

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

BERNARD WEINBERGER and : CIVIL ACTION

LORNA WEINBERGER, :

Plaintiffs :

:

v. :

:

MELLON MORTGAGE COMPANY and :

BALBOA INSURANCE COMPANY, :

Defendants : NO. 98-2490

Newcomer, J. September , 1998

**MEMORANDUM**

Presently before the Court are defendant Mellon Mortgage Company's Motion to Dismiss Plaintiffs' Complaint Pursuant to Federal Rules of Civil Procedure 12(b)(6) and 12(b)(1), defendant Balboa Insurance Company's Motion to Dismiss, plaintiffs' joint response thereto, and defendants' replies thereto. For the reasons that follow, said Motions will be granted.

**A. Background<sup>(1)</sup>**

In August of 1989, plaintiffs, Bernard and Lorna Weinberger, obtained a mortgage worth \$330,000.00 on their residential property from Gilpin, Van Trump and Montgomery, Inc. Gilpin then assigned the mortgage to Metropolitan Life Insurance Company, t/a Metmor Financial, Inc. Metmor then designated the defendant, Mellon Mortgage Company ("MMC") as its agent-in-fact pursuant to a power of attorney to service the mortgage. Under the mortgage agreement, plaintiffs were obligated to maintain hazard insurance on their property. Prior to May 2, 1997, plaintiffs maintained a comprehensive homeowner's policy with Nationwide Mutual Fire Insurance Company. The annual premium for this

policy was approximately \$880.00. By letter dated April 2, 1997, however, plaintiff and MMC were notified that Nationwide was canceling plaintiffs' policy as of May 2, 1997 because of the bankruptcy status of plaintiff Bernard Weinberger. On August 11, 1997 MMC sent plaintiffs a letter requesting information about their hazard insurance and informing plaintiffs that MMC would immediately obtain coverage from Balboa Insurance Company for one year if MMC did not receive evidence that an adequate replacement policy had been issued. MMC also explicitly warned plaintiffs that the hazard insurance MMC would obtain through Balboa could be substantially higher than what plaintiffs normally would pay, and urged plaintiffs to obtain hazard insurance from their insurance agent. By letter dated October 1, 1997, MMC informed plaintiffs that MMC had obtained hazard insurance through Balboa at a yearly premium of \$2,890.00.

Meanwhile, because plaintiffs were unable to meet their monthly mortgage payments, and in order to bring their account with MMC up to date, plaintiffs entered into a partial release agreement with MMC under the following terms: MMC granted plaintiffs a partial release of their mortgage, allowing them to sell part of their property. A portion of the proceeds from that sale were applied against amounts owed by plaintiffs on their mortgage. In addition, plaintiffs agreed to release MMC from any claims relating to or arising out of the servicing of the loan prior to the date of the partial release. This entire transaction closed on October 15, 1997.

Plaintiffs claim that the premium charged by Balboa is oppressive, exorbitant, and unconscionable, and that MMC receives a kickback, rebate, or commission from Balboa on such forced-placed insurance premiums. Plaintiffs seek to bring the instant case as a class action on behalf of an alleged class of borrowers whose mortgages were serviced by MMC and whose hazard insurance policies were forced-placed by MMC and Balboa. Plaintiffs assert five claims against defendant MMC: breach of contract, breach of the duty of fair dealing, unjust enrichment, a claim under the Fair Debt Collection Practices Act ("FDCPA"), and claims under the Racketeer Influenced and Corrupt Organizations Act ("RICO"). Plaintiffs assert two claims against defendant Balboa: unjust enrichment and claims under RICO. Both defendants now move to dismiss all claims under Fed. R. Civ. P. 12(b)(6) and 12(b)(1).

## **B. Legal Standard**

Pursuant to Rule 12(b)(6), a court should dismiss a claim for failure to state a cause of action only if it appears to a certainty that no relief could be granted under any set of facts which could be proved. Hishon v. King & Spalding, 467 U.S. 69, 73 (1984). Because granting such a motion results in a determination on the merits at such an early stage of a plaintiff's case, the district court "must take all the well pleaded allegations as true, construe the complaint in the light most favorable to the plaintiff, and determine whether, under any reasonable reading of the pleadings, the plaintiff may be entitled to relief." Colburn v. Upper Darby Township, 838 F.2d 663, 664-65 (3d Cir. 1988), cert. denied, 489 U.S. 1065 (1989) (quoting Estate of Bailey by Oare v. County of York, 768 F.2d 503, 506 (3d Cir. 1985)).

If the Court considers matters outside of the pleadings, then the Rule 12(b)(6) motion is to be treated as one for summary judgment. See Fed. R. Civ. P. 12(b). A reviewing court may enter summary judgment where there are no genuine issues as to any material fact and one party is entitled to judgment as a matter of law. White v. Westinghouse Elec. Co., 862 F.2d 56, 59 (3d Cir. 1988). The evidence presented must be viewed in the light most favorable to the non-moving party. Id. "The inquiry is whether the evidence presents a sufficient disagreement to require submission to the jury or whether it is so one sided that one party must, as a matter of law, prevail over the other." Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 249 (1986). In deciding the motion for summary judgment, it is not the function of the Court to decide disputed questions of fact, but only to determine whether genuine issues of fact exist. Id. at 248-49.

### **C. Discussion**

**Defendants move to dismiss plaintiffs' action on a number of different grounds -- because plaintiffs' claims are barred by the release signed by plaintiffs, because plaintiffs have failed to state a cause of action under the FDCPA or RICO, and because this Court should decline to exercise supplemental jurisdiction over the state law claims when no federal claims remain. Because the Court determines that all of plaintiffs' claims against MMC are barred by the release executed by plaintiffs, and that plaintiffs' Complaint fails to state a claim against Balboa, defendants' Motions will be granted.**

#### **1. Plaintiffs' Claims Against MMC**

**As part of the partial release agreement entered into by plaintiffs and MMC, plaintiffs executed a release in favor of MMC. That release states in full as follows:**

**The undersigned, Bernard Weinberger and Lorna Weinberger, hereby agree that in exchange for Mellon Mortgage Company's agreement to allow the sale of a portion of the mortgaged property and Partial Release of its lien as described in correspondence dated July 31, 1997; August 6, 1997; August 7, 1997; August 13, 1997; August 26, 1997; September 8, 1997; and herein, the undersigned hereby fully and forever release Mellon Mortgage Company, its officers, directors, employees, agents, affiliates, parent and investors from any and all loss, cost, claim, damage, setoff, defense or other liability related to or arising from such Partial Release transaction or servicing of the subject loan prior to the date of said Partial Release.**

**(See Pls' Resp. at Exh. M.) Neither party contests the validity of the release, and both agree that the instant action involves claims arising out of the "servicing of the subject loan." Instead, what is hotly contested is the cutoff date of the release as stated in the last phrase, "prior to the date of said Partial Release." According to**

the release, claims arising prior to this date are released; by implication, claims arising thereafter are not.

The parties agree that the events giving rise to the instant lawsuit occurred between August and October of 1997. Given this pivotal window of time, plaintiffs, on the one hand, contend that "the date of said Partial Release" referred to in the above release is September 15, 1997, the date on which MMC executed a document entitled "Partial Satisfaction Piece." (See Pl.s' Resp. at Exh. D.) That document clearly states that it was made on the 15th of September of 1997 and further states in pertinent part as follows:

The undersigned hereby certifies that the debt secured by the above-mentioned Mortgage has been partially paid or otherwise partially discharged and that upon the recording hereof said Mortgage shall be and is hereby satisfied and discharged, but only to the extent and with regard to the above-referenced property.

(Id.) According to plaintiffs, the date that the Partial Satisfaction Piece was executed by MMC--September 15, 1997--is "the date of said Partial Release" referred to in the release at issue. And because some key events giving rise to this case arose after September 15, 1997--in particular the letter of October 1, 1997--plaintiffs argue that the release does not bar the instant suit.

MMC, on the other hand, contends that the pivotal "date of said Partial Release" is October 15, 1997, the date of the closing of the entire partial release transaction. Plaintiffs admit and affirmatively state in their response that this transaction occurred on October 15, 1997. According to MMC, the Partial Satisfaction Piece is but one document of the partial release transaction, and the phrase "date of said Partial Release" refers not to the date on which one document was executed but to the date on which the entire partial release transaction was consummated.<sup>(2)</sup> And because the date on which the transaction closed--October 15, 1997--comes after the date or dates of the events giving rise to this suit, MMC argues that the release effectively precludes plaintiffs from bringing the instant action against MMC.

As both parties have submitted and as this Court has considered exhibits outside of the pleadings, the Court treats MMC's Motion as one for summary judgment. As stated above, entry of summary judgment is appropriate where there are no genuine issues as to any material fact and one party is entitled to judgment as a matter of law. White, 862 F.2d at 59. With respect to the release, there are no contested issues of fact. The parties instead disagree on the interpretation of the portion of the release dealing with the cutoff date. This Court finds that the release at issue is unambiguous and that the date referred to as the "date of said Partial Release" is the date of the closing of the Partial Release transaction. That date, by admission of plaintiffs, was October 15, 1997. Reading the language of the release, "said Partial Release" logically refers back to the "Partial Release transaction" which occurs one phrase before. In the opinion of this Court, it would contravene common sense to find that the "date of said Partial Release," coming after "the Partial Release

transaction," refers to the date on which one document of that transaction, the "Partial Satisfaction Piece," was executed, as opposed to the date on which the entire partial release transaction occurred. This reading is supported by the fact that MMC explicitly conditioned the partial release agreement "on closing occurring no later than September 30, 1997." (See Pl.'s Resp. at Exh. M.) Plaintiffs apparently believe this fact to support their argument as the date mentioned is September 30, not October 15. However, neither side contests that the closing actually occurred on October 15. Although no writing submitted to the Court shows that MMC delayed the closing date on which the partial release agreement was conditioned, the mere fact that the agreement was conditioned, at one point, on the closing taking place on a certain date, is a tell-tale sign that the date of closing signified the consummation and legitimization of the partial release agreement -- not the execution by MMC of one document of that transaction.

This Court thus finds that, as a matter of contract interpretation, "the date of said Partial Release" refers to the date on which the Partial Release transaction was consummated and not the date on which one document of that transaction was executed. Accordingly, as all of plaintiffs' claims asserted against MMC in this suit arise from events that predate October 15, 1997, the Court finds that, as a matter of law, plaintiffs' claims against MMC are barred by the release signed by plaintiffs. MMC's Motion will therefore be granted, and judgment entered in favor of MMC and against plaintiffs on all counts.<sup>(3)</sup>

## **2. Plaintiffs Claims Against Balboa**

Plaintiffs assert two claims against defendant Balboa -- a federal RICO claim and a state law claim for unjust enrichment. Balboa moves on Rule 12(b)(6) grounds to dismiss both claims. The Court addresses each in turn.

Plaintiffs assert claims for violation of the RICO Act under 18 U.S.C. 1962(c) and (d). Section 1962(d) prohibits any conspiracy to violate the other subsections of 1962. Section 1962(c)--the substantive provision on which plaintiffs have predicated their 1962(d) claim--makes it unlawful for "any person employed by or associated with any enterprise engaged in, or the activities of which affect, interstate or foreign commerce, to conduct or participate, directly or indirectly, in the conduct of that enterprise's affairs through a pattern of racketeering activity." 18 U.S.C. 1962(c). According to the statutory language then, to state a cause of action under 1962(c), one must adequately plead (1) conduct (2) of an enterprise (3) through a pattern (4) of racketeering activity. See Sedima, S.P.R.L. v. Imrex Co., Inc., 473 U.S. 479, 496 (1985). A "pattern of racketeering activity" requires at least two acts of racketeering activity. 18 U.S.C. 1961(5). Violation of the federal mail fraud statute, 18 U.S.C. 1341, as alleged by the plaintiffs, is one such predicate act of racketeering activity. See 18 U.S.C. 1961(1)(B).

Plaintiffs contend that MMC and Balboa together are an association-in-fact constituting the RICO enterprise, and that both MMC and Balboa conducted

**and/or participated in the conduct of the enterprise's affairs through a pattern of racketeering activity. The alleged racketeering activity in this case involves a kickback scheme to defraud mortgagors whose hazard insurance policies were forced-placed. In short, MMC and Balboa are alleged to have conspired in a kickback scheme wherein mortgagors whose home insurance policies lapsed and were forced-placed by MMC were charged excessively high rates by Balboa to the financial benefit of MMC and Balboa. While such allegations sound sinister and Machiavellian, this Court finds that plaintiffs' Complaint fails to state a cause of action under RICO.**

**As stated above, a viable RICO action must allege at least two predicate acts of racketeering activity. In this case, plaintiffs attempt to allege acts of mail fraud as the predicate RICO acts. The federal mail fraud statute, 18 U.S.C. 1341, prohibits the use of the mails for the purpose of carrying out any scheme or artifice to defraud. See Kehr Packages, Inc. v. Fidelcor, Inc., 926 F.2d 1406, 1413 (3d Cir. 1991). "A scheme or artifice to defraud need not be fraudulent on its face, but must involve some sort of fraudulent misrepresentations or omissions reasonably calculated to deceive persons of ordinary prudence and comprehension." Id. at 1415. The actual violation is the mailing; but the mailing must relate to the underlying fraudulent scheme. Id. at 1413. "The scheme need not involve affirmative misrepresentation, but the statutory term 'defraud' usually signifies 'the deprivation of something of value by trick, deceit, chicane or overreaching.'" Id. at 1415 (quoting McNally v. United States, 483 U.S. 350, 358 (1987)).**

**In the instant case, while plaintiffs have alleged two mailings--satisfying the numerical requirement for the requisite predicate acts--at a more fundamental level, they have failed to allege any conduct on the part of the defendants which comes within the ambit of the federal mail fraud statute, that is, any conduct which can be said to have purposed to defraud or deceive. The scheme alleged in this case is a kickback scheme in which MMC allegedly receives a kickback or commission of sorts from Balboa from excessively high insurance rates charged to mortgagors whose home insurance coverage was force-placed by MMC. Taking such allegations as true, the Court nevertheless cannot conceive how such a scheme constitutes a scheme to defraud. As alleged in plaintiffs' Complaint, the letter sent to plaintiffs by MMC--one of the alleged predicate acts--warns in big and bold letters that MMC will obtain a policy through Balboa which may cost substantially more and provide less coverage unless plaintiffs provide evidence of a replacement policy. It also "urges" plaintiffs to contact their insurance agent to obtain their own hazard insurance.**

**Plaintiffs argue that this is a case of omission in that the letter did not disclose the illegal kickback scheme to defraud mortgagors. While such an argument is somewhat circular, more fundamentally, it fails to take into consideration the fact that the underlying scheme itself must be fraudulent, that is, one which "involve[s] some sort of fraudulent misrepresentations or omissions reasonably calculated to deceive persons of ordinary prudence and comprehension." Kehr, 926 F.2d at 1415.**

The Court cannot see how letters that warn of an imminent bad deal and urge one to seek better, could possibly be calculated to deceive anyone. It is difficult to understand what plaintiffs claim the letter was intended to have defrauded them of or have deceived them into believing or doing. If defendants were indeed scheming to deceive plaintiffs into allowing their insurance to lapse so that MMC could charge Balboa's higher rates, then, as articulated by the Third Circuit, "none of [defendants'] alleged acts or omissions could be 'reasonably calculated to deceive a person of ordinary prudence and comprehension.'" Kehr, 926 F.2d at 1416. Thus the Court finds that the alleged kickback scheme engaged in by defendants MMC and Balboa, does not make out a "scheme to defraud" as required to constitute a predicate act of mail fraud. The mailing cannot be in violation of the mail fraud statute where the so-called scheme could not have deceived anyone. See, e.g., McEvoy Travel Bureau, Inc. v. Heritage Travel, Inc., 904 F.2d 786, 792 (1st Cir. 1990) (dismissing a RICO claim on the grounds that the allegations of an illegal rebate and kickback scheme did not amount to a scheme to defraud). Accordingly, plaintiffs' RICO claims against defendant Balboa will be dismissed.

Finally, this Court will also dismiss plaintiffs' state law claim for unjust enrichment against Balboa as it declines, in its discretion, to exercise supplemental jurisdiction over one remaining state law claim where all federal claims have been dismissed.

#### D. Conclusion

In conclusion, defendants' Motions to Dismiss will be granted for the aforementioned reasons.

An appropriate Order follows.

Clarence C. Newcomer, J.

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**LORNA WEINBERGER, :**

**Plaintiffs :**

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**MELLON MORTGAGE COMPANY and :**

**BALBOA INSURANCE COMPANY, :**

**Defendants : NO. 98-2490**

**ORDER**

**AND NOW, this day of September, 1998, consistent with the foregoing Memorandum, it is hereby ORDERED as follows:**

**(1) Defendant Mellon Mortgage Company's Motion to Dismiss Plaintiffs' Complaint Pursuant to Federal Rules of Civil Procedure 12(b)(6) and 12(b)(1), which this Court construes as a Motion for Summary Judgment, is hereby GRANTED. It is further ORDERED that JUDGMENT is ENTERED in favor of defendant MMC and against plaintiffs on all claims.**

**(2) Defendant Balboa Insurance Company's Motion to Dismiss is hereby GRANTED. It is further ORDERED that all claims against defendant Balboa are hereby DISMISSED.**

**AND IT IS SO ORDERED.**

**Clarence C. Newcomer, J.**

**1. The factual allegations in plaintiffs' Complaint are in some instances supplemented by the factual allegations found in plaintiffs' response to the instant Motions. For purposes of these Motions, which implicate different standards of review, the Court sets forth the facts as alleged in plaintiffs' Complaint, and in some instances, as supplemented by the response.**

**2. MMC also argues that even if that document were the pivotal document, the effective date of the release or satisfaction called for by that document is the date on which that document is recorded and not merely executed.**

**3. As the Court disposes of MMC's Motion on the grounds of the release, it does not address MMC's other arguments.**