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Third Circuit Holds That Plaintiffs Alleging Respa Violations Under Section 8 Need Not Show An Overcharge To Have Article III Standing To Sue

By *John Stigi* and Martin White

In *Alston v. Countrywide Financial Corp.*, 2009 WL 3448264 (3d Cir. October 28, 2009), the United States Court of Appeal for the Third Circuit confronted the issue of whether consumer plaintiffs alleging a violation of section 8 of the Real Estate Settlement Procedures Act of 1974 ("RESPA"), codified in relevant part at 12 U.S.C. § 2607(d)(2), need to show a monetary injury "in the form of an overcharge" to have standing to bring a private right of action against a mortgage lender. The Third Circuit concluded that plaintiffs need not suffer an overcharge because the "plain language of RESPA section 8 indicate[s] that Congress created a private right of action without requiring an overcharge allegation." Rather, plaintiffs must only allege that a defendant received a "kickback" or offered a "sham service" under RESPA section 8(a) and 8(b) — regardless of whether plaintiffs have suffered a monetary harm — to have Article III standing to sue in the Third Circuit. This decision paves the way for class action litigation against other lenders asserting claims under Section 8 of RESPA.

Alston involved class plaintiffs who obtained home mortgages from defendant Countrywide Home Loans ("Countrywide") in 2005 and 2006 and who made down payments of less than 20% on their mortgage loan. Countrywide's alleged policy was that consumers who made down payments of less than 20% were required to purchase private mortgage insurance ("PMI"). Plaintiffs alleged that, in purchasing PMI, Countrywide extracted kickbacks from the private mortgage insurers for referring business their way.

Plaintiffs contended that these private mortgage insurers — at the time, there were a total of seven such insurers, each of whom were selected on a rotating basis — reinsured their loans with defendant Balboa Reinsurance Co. ("Balboa"), a Countrywide affiliate. According to plaintiffs, the private mortgage insurers would pay a percentage of the premiums received from plaintiffs to

Balboa, and Balboa would assume a percentage of the private insurers' risk, specifically, the risk of default between a certain percentage (typically 4-14%).

The problem, as plaintiffs put it, was that Balboa was not, in actuality, taking on any risk. According to plaintiffs, Balboa "collected over $892 million in reinsurance premiums since 1999" but "paid nothing in claims." Consequently, "the reinsurance premiums paid to Balboa . . . were kickbacks to Countrywide," for Countrywide's "referral of PMI business" to the private mortgage insurers in violation of section 8(a) of RESPA. Furthermore, plaintiffs contended that Countrywide was providing nothing more than "sham reinsurance coverage" in violation of section 8(b) of RESPA. Plaintiff contended that this resulted in an overcharge for their PMI. Critically, however, plaintiffs contended that *even if* they were not overcharged, they were "nonetheless entitled to kick-back free [real estate] settlements" and the statutory damages set forth under section 8(d)(2) of RESPA.

Countrywide moved to dismiss plaintiffs' RESPA claims on the ground that plaintiffs lacked standing. Countrywide argued that the PMI rates charged were *per se* reasonable because the rates had been filed and approved by the Pennsylvania Insurance Department and that, as a consequence, plaintiffs could not have been overcharged for their PMI. Countrywide argued that, without an overcharge, plaintiffs lacked standing — an injury-in-fact — to proceed with their RESPA claims.

The district court granted Countrywide's motion to dismiss. It held that the PMI rates paid by plaintiffs were *per se* reasonable. The district court then turned to the question of whether, in the absence of an overcharge, plaintiffs had standing to proceed under RESPA. It concluded they did not. Conceding that section 8(d)(2) "entitles persons who paid for any settlement service in violation of RESPA," the court nonetheless concluded that plaintiffs lacked standing because "the purpose of RESPA is to protect individuals from unnecessarily high settlement charges." In light of this guiding purpose, the district court "declined to construe RESPA's damages provision as authorizing Plaintiffs to sue for damages where they have not been overcharged." As a result, the district court dismissed plaintiffs' RESPA claims for lack of jurisdiction.

Plaintiffs appealed, contending that "Congress bestowed upon the consumer the right to a real estate settlement free from unlawful kickbacks and unearned fees, and Countrywide's invasion of that statutory right, *even without an overcharge*, was an injury-in-fact for the purposes of Article III standing." The Third Circuit agreed, reversing the district court, and holding that plaintiffs had standing to sue under RESPA.

The issue before the Third Circuit turned on "a question of statutory interpretation"; namely, "does or does not the plain language of RESPA section 8 indicate that Congress created private right of action without requiring an overcharge allegation"? To answer this question, the Court turned to the language of the statute.

Section 8(a) of RESPA prohibits "any fee, kickback, or thing of value pursuant to any agreement . . . that business incident to or part of a real estate settlement service involving a federally mortgage loan shall be referred to any person." Stated simply, section 8(a) prohibits kickbacks for referrals.

Section 8(b) of RESPA mandates that "[n]o person shall give and no person shall accept any portion, split, or percentage of any charge made or received for the rendering of real estate settlement service . . . other than for services actually performed." Stated simply, section 8(b) prohibits unearned fees.

Section 8(d)(2) — the specific subsection of the statute before the Third Circuit — provides that "any person" who violates section 8(a) or section 8(b), "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." The question before the Third Circuit was whether plaintiffs had to show an overpayment to be able to bring a private action.

In concluding that section 8(d)(2) did not require an overpayment, the Third Circuit turned to the "plain unambiguous language of section 8(d)(2)." The Court first noted that none of the provisions at issue — sections 8(a), 8(b) and 8(d) — "contain[] the word 'overcharge' or otherwise impl[y] that the plaintiff must allege that he or she paid more than he or she otherwise would have paid." Quoting *Carter v. Welles-Bowen Realty, Inc.*, 553 F.3d 979, 986 (6th Cir. 2009), the *Alston* Court noted that "the ordinary definition of 'any' indicates that charges are neither restricted to a particular *type* of charge (such as an overcharge) nor limited to a specific *part*." Additionally, the *Alston* Court noted that "the provision of statutory damages based on the entire payment, not on an overcharge, is a certain indication that Congress did not intend to require an overcharge to recover under section 8 of RESPA." Though the Court noted a "split of district court authority" on this point, it nonetheless concluded that the "obvious meaning" of section 8(d)(2) was that Congress intended for plaintiffs to be entitled to treble damages on "the total payment for an infected service, not just any resultant overcharge."

The Court further concluded that a successful plaintiff would be "entitled to three times any charges paid, but only for the service connected to the kickback or fee split" under section 8(d)(2). If Congress wished to limit damages to out-of-pocket compensatory damages, it knew how to do so; Congress had done as much with respect to RESPA section 6 (12 U.S.C. § 2605(f)(1)), in limiting plaintiffs suing under that section to "actual damages."

In light of this, the Court concluded "the plain unambiguous language of section 8(d)(2) indicates that damages are based on the settlement service amount with no requirement that there have been an overcharge." The district court's reliance on Congress' purpose in passing RESPA was in error; because Congress' intent was "clear", the district court erred in looking beyond "the plain unambiguous language of section 8(d)(2) in resolving the overcharge question."

The *Alston* Court concluded by finding that plaintiffs had standing to sue. The fact that plaintiffs' injury was non-monetary was "not dispositive" because, quoting *Havens Realty Corp. v. Coleman*, 455 U.S. 363, 373 (1982), "the actual or threatened injury required by Art. III may exist solely by virtue of statutes creating legal rights, the invasion of which creates standing."

Finally, the Court rejected Countrywide's argument that "even if section 8(d)(2) is read to permit suits without an overcharge allegation" plaintiffs' claims would still be "barred" by the filed rate doctrine — the doctrine that provides that "a rate filed with and approved by a governing regulatory agency is unassailable in a judicial proceeding brought by ratepayers." Because the PMI insurance rates were approved by the Pennsylvania Insurance Department, Countrywide argued, the rates were "unassailable" and plaintiffs' claims were barred.

The Third Circuit rejected this argument as well. First, plaintiffs' claim challenged "the payment of kickbacks" by private mortgage insurers to Countrywide, "not the rates [plaintiffs] paid for PMI." Because the kickbacks were (naturally) not filed with the state, the filed rate doctrine did not apply." So too, the Court concluded that plaintiffs' suit was targeted at Countrywide's conduct, not the rates paid for PMI. Sections 8(a) and 8(b) prohibit violations of a fair business practice —the use of illegal kickbacks or payment for non-existent "sham" services — not unfair pricing. Hence, the Third Circuit concluded that "if we were to find that the filed rate doctrine bars plaintiffs' claims, we would effectively be excluding PMI from the reach of RESPA, a result plainly unintended by Congress."

Alston stands as a potentially significant development for class action suits brought under RESPA. Stated simply, in the wake of *Alston*, mortgage providers can anticipate a rash of new section 8(d)(2) claims. In finding that plaintiffs do not need to allege an overcharge to have Article III standing under section 8(d)(2), plaintiffs will argue that the Third Circuit eliminated a potentially effective defense. To have standing, plaintiffs will argue they now need only allege a kickback or "sham" service in order to have standing under RESPA. Plaintiffs will also use *Alston* to argue that the filed rate doctrine is not a defense to section 8(d)(2) claims. Finally, plaintiffs will argue that *Alston*'s conclusion that plaintiffs are entitled to treble damages on any charges paid for the service connected to the kickback or fee split (as opposed to compensatory damages for only that part which was linked to the kickback) gives rise to potentially greater damages. Taken together or alone, *Alston* has the potential of encouraging more class action litigation.

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