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2008 Survey of RESPA Developments

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Introduction

Over the past year, the U.S. Department of Housing and Urban Development ("HUD") and state insurance regulators have continued to pursue enforcement activities under the Real Estate Settlement Procedures Act ("RESPA")[1] against settlement service providers and captive title reinsurance arrangements, even as the U.S. General Accountability Office ("GAO") was recommending legislative changes to RESPA in a report on practices in the title insurance industry. But the most significant RESPA developments resulted from litigation as courts decided cases on liability under the RESPA section 8(b) fee-splitting provisions, standing-to-sue issues, RESPA's statute of limitations, the proper measure of damages, affiliated business arrangements, and the secondary market exemption.

GAO Title Insurance Report

In response to a congressional request, on April 13, 2007, the GAO issued a report titled *Actions Needed To Improve Oversight of the Title Industry and Better Protect Consumers* (the "GAO report"), examining practices in the title insurance industry.[2] This report suggested that Congress should consider, as part of its oversight of HUD, exploring the need for modifications to RESPA, including increases in HUD's enforcement authority.

The GAO report noted that title insurance is dominated by five insurers which, in 2005, accounted for ninety-two percent of the national market, and in most

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1. RESPA, Pub. L. No. 93-533, 88 Stat. 1724 (1974) (codified as amended at 12 U.S.C. §§ 2601–2617 (2000)) [hereinafter "RESPA"].

2. United States Government Accountability Office, Title Insurance: Actions Needed To Improve Oversight of the Title Industry and Better Protect Consumers, GAO-07-401 (Apr. 13, 2007), *available at* http://www.gao.gov/new.items/d07401.pdf. This GAO report was issued to follow up on a previous GAO report and previous testimony. *See id.* at 1 n.1 (citing United States Government Accountability Office, Title Insurance: Preliminary Views and Issues for Further Study, GAO-06-568 (Apr. 24, 2006); United States Government Accountability Office, Title Insurance: Preliminary Views and Issues for Further Study, GAO-06-569T (Apr. 26, 2006)).

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states two or three large insurers dominate.[3] However, understanding and overseeing the industry is difficult, owing to variations among states regarding the manner in which: (i) title agents search records; (ii) premiums are priced as a result of differing market conditions; and (iii) real estate agents, real estate brokers, and others enter into affiliated business arrangements ("AfBAs") with title insurers.[4]

The GAO report highlighted a concern that consumers may be overpaying for title insurance.[5] Consumers find it difficult to compare title insurance policies, and consumers also are often unwilling to disrupt the larger real estate transaction for a relatively modest potential savings on the title insurance policy.[6] Moreover, the potential for conflicts of interest exists because real estate and mortgage professionals often choose the title insurer, and these individuals may have a financial interest in the insurance transaction.[7] The GAO report also noted that HUD and state insurance regulators have recently made allegations of illegal compensation being paid to realtors, builders, and others for consumer referrals.[8]

The GAO report recommended that HUD clarify its regulations relating to referral fees and AfBAs and enhance its coordination with state regulators.[9] The report also suggested that Congress should consider amending RESPA to give HUD increased enforcement authority for violations of RESPA's section 8 prohibitions on referral fees by granting HUD the ability to levy civil money penalties and enhancing the information required to be provided to consumers.[10]

Recent Enforcement Actions and Settlements

HUD Settlements

1-800-East-West Mortgage Company—September 2006

On September 6, 2006, HUD announced settlements in two cases. The first settlement followed from HUD's allegations that a Boston-area real estate closing attorney provided things of value for the referral of settlement service business from 1-800-East-West Mortgage Company, Inc. ("East-West").[11] According to HUD, the closing attorney provided tickets to a Boston Red Sox game and a New England Patriots event, as well as upscale restaurant gift certificates to East-West

3. *Id.* at 3.
4. *Id.*
5. *Id.* at 4.
6. *Id.*
7. *Id.*
8. *Id.*
9. *Id.* at 6.
10. *Id.*
11. Press Release, U.S. Department of Housing and Urban Development, HUD Settles Cases Against New England Attorney and Property Appraisal Firm for Paying Kickbacks for Referrals (Sept. 6, 2006), http://www.hud.gov/news/release.cfm?content=pr06-106.cfm [hereinafter "East-West Press Release"]. The settlement agreements are available at U.S. Department of Housing and Urban Development, RESPA Settlement Agreements, 1-800-East-West Mortgage Company, Inc. (15 June 05), http://www.hud.gov/utilities/intercept.cfm?/offices/hsg/sfh/res/eastwest.pdf (last visited Jan. 11, 2008), and U.S. Department of Housing and Urban Development, RESPA Settlement Agreements, Grasso Appraisal Services, Inc. (13 June 06), http://www.hud.gov/offices/hsg/sfh/res/grasso.pdf (last visited Jan. 11, 2008) [hereinafter "Grasso Appraisal Services Settlement Agreement"].

and its employees in exchange for referrals of loan closing business. HUD entered into the second settlement with Grasso Appraisal Services, Inc. ("Grasso"), a real estate appraisal company, in connection with kickbacks allegedly paid by Grasso to East-West.[12] In this case, HUD determined that Grasso paid kickbacks to East-West and its employees in the form of restaurant gift certificates.[13] These settlements against the alleged payors of kickbacks are a continuation of the 2005 settlement HUD reached with East-West under which East-West paid $150,000 to resolve allegations that it was the recipient of such kickbacks.[14] Under that earlier settlement agreement, East-West agreed to cooperate with an ongoing investigation of closing attorneys, appraisers, title companies, and other settlement service providers who allegedly provided items of value to East-West.[15]

Fidelity National Title Insurance and Longford Homes—February 2007

In February 2007, HUD reached settlement agreements with a New Mexico home builder and a Florida title insurance company over alleged violations of RESPA.[16] HUD alleged that Longford Homes of New Mexico, Inc., and Fidelity National Title Insurance Company were engaged in a business arrangement that violated RESPA's anti-kickback and referral fee provisions.[17] Specifically, HUD claimed that the title insurer provided the home builder with money to cover expenditures related to the home builder's marketing expenses in exchange for the referral of settlement service business.[18] As a result of the settlements, the two companies agreed to pay nearly $90,000 and to cease the practices.[19]

Fulton Homes, Lyon Homes, and Shea Homes—September 2006

On October 12, 2006, HUD announced three settlements totaling $1.95 million with three homebuilders engaged in captive title reinsurance arrangements that HUD alleged violated section 8 of RESPA.[20] The agreements included

12. East-West Press Release, *supra* note 11.
13. *Id.*
14. *See* Grasso Appraisal Services Settlement Agreement, *supra* note 11, at 3.
15. *See id.*
16. Press Release, U.S. Department of Housing and Urban Development, HUD Settles Cases Against New Mexico Builder and Florida Title Company for Paying Kickbacks for Referrals (Apr. 12, 2007), http://www.hud.gov/news/release.cfm?content=pr07-041.cfm [hereinafter "Fidelity Press Release"].
17. A copy of the settlement agreement with Fidelity is available at U.S. Department of Housing and Urban Development, RESPA Settlement Agreements, Fidelity National Title Insurance Company (5 Feb 07), http://www.hud.gov/offices/hsg/sfh/res/fidelity.pdf (last visited Jan. 11, 2008). A copy of the settlement agreement with Longford is available at U.S. Department of Housing and Urban Development, RESPA Settlement Agreements, Longford Homes of New Mexico, Inc. (5 Feb 07), http://www.hud.gov/offices/hsg/sfh/res/longford.pdf (last visited Jan. 11, 2008).
18. Fidelity Press Release, *supra* note 16.
19. *Id.*
20. Press Release, U.S. Department of Housing and Urban Development, HUD Announces Three Settlements with Builders Involved in Captive Title Reinsurance Arrangements (Oct. 12, 2006), http://www.hud.gov/news/release.cfm?content=pr06-137.cfm [hereinafter "Shea Homes Press Release"].

(i) a $950,000 settlement with Shea Homes, Inc., and its captive title reinsurance company, Shea Financial Services, Inc.; (ii) an $850,000 settlement with William Lyon Homes and its captive title reinsurance company, Duxford Title Reinsurance, Inc.; and (iii) a $150,000 settlement with Fulton Homes, an Arizona builder.[21] In announcing these settlements, HUD emphasized that it sees "almost no legitimate purpose for [captive title reinsurance] when it comes to single-family homes."[22] HUD noted that there is little history of claims being paid by reinsurance companies, and that it appears that many captive title reinsurance arrangements are designed to generate excessive referral fees.[23]

These three settlements marked the second round of federal-level settlements for captive title reinsurance arrangements. As reported in last year's *Annual Survey,* HUD had previously settled with builders and a lender.[24] As of this writing, the total amount of HUD-negotiated settlement agreements in captive title reinsurance cases stands at $3.55 million.

Other Federal Actions—FTC Modifies Fairbanks Capital Settlement

In August 2007, the Federal Trade Commission ("FTC") modified its settlement with Fairbanks Capital over alleged violations of several federal laws, including RESPA.[25] Fairbanks, a subprime mortgage loan servicer, had agreed in 2003 to a $40 million settlement agreement with the FTC over charges it had violated federal laws through its servicing practices.[26] In the 2007 settlement agreement regarding RESPA, the FTC alleged that Fairbanks failed to: (i) respond to borrowers' written requests about their loans; and (ii) make timely insurance and property tax payments on behalf of borrowers and otherwise properly administer their

21. *Id.* The settlement agreements are available at U.S. Department of Housing and Urban Development, RESPA Settlement Agreements, Shea Homes Limited Partnership (15 Sept 06), http://www.hud.gov/offices/hsg/sfh/res/shea.pdf (last visited Jan. 11, 2008); U.S. Department of Housing and Urban Development, RESPA Settlement Agreements, William Lyons Homes, Duxford Title Reinsurance, Inc. (15 Sept. 06), http://www.hud.gov/offices/hsg/sfh/res/lyons.pdf (last visited Jan. 11, 2008); and U.S. Department of Housing and Urban Development, RESPA Settlement Agreements, Fulton Homes Sales Corporation (4 Oct 06), http://www.hud.gov/offices/hsg/sfh/res/fultonhm.pdf (last visited Jan. 11, 2008).

22. Shea Homes Press Release, *supra* note 20.

23. *Id.*

24. *See* Joseph Kolar, Robert Jaworski, Susan Kelsey, Donald Blanchard & Clinton Rockwell, *RESPA Review: "Kicking Back" and "Doing the Splits,"* 62 Bus. Law. 599, 605–08 (2007) (2007 *Annual Survey*).

25. For information about the modification of the settlement, see Press Release, Federal Trade Commission, FTC, Subprime Mortgage Servicer Agree to Modified Settlement: Agreement with Former Fairbanks Capital Provides Additional Consumer Benefits (Aug. 2, 2007), http://www.ftc.gov/opa/2007/08/sps.shtm. For information about the original 2003 settlement arising from alleged violations of the FTC Act, the Fair Debt Collection Practices Act ("FDCPA"), the Fair Credit Reporting Act ("FCRA"), and RESPA, see Press Release, Federal Trade Commission, Fairbanks Capital Settles FTC and HUD Charges: Agencies Allege Fairbanks Engaged in Illegal Practices in Servicing Subprime Loans; Defendants Will Pay Over $40 Million for Consumer Refunds (Nov. 12, 2003), http://www.ftc.gov/opa/2003/11/fairbanks.shtm [hereinafter "2003 Fairbanks Press Release"].

26. *See* 2003 Fairbanks Press Release, *supra* note 25.

escrow accounts.[27] In the recent modification of the settlement, Fairbanks agreed in a permanent stipulation that it would remedy those deficiencies.[28]

State Actions—First American Title Insurance

On March 7, 2007, the Minnesota Department of Commerce announced settlements involving kickback schemes in which title insurance companies allegedly set up sham AfBAs with real estate agents, mortgage originators, and developers in order to circumvent state and federal laws prohibiting direct payments for referrals.[29] With respect to the largest settlement, investigators identified thirty-five AfBAs, structured as joint ventures ("JVs"), between First American Title Insurance Co. ("First American") and 600 "referral partners" that included real estate agents and brokers, mortgage originators, building contractors, land developers, and others.[30] Typically, the JV partnerships or limited liability companies were set up offering eighty percent ownership to the referral partners, while First American retained the remaining twenty percent.[31] Allegedly, First American managed the companies without receiving any compensation for its services.[32] First American set up offices, hired and trained employees, and supervised the employees to provide closing services.[33] Referral partners and associates were encouraged to direct their customers to the affiliated businesses for such closing services in return for an annual dividend.[34] The referral partners allegedly received compensation in amounts beyond their contributions to the JVs.[35] Moreover, the title services of the JVs were not marketed to the general public or persons unrelated to the referral partners.[36]

The Minnesota Department of Commerce and HUD concluded that the JVs were "not bona fide settlement service providers within the meaning of RESPA."[37] First American agreed to pay a civil penalty of $500,000 and to cease and desist from accepting new business through the JVs within thirty days.[38]

27. United States v. Select Portfolio Servicing, Inc., No. 03-12219-DPW, at 16-17 (FTC D. Mass. Sept. 4, 2007) (modified stipulated final judgment and order), *available at* http://www.ftc.gov/os/2003/11/070802selectportfoliomodiifiedstip.pdf.

28. *See id.*

29. Press Release, Minnesota Department of Commerce, Crack Down on Sham Title Insurance Affiliations: Consumers Pay Too Much for Title Insurance To Support Kickbacks and Illegal Referrals (Mar. 7, 2007), http://www.state.mn.us/portal/mn/jsp/common/content/include/contentitem.jsp?contentid=536913586 [hereinafter "Minnesota Department of Commerce Press Release"].

30. *See id. See also In re* First Am. Title Ins. Co., Consent Order (Minn. Comm'r of Commerce & HUD Feb. 28, 2007) [hereinafter "Consent Order"], *available at* http://www.state.mn.us/mn/externalDocs/Commerce/First_American_Consent_Order_030807051941_FirstAmericanJVSettlement.pdf; Matt Carter, *Minnesota Fines First American $500,000 for Alleged Sham Businesses—Title Insurer Denies Allegations in Consent Order,* Am. Land Title Ass'n, Mar. 7, 2007, http://www.alta.org/indynews/news.cfm?newsID=4720&print=1.

31. Minnesota Department of Commerce Press Release, *supra* note 29.

32. *Id.*

33. *Id.*

34. *Id.*

35. *See* Consent Order, *supra* note 30, at 2–5.

36. *Id.* at 3.

37. *Id.* at 4.

38. *Id.* at 6–7.

The settlement agreement with First American was part of a larger enforcement effort by the Minnesota Department of Commerce and HUD against sham affiliations. Actions were also announced against four other title insurance companies: Dale Dodge, owner of Verity Title and Abstract; Gibraltar Title Agency; American Residential Mortgage; and Powerhouse Title, LLC.[39] In these actions, the Department of Commerce levied civil penalties of $615,000 and ordered $100,000 to be reimbursed to customers.[40] The Minnesota Department of Commerce indicated that it is continuing to work in coordination with HUD to ensure RESPA compliance.[41]

The California Department of Insurance has also pursued First American for state law and RESPA violations. On December 27, 2006, First American agreed to pay $10 million to settle allegations by the California Department of Insurance that First American had engaged in certain illegal rebating activities.[42] Specifically, the California Department of Insurance alleged that First American, among other things, had paid the business support expenses of, and made cash payments and provided miscellaneous gifts and merchandise to, real estate professionals for the referral of title insurance business.[43] The California Department of Insurance's complaint specifically alleged that such activities violated RESPA, although the resulting settlement agreement only refers to monetary penalties as provided for under the California Insurance Code.[44] The settlement agreement does not constitute any admission of wrongdoing by First American.[45]

RESPA Litigation Developments During 2007

Introduction

RESPA litigation in 2007, as usual, focused on RESPA section 8. Decisions included a final resolution of the *Culpepper* yield spread premium ("YSP") litigation (discussed below), the introduction of a new element into the already confusing debate over whether markups/overcharges violate RESPA section 8(b), conflicting decisions concerning the proper measure of damages in a RESPA section 8(a) case, and judicial determinations concerning the circumstances in which RESPA's one-year statute of limitations for actions brought under section 8 should be equitably tolled. In addition, a court rendered a decision concerning the proper boundary of the RESPA secondary market exemption. Servicing issues also received attention in the courts this year, relating both to the escrow account rules in RESPA section 10

39. Minnesota Department of Commerce Press Release, *supra* note 29.
40. *Id.*
41. *Id.*
42. *See In re* First Am. Title Ins. Co., No. RC7104-A, at 5 (Dec. 27, 2006) (stipulation and waiver), *available at* http://www20.insurance.ca.gov/ePubAcc/Graphics/92509.pdf [hereinafter "Stipulation and Waiver"]. *See also In re* Licenses & Licensing Rights of First Am. Title Ins. Co., No. RC7104-A (Nov. 6, 2006) (notice of noncompliance and hearing), *available at* http://www20.insurance.ca.gov/pdf/PLD/91129.pdf.
43. *See* Stipulation and Waiver, *supra* note 42, at 2–3.
44. *Id.* at 5.
45. *Id.* at 6.

and the servicing transfer rules in RESPA section 6. We briefly summarize these developments below.

Culpepper IV: The End of the Road

It seemed to some almost an anti-climax that went largely unnoticed, but on July 2, 2007, the U.S. Court of Appeals for the Eleventh Circuit brought to a final conclusion the decade-long litigation that involved no fewer than four appeals to the Eleventh Circuit and necessitated the issuance of two separate Statements of Policy by HUD.[46] The overarching issue throughout the litigation was whether YSPs paid by residential mortgage lenders to mortgage brokers constitute illegal kickbacks or referral fees under RESPA section 8(a), with a critical sub-issue being whether it is appropriate to litigate this issue on a class basis.[47]

When the Eleventh Circuit heard the case in 2001, it decided that class action treatment of the YSP issue was appropriate.[48] That decision was quickly followed by HUD's 2001 issuance of a second Statement of Policy on YSPs[49] in which HUD: (i) specifically indicated that the court's reading of HUD's prior Statement of Policy[50] in *Culpepper III* was incorrect; and (ii) restated its prior Statement of Policy to remove the ambiguities upon which the decision in *Culpepper III* rested.[51] The result was a series of YSP decisions denying class certification and/or granting summary judgment in favor of the defendants. Included in this series of cases were two Eleventh Circuit decisions: *Heimmermann v. First Union Mortgage Corp.*[52] and *Hirsch v. BankAmerica Corp.*[53]

Following *Heimmermann,* the *Culpepper* district court granted the defendants' motion to decertify the class and for summary judgment.[54] The Culpeppers appealed that decision to the Eleventh Circuit, arguing that notwithstanding issuance of HUD's 2001 Statement of Policy and *Heimmermann, Culpepper III* was the "law of the case" and therefore had to be followed.[55]

The Eleventh Circuit rather easily disposed of this argument.[56] It held that the controlling authority (HUD's 2001 Statement of Policy) had since made contrary law applicable to the case and that the court's prior decision was clearly

46. *See* Culpepper v. Irwin Mortgage Corp., 491 F.3d 1260, 1263 (11th Cir. 2007) [hereinafter "*Culpepper IV*"].
47. *See id.* at 1273–76.
48. Culpepper v. Irwin Mortgage Corp., 253 F.3d 1324, 1326 (11th Cir. 2001) [hereinafter "*Culpepper III*"].
49. Real Estate Settlement Procedures Act Statement of Policy 2001-1, 66 Fed. Reg. 53052 (Oct. 18, 2001).
50. Real Estate Settlement Procedures Act (RESPA) Statement of Policy 1999-1 Regarding Lender Payments to Mortgage Brokers, 64 Fed. Reg. 10080 (Mar. 1, 1999).
51. Real Estate Settlement Procedures Act Statement of Policy 2001-1, 66 Fed. Reg. at 53053–59.
52. 305 F.3d 1257, 1264 (11th Cir. 2002) (denying class certification), *cert. denied,* 539 U.S. 970 (2003).
53. 328 F.3d 1306, 1307 (11th Cir. 2003) (affirming summary judgment in favor of defendants).
54. *See* Culpepper v. Inland Mortgage Corp., 243 F.R.D. 459 (N.D. Ala. 2006).
55. *See Culpepper IV,* 491 F.3d at 1262–63.
56. *Id.* at 1263.

erroneous and would have resulted in a manifest injustice if followed—circumstances that are recognized as exceptions to the "law of the case" doctrine.[57] The Eleventh Circuit then applied the HUD test for determining whether a YSP is legal, which consists, first, of ascertaining whether the mortgage broker provided compensable services in return for the total compensation (including the YSP) that it received and, second, ascertaining whether the total compensation the broker received was reasonable in the marketplace in return for those services.[58] The court determined that since the plaintiffs did not produce any evidence to demonstrate that the broker's total compensation exceeded the reasonable value of the services provided, summary judgment in the defendants' favor was appropriate.[59]

Cohen: A New Wrinkle to the Mark-Up/Overcharge Debate

As reported in last year's *Annual Survey,*[60] there is a split of authority over whether "mark-ups" of settlement service fees (where a settlement service provider charges a customer more for a settlement service than it pays a third-party provider for that service and retains the excess, without performing any services) violate section 8(b) of RESPA.[61] And there is a consensus that "overcharges" for settlement services (where the provider of the service charges an amount that exceeds the reasonable market value of the service) do not violate section 8(b).[62] Now, in light of a Second Circuit ruling, there is a third category of fee to worry about, which the court labeled as an "undivided unearned fee" (or which perhaps could more descriptively be called a "no service fee").[63]

In *Cohen v. JP Morgan Chase & Co.*,[64] the plaintiff alleged that Chase had charged her a "post closing fee" but had not provided any services in return for that fee. Chase moved to dismiss the complaint for failure to state a claim under RESPA section 8(b) because: (i) the fee was analogous to an "overcharge" that was not actionable under section 8(b); and (ii) the plaintiff failed to allege that the fee had been split with a third party.[65] The district court granted Chase's motion.[66]

On appeal, the U.S. Court of Appeals for the Second Circuit reversed, finding that section 8(b), in addition to prohibiting splits of fees between two parties in cases in which one party performs no services or marks up third-party fees, can

57. *Id.* at 1271–72.
58. *Id.* at 1273–74.
59. *Id.* at 1274.
60. *See* Kolar, Jaworski, Kelsey, Blanchard & Rockwell, *supra* note 24, at 609–12.
61. Three circuits have held that mark-ups violate section 8(b) (or have deferred to HUD's judgment that they do). Santiago v. GMAC Mortgage Group, Inc., 417 F.3d 384, 388 (3d Cir. 2005); Kruse v. Wells Fargo Home Mortgage, Inc., 383 F.3d 49, 62 (2d Cir. 2004); Sosa v. Chase Manhattan Mortgage Corp., 348 F.3d 979, 983 (11th Cir. 2003). And three circuits have held that they do not. Boulware v. Crossland Mortgage Corp., 291 F.3d 261, 265 (4th Cir. 2002); Krzalic v. Republic Title Co., 314 F.3d 875, 879 (7th Cir. 2002); Haug v. Bank of Am., N.A., 317 F.3d 832, 836 (8th Cir. 2003).
62. *See Santiago,* 417 F.3d at 387; *Kruse,* 383 F.3d at 56.
63. Cohen v. JP Morgan Chase & Co., 498 F.3d 111, 115 (2d Cir. 2007).
64. *Id.* at 113.
65. *Id.*
66. *Id.*

reasonably be read, as HUD reads it,[67] to prohibit a charge by a settlement service provider where "no, nominal or duplicative work is done."[68]

Finding the statute ambiguous in cases in which a party performs no services, the Second Circuit accorded *Chevron*[69] deference to HUD's construction of section 8(b).[70] In essence, the court found that the language "[n]o person shall give and no person shall accept any portion, split, or percentage of any charge . . . other than for services actually performed"[71] is expansive enough to reach a charge unilaterally assessed by a person, and not shared with any other person, in return for which no services are provided.[72]

The importance of this decision remains to be seen. Assuming that Chase can show that it performed some service in return for its fee, no matter how insignificant, it may be entitled to summary judgment on the ground that, at worst, it merely charged the customer more than the service was worth, i.e., an "overcharge," which is not prohibited by section 8(b). On the other hand, plaintiffs' class action attorneys may find *Cohen* useful in helping to draft complaints that can withstand dismissal motions at the outset of litigation.

Proper Measure of Damages/Standing

Section 8(d)(2) of RESPA provides that "[a]ny person or persons who violate the prohibitions or limitations of this section shall be jointly and severally liable to the person or persons charged for the settlement service involved in the violation in an amount equal to three times the amount of any charge paid for such settlement service."[73] District courts, in two 2007 decisions, reached different conclusions as to the proper interpretation of this provision.

In *Carter v. Welles-Bowen Realty, Inc.*,[74] the court interpreted this language as allowing for damages only in an amount equal to three times the portion of the settlement service charge that constitutes an illegal fee under RESPA,[75] as opposed to three times the charge for the entire settlement service involved in the violation. The opposite conclusion was reached by the court in *Yates v. All American Abstract Co.*,[76] which principally relied on the reasoning in a 2006 decision reported in last year's *Annual Survey, Kahrer v. Ameriquest Mortgage Co.*[77]

67. *See* Real Estate Settlement Procedures Act Statement of Policy 2001-1, 66 Fed. Reg. at 53059.
68. *Cohen,* 498 F.3d at 114.
69. *See* Chevron USA, Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837, 843–44 (1984).
70. *Cohen,* 498 F.3d at 113.
71. 12 U.S.C. § 2607(b) (2000).
72. *Cohen,* 498 F.3d at 124–25.
73. RESPA, *supra* note 1, § 8(d)(2), 88 Stat. at 1728 (codified as amended at 12 U.S.C. § 2607(d)(2)).
74. 493 F. Supp. 2d 921 (N.D. Ohio 2007).
75. *Id.* at 927. In this regard, the court relied on the reasoning in *Morales v. Attorneys' Title Insurance Fund, Inc.,* 983 F. Supp. 1418 (S.D. Fla. 1997), and *Moore v. Radian Group, Inc.,* 233 F. Supp. 2d 819 (E.D. Tex. 2002). *Id.* at 924–27.
76. 487 F. Supp. 2d 579 (E.D. Pa. 2007).
77. *See id.* at 582 (citing Kahrer v. Ameriquest Mortgage Co., 418 F. Supp. 2d 748 (W.D. Pa. 2006)); Kolar, Jaworski, Kelsey, Blanchard & Rockwell, *supra* note 24, at 612; *accord* Pettrey v. Enter. Title Agency, Inc., 241 F.R.D. 268, 273–77 (N.D. Ohio 2006).

The *Yates* court found persuasive that RESPA section 8(d)(2) had previously provided that the measure of damages in a section 8(a) case was "three times the value of the [referral] fee or thing of value [given in return for a referral]" but had been changed to its current form in 1983, indicating congressional intent to expand the recovery of damages.[78] The court in *Carter,* however, taking a closer look at the circumstances underlying the 1983 amendment, found that the amendment was intended merely to consolidate the existing two damage provisions—one specifying damages for violations of section 8(a) and the other for violations of section 8(b)—not to change them.[79]

Interestingly, the damages issue was addressed in both cases, as in the *Kahrer* case, in the context of motions to dismiss for lack of standing. The plaintiffs in both *Carter* and *Yates* alleged a violation of RESPA section 8(a) in the context of an AfBA but did not allege that they were overcharged for the settlement service provided on their behalf by the AfBA.[80] The *Carter* court found that plaintiffs lacked standing to sue because the existence of an overcharge or other concrete injury was essential to their ability to collect damages, whereas the *Yates* court came to the opposite conclusion because, in its view, the plaintiffs could recover damages without having to prove that they were overcharged.[81]

Failure to Satisfy AfBA Requirements: Loss of Safe Harbor or Violation?

In *Pettrey v. Enterprise Title Agency, Inc.*,[82] the district court, in ruling on the plaintiff's motion for class certification, determined that a failure to satisfy the conditions stated in RESPA (and in HUD's 1996 Statement of Policy[83]) for entitlement to the AfBA exception to section 8 constitutes a *per se* violation of section 8. In this regard, the *Pettrey* court stated:

> The safe harbor of [s]ection 8(c)(4), which provides for [AfBAs], is necessary precisely because [AfBAs] are by their nature likely to fall under the sweeping language of [s]ections 8(a) and 8(b). Even allowable [AfBAs] are arrangements whereby business is referred to a provider of settlement services and the referring party receives income from the provider. It follows that a purported [AfBA] that fails to meet the statutory requirements for an [AfBA] violates [s]ection 8. This conclusion is supported by [s]ection 8(d)(3), which provides that "[n]o person or persons shall be liable for a violation of the provisions of subsection (c)(4)(A)" regarding disclosure of the [AfBA] relationship if certain requirements are met. 12 U.S.C. [section] 2607(d)(3). The converse is that the statutory [AfBA] requirements can be "violated" such that a person is "liable."[84]

78. *See Yates,* 487 F. Supp. 2d at 582.
79. *See Carter,* 493 F. Supp. 2d at 927.
80. *See Yates,* 487 F. Supp. 2d at 581; *Carter,* 493 F. Supp. 2d at 922.
81. *Yates,* 487 F. Supp. 2d at 582; *Carter,* 493 F. Supp. 2d at 927.
82. 241 F.R.D. 268, 275–76 (N.D. Ohio 2006), *reconsideration denied,* 242 F.R.D. 384 (N.D. Ohio 2007).
83. HUD Statement of Policy 1996-2, 61 Fed. Reg. 29258 (June 7, 1996).
84. 241 F.R.D. at 275 (internal citation omitted).

This conclusion appears problematic. The AfBA rules specifically provide that "the only thing of value that is received from the [AfBA], *other than the payments permitted under this subsection,* is a return on the ownership interest or franchise relationship."[85] "This subsection" refers to subsection (c) of RESPA section 8, which identifies certain other payments, in addition to returns on ownership interests in an AfBA, as not being prohibited by RESPA section 8. One such payment is a "payment to any person of a bona fide salary or compensation or other payment for goods or facilities actually furnished or for services actually performed."[86] Hence, if the person receiving compensation in the form of an AfBA distribution can show that he or she provided valuable services in return for that compensation and the amount of that compensation does not exceed the reasonable market value of those services, subsections 8(c)(2) and 8(c)(4) of RESPA, read together, provide that such a payment does not constitute a section 8 violation.[87]

Equitable Tolling: Due Diligence Regarding Matters of Public Record

Another interesting pair of decisions issued in 2007 concerns the extent to which plaintiffs must exercise due diligence in order to be entitled to equitable tolling of the RESPA one-year statute of limitations for actions brought by private parties.[88] In *Kay v. Wells Fargo & Co., N.A.,*[89] after first finding that the RESPA statute of limitations was subject to equitable tolling,[90] the court determined that the plaintiffs had not alleged facts sufficient to show the due diligence needed for equitable tolling. In this regard, the court pointed out that "much of the information on which [the] plaintiff relies in her complaint [concerning the possible RESPA section 8 violation connected with so-called "captive reinsurance arrangements"] was released by [HUD] in a letter from 1997 which warned of the dangers of kickback schemes in captive reinsurance agreements."[91]

In addition, the *Kay* court noted that the plaintiff submitted a chart showing that as far back as 2000, the defendant mortgage insurer allegedly paid out zero dollars in claims despite receiving considerable amounts of money in premiums.[92] Since this information was publicly available, the court found that it could have been obtained by the other borrowers in the class as well as by the named plaintiff herself, so that equitable tolling was inappropriate.[93]

85. RESPA, *supra* note 1, § 8(c)(4), 88 Stat. at 1728 (codified as amended at 12 U.S.C. § 2607(c)(4)(2000)) (emphasis added).

86. RESPA, *supra* note 1, § 8(c)(2), 88 Stat. at 1728 (codified as amended at 12 U.S.C. § 2607(c)(2)(2000)).

87. *See supra* notes 85 and 86. *See also* 24 C.F.R. § 3500.14(g)(l)(iv), 3500.15(b)(3) (2007).

88. *See* RESPA, *supra* note 1, § 16, 88 Stat. at 1731 (codified as amended at 12 U.S.C. § 2614(2000)).

89. No. C 07-01351 WHA, 2007 WL 2141292 (N.D. Cal. July 24, 2007).

90. *See Kay,* 2007 WL 2141292, at *3; *accord* Lawyers Title Ins. Corp. v. Dearborn Title Corp., 118 F.3d 1157, 1166–67 (7th Cir. 1997). *But see* Hardin v. City Title & Escrow Co., 797 F.2d 1037, 1040–41 (D.C. Cir. 1986).

91. *Kay,* 2007 WL 2141292, at *4.

92. *Id.*

93. *Id.*

The court in *Boudin v. Residential Essentials, LLC*[94] took the opposite tact. The *Boudin* court allowed equitable tolling, despite the defendant's assertion that the alleged mark-up (of a recording fee) was easily discoverable by the plaintiff because the actual amount of the fee was a matter of public record.[95] The *Boudin* court in effect refused to take judicial notice of the public availability of the fee since it was not undisputed. Also factoring into the *Boudin* court's conclusion was likely its finding that the defendant may have affirmatively deceived the plaintiff by explicitly stating on the HUD-1 that every fee received by the defendant, with an exception only for the particular fee alleged to have been marked up, was disbursed to the defendant.[96]

Interestingly, the defendant in *Boudin* also maintained that the plaintiff's complaint should be dismissed because the plaintiff's allegation that the defendant performed no services in return for the mark-up was not plausible.[97] In this regard, the defendant relied on the refusal of the U.S. Court of Appeals of Appeals for the Eleventh Circuit in *Sosa v. Chase Manhattan Mortgage*[98] to permit the plaintiff in that case to amend its complaint to include such an allegation.[99] The *Sosa* court found it "impossible to say that [the defendant] performed no services for which its retention of a portion of the fees at issue was justified" because it was "undisputed . . . that [the defendant] arranged to have items delivered to complete the closing," and the defendant "benefited the borrowers by arranging for third party contractors to perform the deliveries."[100] However, the *Boudin* court determined that such facts were not "undisputed," i.e., that the plaintiff in *Boudin* specifically alleged that no services had been provided in return for the mark-up and had not indicated otherwise either in his complaint or in any of the briefs submitted on his behalf, and therefore the court refused to dismiss the complaint.[101]

Secondary Market Exception: Bona Fide Warehouse Lines

Bona fide "secondary market transactions" are specifically excluded from coverage under RESPA.[102] In determining whether a transaction is a bona fide secondary market transaction, HUD will consider "the real source of funding and the real interest of the funding lender."[103] The courts generally seek to follow this guidance.

In *Pierce v. Novastar Mortgage, Inc.*,[104] for example, the court examined certain funding arrangements between NovaStar Home Mortgage, Inc. ("NSH") and NovaStar Mortgage, Inc. ("NSM") and between West Valley Mortgage ("WVM") and

94. No. 07-0018-WS-C, 2007 WL 2023466 (S.D. Ala. July 10, 2007).
95. *Id.* at *5–6.
96. *See id.*
97. *Id.* at *2.
98. 348 F.3d 979, 983–84 (11th Cir. 2003).
99. *Boudin,* 2007 WL 2023466, at *2.
100. *Id.* (citing *Sosa,* 348 F.3d at 983–84).
101. *Boudin,* 2007 WL 2023466, at *2.
102. 24 C.F.R. § 3500.5(b)(7) (2007).
103. *Id.*
104. 489 F. Supp. 2d 1206 (W.D. Wash. 2007).

NSM. The facts were that NSH and WVM closed loans with funds from a warehouse line of credit that they obtained from Wachovia Bank, N.A., and then sold those loans to NSM.[105] Neither NSH nor WVM disclosed the YSPs that each received from NSM on the sale of those loans to NSM.[106]

The plaintiffs alleged that this failure to disclose violated RESPA and, hence, also the Washington Consumer Loan Act, which requires adherence to the RESPA disclosure requirements.[107] The defendants responded that these transactions were "secondary market transactions" which are exempt from RESPA.[108] The *Pierce* court ruled in favor of the plaintiffs, finding that neither NSH nor WVM was the real source of funding for these loans because: (i) NSH and NSM were jointly and severally liable to pay principal and interest on the NSH warehouse line; and (ii) NSM was a guarantor on the WVM warehouse line.[109]

Escrow Accounts

The RESPA escrow account rules also received some attention from courts during 2007. In *In re Dominique,*[110] the bankruptcy court discharged, as part of the debtors' Chapter 13 plan, the debtors' liability for a debt that the debtors owed to their mortgage holder to cover a deficiency in their escrow account. While the debtor was making payments under the plan, the mortgage holder had ceased providing the debtor with annual escrow statements and notices of shortages or deficiencies as normally required by RESPA section 10 and HUD's Regulation X[111] (presumably due to the Bankruptcy Code automatic stay,[112] which prohibits contacting the debtor).[113] Although Regulation X does not require a loan servicer to provide annual statements "where the borrower is in bankruptcy proceedings,"[114] the court determined that there is no corresponding exemption in Regulation X from the requirement of a servicer to "conduct an escrow account analysis at the completion of [every] escrow account computation year" and to thereafter advise the borrower of any shortfall or deficiency.[115] Since the servicer failed to fulfill these obligations under RESPA, the court held that it had waived its rights to payment of the escrow deficiency.[116]

Also, in *Fournigault v. Independence One Mortgage Corp.,*[117] the court determined that a loan contract which allows for no escrow account cushion must "zero out"

105. *Id.* at 1208–09.
106. *Id.*
107. *Id.* at 1211.
108. *Id.* at 1212–14.
109. *Id.*
110. 368 B.R. 913, 921–22 (Bankr. S.D. Fla. 2007).
111. 24 C.F.R. § 3500.17 (2007).
112. 11 U.S.C.A. § 362(a) (West 2004 & Supp. 2007).
113. *In re Dominique,* 368 B.R. at 916–17.
114. 24 C.F.R. § 3500.17(i)(l) (2007).
115. *In re Dominique,* 368 B.R. at 916 (quoting 24 C.F.R. § 3500.17(c)(3) (2007) and citing 24 C.F.R. § 3500.17(f)(5) (2007)).
116. *Id.* at 921–22.
117. 242 F.R.D. 486, 488 (N.D. Ill. 2007).

at least once each year, despite providing for monthly escrow payments to be based on estimated taxes and insurance premiums.

Qualified Written Requests

An increasingly popular claim being filed against servicers is for failing to provide a timely and proper response to a borrower's "qualified written request" ("QWR") for information, as required by section 6 of RESPA.[118] In this regard, RESPA requires that servicers acknowledge receipt of a QWR in writing within twenty days and respond to the QWR in writing (by making corrections or providing information, a written explanation, or any necessary clarifications) within sixty days after receipt.[119] RESPA provides a private right of action for damages for violation of these requirements.[120]

In *In re Nosek,*[121] the district court reversed a finding of the bankruptcy court that the debtor's mortgage holder violated the requirements of RESPA section 6 concerning QWRs when it failed to acknowledge receipt of a QWR from the debtor within the required twenty-day period. The district court determined that the Bankruptcy Code provides the sole statutory remedy for a debtor to seek information concerning the servicing of the debtor's mortgage loan when such information is related to an ongoing bankruptcy proceeding, and that these provisions therefore displace the QWR provisions in RESPA.[122]

118. *See* RESPA § 6(e), 12 U.S.C. § 2605(e) (2000), *added by* Act of Nov. 28, 1990, Title IX, § 941, 104 Stat. 4079, 4405, 4408–09.

119. RESPA § 6(e)(1), (2), 12 U.S.C. § 2605(e)(1), (2) (2000), *added by* Act of Nov. 28, 1990, Pub. L. No. 101-625, Title IX, § 941, 104 Stat. at 4408–09.

120. RESPA § 6, 12 U.S.C. § 2605 (2000), *added by* Act of Nov. 28, 1990, Pub. L. No. 101-625, Title IX, § 941, 104 Stat. at 4405–11.

121. 354 B.R. 331, 338–39 (D. Mass. 2006).

122. *Id.* at 339.