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FEDERAL DISTRICT COURT IN 11TH CIRCUIT EXPANDS SCOPE OF RESPA SECTION 8(B)

In a memorandum opinion, a United States District Court for the Northern District of Alabama has held that a real estate broker that charges its customers a percentage based commission and a separate administrative brokerage commission of \$149 that is not shared with its sales agents violates Section 8(b) of the Real Estate Settlement Procedures Act (RESPA), because the additional \$149 fee was not for services actually performed. JRHBW Realty, Inc. (d/b/a RealtySouth) split its real estate brokerage charge into two components, and showed them on separate lines of the HUD-1 Settlement Statement. The District Court held that the \$149 portion of the charge (the administrative brokerage commission) was in essence charged for the same services for which RealtySouth charged its percentage based commission, and therefore was not charged for "services actually performed," and was an unearned fee that violated Section 8(b) of RESPA.

It has for a number of years been HUD's position that a settlement service provider is prohibited by Section 8(b) from charging for a settlement service it did not perform, or from marking up the cost of a settlement service that it did perform. While United States Circuit Courts have split on HUD's interpretation with respect to mark ups (with the 11th Circuit supporting HUD's position), this District Court is the first to hold that a settlement service provider that charges for a service it purportedly did not perform violates Section 8(b).

In light of this decision, real estate brokers in states covered by the 11th Circuit (Alabama, Florida and Georgia), and perhaps elsewhere as well, need to review how they characterize their compensation. Had RealtySouth merely stated that its brokerage charge was X% + \$149, and placed the entire charge on one line of the HUD-1 Settlement Statement, the District Court would have been hard pressed to find that the \$149 portion of the charge violated RESPA, because courts have long recognized that RESPA is not a price setting statute, and that it is not the role of the courts to determine if a fee charged by a settlement service provider for its settlement services performed is reasonable. Since a real estate broker may charge a percentage based commission or a flat rate for its services, there would seem to be no valid reason to interpret RESPA to prohibit charging a percentage plus a flat fee.

Busby v. JRHBW Realty, Inc. d/b/a Realty South, 609 F.Supp. 2d 1104 (N.D. Ala, 2009)

Authored By:

[Sherwin F. Root](#)

(213) 617-5465

sroot@sheppardmullin.com