

## A Mortgage and Consumer Finance Law Update

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### **Ninth Circuit Holds That Allegedly Excessive Underwriting Fees Cannot Be the Basis for a RESPA Section 8(b) Claim and the National Bank Act Preempts State Consumer Protection Claims**

On March 8, the Ninth Circuit Court of Appeals held that the National Bank Act preempts unfair and fraudulent conduct claims under California's unfair competition statute and that allegedly excessive underwriting fees cannot serve as the basis for claims under Section 8(b) of the Real Estate Settlement Procedures Act ("RESPA"). The *Martinez v. Wells Fargo Home Mortgage, Inc.* decision will make it more difficult for plaintiffs suing federally-chartered national banks to assert state law unfair competition claims based on the bank's lending activities.

The case was brought by California homeowners Armando and Alinda Martinez, who alleged that Wells Fargo violated RESPA by charging an allegedly-excessive \$800 underwriting fee. The plaintiffs also sued Wells Fargo under California's Unfair Competition Law, arguing that the underwriting fee and an alleged "mark up" of a tax service fee were either "unfair," "fraudulent" or "unlawful." In *Martinez*, the Ninth Circuit announced two significant holdings.

First, the Court joined three other federal circuits in deciding that an allegedly excessive underwriting fee did not violate RESPA. The Court noted that, under RESPA, Wells Fargo need only have disclosed what it "charged," not what its services "cost." In response to the argument that there is no difference between "costs" and "charges," the Court responded with a common-sense view:

There is a difference between what a business 'charges' its customers for a service or product, and what the service or product 'costs' the business. That difference is called 'profit,' and it is the motive for businesses to sell services or products.

Second, the Court determined that federal banking laws and regulations, which control how banks charge for various fees in connection with a home loan, preempt California's Unfair Competition Law.

#### **Case Background**

The plaintiffs originally filed suit in 2006, intending for their case to be treated as a class action representing all consumers who had been charged with an \$800 underwriting fee. Before the class could be certified, the United States District Court for the Northern District of California dismissed the case in 2007. The district court held that Wells Fargo's \$800 service fee did not violate RESPA or any associated federal regulations, and that the claims under California's

Unfair Competition Law were preempted by the National Bank Act and associated federal regulations. The plaintiffs appealed the district court's decision to the Ninth Circuit.

### **The Ninth Circuit's Decision**

The Ninth Circuit first reviewed whether an \$800 underwriting fee violated RESPA, particularly Section 8(b), which prohibits lenders from giving or accepting any charge involving a federally related mortgage loan other than for services "actually performed." The plaintiffs argued that the \$800 fee was excessive and therefore could not have been for services actually performed. The Ninth Circuit disagreed. The Court stated that Section 8(b) merely prohibits fees for services that have not been actually performed. As long as Wells Fargo imposed a fee for services actually performed, the plaintiffs could not show a violation of Section 8(b). Though this question under Section 8(b) of RESPA was "an issue of first impression" in the Ninth Circuit, the Court joined the Second, Third and Eleventh Circuits in finding that a customer cannot sue under RESPA for what it thinks is an "excessive" fee, so long as the underwriting fee is charged in connection with services "actually performed."

Turning to California's Unfair Competition Law, the Court examined the three components of California's consumer protection law and evaluated whether Wells Fargo's \$800 fee amounted to "unfair" competition, a "fraudulent" practice or "unlawful" conduct. The Court held that the National Bank Act and the federal agency administering the Act, the Office of the Comptroller of the Currency ("OCC"), had the power to promulgate regulations regarding banking and lending, and that federal regulations relating to the setting and disclosure of fees preempted California's Unfair Competition Law insofar as the \$800 underwriting fee could be viewed as "unfair" or "fraudulent."

As for the plaintiffs' argument that the \$800 fee was "unlawful" under California's Unfair Competition Law, the Court held that this component of the law required incorporation of another statute or regulation by reference, and that the plaintiffs would have to show that the \$800 fee violated some other state or federal law. However, to the extent that any other predicate state law was preempted by the National Bank Act or regulations promulgated by the OCC, any such law could not serve as a basis for the "unlawful" prong of a violation under California's Unfair Competition Law. The Court ultimately found that the plaintiffs had failed to show any violation of another statute or regulation that could serve as a predicate violation.

### **Significance**

Many states have enacted consumer protection acts similar to the California statute at issue in *Martinez*. Modeled after the Federal Trade Commission Act, the acts prohibit "unfair" or "deceptive" acts committed in trade or commerce. By confirming that state consumer protection claims based on a national bank's lending activities are preempted under federal law and joining its sister circuits in holding that allegedly excessive charges are not violations of Section 8(b) of RESPA, the Ninth Circuit has now weighed in strongly in favor of a consistent federal precedent on these issues.

The *Martinez* decision deals a blow to the ability of plaintiffs to use state consumer protection laws as a litigation bargaining chip. The Ninth Circuit's opinion helps bring clarity to the confusion of how state consumer protection laws interact with federal banking laws. The Court

properly acknowledged that national banks are subject to state law insofar as they do not conflict with federal law. Notably, the Court also held that vague allegations that a fee charged is "unfair" will no longer suffice to establish a claim under state law, given the comprehensive scheme of federal statutes under the National Bank Act and associated OCC regulations.

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