

**IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF WEST VIRGINIA
Wheeling**

LIJKEL DIJKSTRA,

Plaintiff,

v.

Civil Action No. 5:11-CV-152

Judge Bailey

**HARRY J. CARENBAUER; HOME
LOAN CENTER, dba Lendingtree Loans;
HLC ESCROW; LENDERS FIRST CHOICE;
CHASE HOME FINANCE, LLC; WILSHIRE
CREDIT CORPORATION; MERRILL LYNCH
MORTGAGE LENDING, INC.; LaSALLE BANK,
N.A.; and DANIEL J. MANCINI,**

Defendants.

ORDER ON CLASS DAMAGES

On the 11th day of March, 2014, this Court ordered the parties to submit their respective briefs regarding class damages. The Court also ordered the plaintiff to file proof that the notices to putative class members were disseminated. After a brief extension of the filing deadlines, the parties submitted their briefs [Docs. 237 & 238], and the plaintiff filed its Notice of Dissemination of Notice of Pendency of Class Action to Putative Class Members [Doc. 232]. This Court has considered all relevant materials and is now prepared to issue its ruling regarding class damages.

Procedural History

On January 3, 2013, this Court entered its Order Granting Conditional Class

Certification [Doc. 127]. The Court certified the following class:

All West Virginia consumers who obtained mortgage loans through LendingTree, and whose loans were closed by persons not admitted to the practice of law in West Virginia or by persons not under the direct supervision of a lawyer admitted to the practice of law in West Virginia, and whose loans were in effect at any time after November 8, 2007.

[Doc. 127, p. 6].

The Court found that the following questions were common to all potential class members:

- (1) whether LendingTree's "witness only" closings constitute unauthorized practice of law;
- (2) whether class members are entitled to statutory penalties for each violation of the West Virginia Consumer Credit and Protection Act, W. Va. Code §§ 46A-5-101, -6-102, -104;
- (3) whether LendingTree should be held in contempt of court for engaging in the unauthorized practice of law;
- (4) whether fees paid to LendingTree for the laypersons' closing services should be refunded or disgorged; and
- (5) whether class members are entitled to injunctive relief and other equitable remedies.

[Doc. 127, p. 11].

The primary theories presented by the class were the unauthorized practice of law and the claim under the WVCCPA for overcharging for notary services. The only Counts

which were conditionally certified for class treatment were Counts I, II, V and X. This Court granted the class summary judgment as to Count I (Declaratory Judgment), in which plaintiff sought an order decreeing that the practice of using non-lawyers not under the direct supervision of a licensed attorney constitutes the unauthorized practice of law; Count V (Overcharging), in which plaintiff sought recovery for certain fees or expenses related to the loan transaction; and Count X (Committing Unfair and Deceptive Trade Practices in Violation of W.Va. § 46A-1-101, et seq. (the “WVCCPA”)), in which plaintiff claims that defendants engaged in the unauthorized practice of law and charged more than \$2 total for Mr. Carenbauer’s appearance.

By Order dated February 26, 2014 [Doc. 210], this Court denied the defendants’ Motion to Decertify the Class [Doc. 159].

On December 31, 2013, and January 2, 2014, the Notice of Pendency of Class Action to Putative Class Members was disseminated to the 692 class members. No class members have opted out to date. This Court reviewed the Notice of Pendency of Class Action and **APPROVES** the same. There being no further business to take up before determining partial final judgment on class damages, this Court now, pursuant to Rule 23(c)(1)(C), hereby **AMENDS** its previous order [Doc. 127] conditionally certifying the class, and does hereby finally certify the class on a non-provisional basis.

Discussion

A. Unauthorized Practice of Law

In its prior ruling, this Court held that it is clear that such a closing is, in fact, the unauthorized practice of law. Defendants continue to insist that this only became the case

in November of 2010, when the West Virginia Supreme Court of Appeals issued its Order in **McMahon v. Advanced Title Servs. of W.Va.**, No. 101027 (W.Va. Jan 11, 2011 (*nunc pro tunc* Nov. 17, 2010)), which held that the Circuit Court of Brooke County's Stipulation and Order entered March 31, 2010, was "plainly right."

In its previous ruling, this Court directed the defendants to the March 2003 Committee on Unauthorized Practice of Law Opinion No. 2003-01 [Doc. 108-1]. This Opinion clearly stated that "it is *inherent at the closing itself* that buyers and sellers will have questions about the transaction and the documents, which answers necessarily go to their respective legal rights and obligations. Such answers are advising on legal matters." The 2003 opinion concluded that "[i]t is clear that as a whole, *real estate closings are the practice of law*. The Committee presumes that significant harm to the public occurs just by the practice of law by lay persons and holds such practice to be the unauthorized practice of law." (emphasis added). As this Court previously noted, LendingTree's use of a notary foreclosed the opportunity to ask questions about the documents or the terms of the loan for these class members, matters which have the potential to affect what is likely the largest investment of their lives.

Furthermore, this Court finds the defendants' argument regarding the clarity of the law on the unauthorized practice of law to be disingenuous as discovery revealed that eight of the class members' loans were closed *after* the West Virginia Supreme Court of Appeals decided **McMahon**. Accordingly, it appears that the defendant continued to engage in this practice even after the decision upon which it relies had issued.

For these reasons, this Court awards a mid-range, inflation-adjusted civil penalty

pursuant to W. Va. Code Section 46A-5-101(1)¹ of two thousand dollars (\$2,000.00) for each class member for the defendants' unauthorized practice of law.

B. Excessive Notary Fees

Count V alleges that the defendants overcharged for the notary's closing services, noting that notaries are limited to a statutory fee of \$2.00 for each notarial service. The defendants claim that a notary is permitted to charge two dollars for each signature notarized; for each act of certifying, retaining, and recording facsimiles of a document; and for each other notarial act performed, W. Va. Code § 29C-4-301; and that notaries are permitted to charge for other services as provided by W. Va. Code §§ 59-1-7 and -11.

While these contentions may be accurate, the fact remains that the defendants did not charge on the basis of the statutory fees, but rather charged on a different basis, with the charges running from \$90.00 to \$275.00. There is no authority for a notary to charge in this fashion.

For these reasons, this Court awards a mid-range, inflation-adjusted civil penalty of two thousand dollars (\$2,000.00) for each class member who paid this excessive notary fee.

C. Disgorgement of Notary Fees

Further, this Court finds that the class members are entitled to disgorgement of the fees paid for these unauthorized loan closings and notary fees in excess of the legal limits. Accordingly, the \$65,591.00 in notary fees, minus \$2.00 for each class member, shall be

¹It is within this Court's discretion pursuant to W. Va. Code Section 46A-5-101(1) to award a penalty of "not less than one hundred dollars or more than one thousand dollars." This penalty may be adjusted for inflation since September 1, 1974, in an amount equal to the consumer price index. W. Va. Code Section 46A-5-106.

refunded to the class members who were charged the excessive fee.

D. Determination of Actual Damages

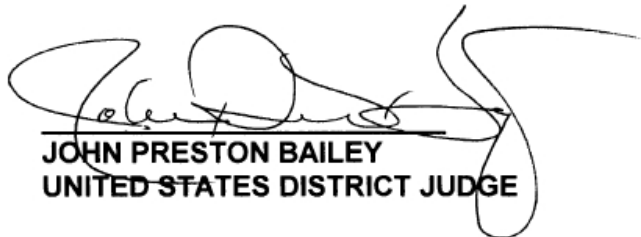
Finally, the plaintiff has requested that any class member who believes he or she suffered actual damages beyond those compensable through the penalties and refunds awarded above be permitted to submit evidence of such alleged damages. This Court grants this request and will hold individual trials on damages for those plaintiffs who come forward with such evidence. Such class members shall give notice within sixty (60) days of receipt of the above payments.

As a final matter, the defendants' Motion for Leave to File Response Brief **[Doc. 240]** is **DENIED**.

It is so **ORDERED**.

The Clerk is directed to transmit copies of this Order to all counsel of record herein.

DATED: July 16, 2014.



JOHN PRESTON BAILEY
UNITED STATES DISTRICT JUDGE