within 30 days after the Court's Order approving the settlement becomes final, defendants will pay to members of the Plaintiff Class a total of 25% of the title charges paid by Class members in connection with the original purchase of their home, as shown on the Class members' settlement sheet. For purposes of this calculation, title charges is defined as the basic premium for title insurance and does not include endorsement and other miscellaneous charges.

(g) Defendants have agreed to pay the attorney's fees and costs of Class Counsel as approved by the Court in an amount not to exceed \$175,000.00.

(h) Defendants are released from all further liability relating to these RESPA claims. Defendants are not released or discharged from other unrelated claims such as, but not limited to, claims based on defects in construction or title claims under any

title insurance policy.

(i) The Agreement also provides that defendants are responsible for mailed and published notice to the Class of the proposed settlement and the hearing to consider its approval (the "Settlement Hearing").

By Order dated February 16, 1999, the Court approved the proposed form and manner of issuing notice of the proposed settlement to the Class and scheduled the Settlement Hearing for April 15, 1999. This Order also set a bar date of April 5, 1999 (the "Bar Date") for Class members to file and serve a timely written notice if they wished to object to the proposed settlement or exclude themselves from the settlement.

The Mailed Notice, Published Notice and Exclusion Notice (as those terms are defined in the Agreement) have been given as required by the terms of the Agreement and the aforesaid Order.

On April 15, 1999, the Court conducted the Settlement Hearing to consider whether the proposed settlement should be approved. No members of the Plaintiff Class appeared at this hearing to object to the proposed settlement and there were no written objections to the proposed settlement.

The individuals identified in plaintiffs' Affidavit Of Exclusions filed on November 5, 1998 have filed and served timely requests for exclusion prior to the Bar Date. These individuals are excluded from the Plaintiff Class and are not bound by the final judgment and order entered in this matter.

II. DISCUSSION

Federal Rule of Civil Procedure 23(e) requires Court approval of all class action settlements. That rule provides that "[a] class action shall not be dismissed or compromised without the approval of the court, and notice of the proposed dismissal or compromise shall be given to all members of the class in such a manner as the court directs." Id. In determining whether to approve a class action settlement, the Court acts as "a fiduciary who must serve as a guardian of the rights of absent class members." In re General Motors Corp. Pick-up Truck Fuel Tank Prod. Liab. Litig., 55 F.3d 768, 784 (3d Cir. 1995)(quoting Grunin v. International House of Pancakes, 513 F.2d 114, 123 (8th Cir.))(internal quotation marks omitted).

A "presumption of correctness is said to attach to a class settlement reached in arms-length negotiations between experienced, capable counsel after meaningful discovery." Ratner v. Bennett, CIV.A. No. 92-4701, 1996 WL 243645 at *5 (E.D. Pa. May 8, 1996)(quoting Manual for Complex Litigation, Second § 30.41 (1985))(internal quotation marks omitted). A settlement must be fair and reasonable and adequately protect the members of the class to be approved. In re General Motors, 55 F.3d at 785.

In In re General Motors, 55 F.3d 768 (3d Cir. 1995) and Girsh v. Jepson, 521 F.2d 153 (3d Cir. 1975), the Third Circuit set forth nine factors for consideration in determining whether a Class Action Settlement was fair, reasonable and adequate. Those factors

are as follows:

1. The complexity, expense and likely duration of the litigation;
2. The reaction of the class to the settlement;
3. The stage of the proceedings and the amount of discovery completed;
4. The risks of establishing liability;
5. The risks of establishing damages;
6. The risks of maintaining the class action through trial;
7. The ability of the defendants to withstand a greater judgment;
8. The range of reasonableness of the settlement fund in light of all the attendant risks of litigation; and,
9. The range of reasonableness of the settlement fund in light of the best possible recovery.

After applying each of these nine factors to this case, the Court concludes that the settlement is fair, adequate and reasonable. The conclusion of the Court is based on the following:

(1) The Complexity, Expense And Likely Duration Of The Litigation. This case involved a unique statute and novel legal issues which had not been previously addressed by the courts. The principal reported case under 12 U.S.C. § 2608 involved the approval of a class action settlement and did not address any of the substantive requirements or proof to prevail. See Weisberg v. Toll Brothers, 617 F.Supp. 539, 541 (E.D. Pa. 1985) ("The case

involves a claim brought under a seldom litigated statute and it appears that it is the first class action brought under the provisions of RESPA."). This appeared to be a case of first impression on the merits and neither side could point to controlling precedent or statutory interpretations to support their claims or defenses. Continued litigation of these claims was certain to break "new ground" and with it, the significant risk of uncertainty in outcome. This was not a "sure winner" for either side.

Moreover, the parties had vigorously battled over class certification and trial was not expected to be any less contentious. The case would certainly have been pursued and defended with the same tenacity and resolve on appeal. The ability to afford the class essentially complete and prompt relief (as opposed to potentially years of continued litigation) favors the proposed settlement.

(2) The Reaction Of The Class To The Settlement. There were no objections to the proposed settlement from the 777 Class members. The reaction of the Class is overwhelmingly favorable.

(3) The Stage Of The Proceedings And The Amount Of Discovery Completed. The settlement was the product of arms-length negotiations which began after the case was certified as a class action following a contested certification hearing. Discovery on the class action issues and the merits was extensive, including the self-executing disclosures required by the Civil Justice Expense

and Delay Reduction Plan, the exchange of several sets of interrogatories and document requests, and thirteen depositions of the parties and various fact witnesses. The legal issues in the case were also extensively researched and investigated, including the threshold "seller" issue under RESPA, a detailed review and analysis of RESPA's legislative history, and research and analysis of the "federally-related" mortgage requirement and the distinction between "directly" and "indirectly" requiring the use of a particular title insurance company. The parties conducted sufficient investigation and discovery to gain an appreciation and understanding of the relative strengths and weaknesses of the claims and defenses asserted.

(4) The Risks Of Establishing Liability. The principal contentions of the parties can be fairly succinctly stated: Plaintiffs contend that they were not allowed to choose their own title insurer, that defendants forced them to use Central Montgomery Abstract, and that they could have saved money if they had been given the choice guaranteed them by RESPA. Defendants contend that they are not a "seller" within the meaning of RESPA, that they did not require plaintiffs or any Class member to use a particular title insurance company, that the use of a particular title insurance company was not a "condition" of the sale, that title insurance in Pennsylvania is a heavily regulated industry, and that even if plaintiffs had been allowed to use the title insurer of their choice, they would have saved little, if any,

money. See Weisberg, 617 F.Supp. at 541, 543 (Class members suffered no actual damages as a result of alleged RESPA violation).

As previously noted, the RESPA provisions at issue have not been frequently litigated and there is little or no precedent to lend certainty to either side on the legal issues giving rise to liability. In addition, some significant facts were in dispute. For example, defendants disputed that they maintained a policy and practice which required home buyers to use a particular title insurer. The determination of this issue by the jury was uncertain and expected to hinge in large part upon the credibility and demeanor of the parties' witnesses.

Plaintiffs also faced certain risks of establishing liability created by the corporate structure of the Gambone Organization. With each new development, the Gambone Organization created a separate legal entity to hold and convey title. While plaintiffs claim they would have been successful at trial in demonstrating the common ownership, management and control of these separate entities, there was the risk that some of the named defendants or entities within the Gambone Organization would not be found liable on plaintiffs' claims. See Weisberg, 617 F.Supp. at 542 (noting the difficulties and risks of proving common control of numerous defendant corporate entities). The proposed settlement eliminates this risk by assuring that all persons who purchased a home from any entity within the Gambone Organization will participate in the settlement.

(5) The Risks Of Establishing Damages. RESPA permits the recovery of treble damages where a violation of section 2608(a) is established. Obviously, treble damages can result in a significant recovery; however, this recovery requires the finding of a statutory violation in the first instance. All of the risks attendant to establishing liability therefore factor into the risks of establishing damages.

One of the principal benefits of the settlement is that it affords Class members complete compensatory relief. Plaintiffs were prepared to offer testimony that they would have saved approximately \$200.00 (or 24% of the \$822.03 they were charged) if they had been given the choice of title insurers. On the other hand, defendants were prepared to offer testimony that charges for title insurance in Pennsylvania are regulated by law and the representative plaintiffs could have only saved approximately \$60.00 (or 7%).

The proposed settlement provides for the payment to plaintiffs and the Class of 25% of their title charges. Thus, plaintiffs and the Class will receive either complete compensatory relief (accepting plaintiffs' version of events) or about three times the amount of money they could have saved (accepting defendants' version of events). Given the risks of establishing liability in the first instance and the "all or nothing" nature of 12 U.S.C. § 2608(a), this is an excellent result.

(6) The Risks Of Maintaining The Class Action Through

Trial. Class certification is always conditional and may be reconsidered. Rendler v. Gambone, 182 F.R.D. 152, 160 (E.D. Pa. 1998). Defendants raised many issues in opposition to class certification and the evidence prior to or at trial on any one of these issues may have caused the Court to revisit the issue of class certification. This is a risk which could not be ignored. The proposed settlement affords meaningful classwide relief to hundreds of homeowners who, without class certification, would have received nothing.

(7) The Ability Of The Defendants To Withstand A Greater Judgment. The title charges for plaintiffs and the Plaintiff Class total \$892,912.57. Thus, treble damages would equal approximately \$2.67 million.

Plaintiffs had no assurances that the Gambone Organization and Continental could withstand a judgment in this amount. Discovery did not reveal any insurance coverage applicable to these claims or any third-party payor to satisfy a judgment. Even assuming that defendants could withstand a judgment in this amount, collection on that judgment was not guaranteed given the many corporate entities comprising the Gambone Organization. The proposed settlement avoids these collectability issues and affords Class members essentially complete relief.

(8-9) The Range Of Reasonableness Of The Settlement Fund In Light Of All The Attendant Risks Of Litigation And The Best

Possible Recovery. The Court is also required to consider the range of reasonableness of the settlement in light of the best possible recovery and all the attendant risks of litigation. The primary inquiry with respect to these factors is the economic value of the proposed settlement. In re General Motors, 55 F.3d at 806.

In this case, the monetary value of the proposed settlement is a good indicator of its reasonableness. The proposed settlement makes Class members whole because they receive, at a minimum, the savings they could have obtained had they been allowed to choose their own title insurer. The settlement also affords relief to the largest possible Class since it includes all persons where title insurance was obtained pursuant to the authorization in the Agreement of Sale regardless of whether that title insurer was "suggested" by defendants. Had plaintiffs proceeded to and prevailed at trial, there was no assurance that relief would have been secured for the same broad Class. This is an excellent result and falls squarely within the range of reasonableness analysis required by Girsh.

Plaintiffs' best case scenario was the recovery of treble damages, but there is little doubt that to obtain this maximum recovery, plaintiffs would have had to try this case, obtain a finding of liability, and then defend that finding on appeal. These additional proceedings were expected to be protracted, costly and time-consuming with all of the attendant risks of litigation and appeal. The decision to compromise these claims for complete

compensatory relief is a good result which avoids all of these risks and costs.

The settlement also vindicates the declared public policies of RESPA to reduce real estate settlement costs and allow comparison shopping for settlement services. See 12 U.S.C. §§ 2601(a), 2604. As part of this settlement but without admitting liability, defendants have agreed to delete the buyer's authorization contained in their form Agreement of Sale, to notify home buyers of their right under RESPA to choose their own title insurer, to allow purchasers who have not yet closed (as of December 1, 1998) to change title insurers if they so desire, and to modify their sales and title insurance policies and practices to conform to RESPA. These are significant benefits which assure that Gambone home buyers have the opportunity to shop around for title insurance as mandated by RESPA. It is also a benefit which has a financial value - with each home closing after December 1, 1998, the settlement assures the opportunity to secure the 24% savings in title insurance which these home buyers would not have otherwise had. Over the course of one year, these changes were estimated to result in a financial savings of approximately \$78,000.00. This is a significant financial benefit which cannot be overlooked and which increases in value over time.

III. Attorney's Fees And Reimbursement Of Costs

After consideration of the entire record, including the Briefs, Affidavits and arguments of the parties and their counsel,

the Court finds that the request of Smolow & Landis for attorney's fees and reimbursement of costs totaling \$175,000.00 is fair and reasonable. The conclusion is based on the following:

The most appropriate method for compensating counsel in this case is the "lodestar" approach. This approach is consistent with the statutory fee shifting framework of RESPA. See 12 U.S.C. §§ 2605(f)(3), 2607(d)(5). The settlement also affords significant non-monetary benefits in furthering the public policies of RESPA and in defendants' changes in policy and practice. The lodestar method is appropriately applied where the settlement furthers declared public policy goals or includes non-cash benefits and other relief. Prudential Insurance Company of America Sales Practices Litigation, 148 F.3d 283, 333 (3d Cir. 1998).

The first step in determining a reasonable fee is to calculate the "lodestar" which is the number of hours reasonably expended multiplied by a reasonable hourly rate. Washington v. Philadelphia County Court of Common Pleas, 89 F.3d 1031, 1035 (3d Cir. 1996). The result of this lodestar computation is strongly presumed to yield a reasonable fee. Id.

Class counsel maintained contemporaneous daily time records showing the amount of time expended in the pursuit of these claims, the tasks performed, and the amount of time devoted to those tasks. Counsel expended a total of 537.0 hours in the pursuit of this action and negotiation the proposed settlement (to April 8, 1999). The Court has reviewed these time records and

concludes that the time spent was fair, reasonable and necessary, especially considering defendants' vigorous defense of this action.

In addition, counsel have estimated future time necessary to conclude this matter to be approximately 34 hours, and have submitted their Affidavit explaining the manner in which this estimate is calculated and the reasonableness and necessity for the services. The Court finds this additional future time to be reasonable and compensable. See Pennsylvania v. Delaware Valley Citizens' Council For Clean Air, 478 U.S. 546 (1985) (post-judgment monitoring of a consent decree is compensable); In Re Meade Land & Development Co., Inc., 527 F.2d 280 (3d Cir. 1975).

The next step is to apply a reasonable hourly rate to the time spent. The general rule is that a reasonable hourly rate is calculated according to the prevailing market rates in the community. Washington, 89 F.3d at 1035. The Court has reviewed the hourly billing rates submitted by counsel, together with the information submitted concerning counsel's skill, experience and reputation. Counsel are able and experienced class action litigators. Counsel have submitted summaries of their professional education and experience, including other class action litigation in which they have been involved and other cases where federal and state courts have determined a fair and reasonable hourly billing rate. The Court finds that the hourly billing rates requested by counsel (\$325.00 per hour for Mr. Smolow and \$300.00 per hour for Mr. Landis) are fair and reasonable in light of their education,

experience and prior awards, and commensurate with the prevailing hourly billing rates of similarly-experienced class action litigators in this area.

The Court finds that the "lodestar" for attorney's fees is \$172,605.00. In addition, Class counsel incurred costs and expenses totaling \$5,302.99 in connection with the pursuit of these claims and the proposed settlement. Counsel have submitted an itemization of these costs and their purpose. These expenses are fair, reasonable and necessary.

IV. CONCLUSION

For the reasons set forth above, the Court concludes that the settlement set forth in the Class Action Settlement Agreement dated January 29, 1999 is approved as being fair, adequate and reasonable and in the best interests of the Plaintiff Class. Likewise, the request of Smolow & Landis for attorney's fees and reimbursement of costs and expenses in the total amount of \$175,000.00 pursuant to the Settlement Agreement is approved.

BY THE COURT:

JAN E. DUBOIS, J.