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NINTH CIRCUIT COURT OF APPEALS JOINS OTHER CIRCUITS AND HOLDS THAT OVERCHARGE DOES NOT VIOLATE SECTION 8(B) OF RESPA

The United States Court of Appeals for the Ninth Circuit, which includes California, issued a ruling on March 9 that the clear and unambiguous language of RESPA Section 8(b) does not reach the practice of overcharging. *Martinez v. Wells Fargo Home Mortgage, Inc.* Section 8(b) of RESPA states that "no person shall give and no person shall accept any portion, split, or percentage of any charge made or received for the rendering of a real estate settlement service in connection with a transaction involving a federally related mortgage loan other than for services actually performed."

The Martinezes refinanced their California home mortgage loan through Wells Fargo, which charged them an \$800 underwriting fee. The Martinezes alleged that the fee was excessive because it was not reasonably related to Wells Fargo's actual costs of performing the underwriting, and therefore violated both Section 8(b) of RESPA and California's unfair competition law, Section 17200 of the California Business & Professions Code. Note that the Court was not presented with a set of facts that no services were provided. Instead, the allegation was that even if services were provided, a portion of the fee represented an illegal overcharge. The District Court dismissed the Martinez's claims. The Ninth Circuit affirmed. It first held that because the alleged overcharge was for the services actually rendered by Wells Fargo, it did not violate Section 8(b). The Ninth Circuit thus joins the Second, Third, and Eleventh Circuits in holding that alleged overcharges do not violate Section 8(b).

Next, the Court held the Martinezes Section 17200 claims were preempted by regulations promulgated by the Office of the Comptroller of the Currency. The Martinezes had alleged that the overcharging by Wells was an unfair practice, but the Court held that this claim was preempted by an OCC regulation that permits each bank governed by the OCC to use its business judgment to set its own fees within its discretion, according to sound banking judgment and safe and sound banking principles (12 Code of Federal Regulations, Section 7.4002(b)(2)). The Court said it would not decide how much an appropriate underwriting fee would be, since this is a business decision to be made by each bank. The Martinezes had also alleged that Wells Fargo had engaged in a fraudulent practice by not disclosing the actual cost of underwriting their loan, but the Court held this claim to be preempted by an OCC regulation that permits a national bank to make real estate loans without regard to state law limitations concerning disclosure and advertising (12 Code of Federal Regulations, Section 34.4(a)). Note that had Wells Fargo been a state-chartered lender, the Court might have reached a different conclusion.

Comment: Although this holding is welcome news, settlement service providers still need to carefully consider their approach on pricing. We suggest they think about these issues in establishing policies on pricing of settlement services subject to RESPA: (a) document the services the fee is intended to cover (e.g., a mortgage broker should not charge a loan funding fee), (b) consider prevailing market rates for the service (and avoid being a "high price" leader), (c) consider the internal costs to perform the work, (d) ensure that employees and vendors understand the services the payment is intended to cover and that they understand how the fee should be disclosed (including on the GFE and HUD-1), (e) avoid wide variations in the fee (e.g., don't categorically exclude certain borrowers from the fee), (f) make sure the fee description is clear and easy to understand, (g) don't mark up third party fees, (h) make sure to understand any state or federal law limitation on types of fees, (i) if the fee is for a service for which the consumer can shop, make sure the consumer understands that he or she can do so, and (j) make sure that the service for which the fee is charged does not duplicate another settlement service provider's fee. Of course, you should always consult with legal experts on these issues.

Click [here](#) to read the decision.

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