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2009 Survey of RESPA Developments

*By Joseph M. Kolar, Robert M. Jaworski, and Melissa J. Klimkiewicz**

Introduction

In 2008, the U.S. Department of Housing and Urban Development ("HUD") once again took up the mantle of reform to propose a sweeping revision of Regulation X,[1] answered questions raised by the National Association of Realtors ("NAR") concerning the Real Estate Settlement Procedures Act ("RESPA"),[2] and continued efforts to enforce RESPA against settlement service providers. Private parties also continued to pursue RESPA claims in litigation, leading to several important decisions, most of which focused on RESPA section 8. These developments are described below.

HUD's New RESPA Reform Proposal

Following its failed July 2002 RESPA reform proposal,[3] which was withdrawn early in 2004,[4] HUD began yet another effort to reform the real estate settlement process. It met and conducted roundtable discussions with various interest groups and developed and tested new forms to improve the process.[5] Finally, on March 14, 2008, it published its proposal (the "Proposal") for a "new and improved" version of Regulation X.[6]

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1. 24 C.F.R. pt. 3500 (2008). Although this proposal was adopted before year-end, *see* Real Estate Settlement Procedures Act (RESPA): Rule to Simplify and Improve the Process of Obtaining Mortgages and Reduce Consumer Settlement Costs, 73 Fed. Reg. 68204 (Nov. 17, 2008) (codified at 24 C.F.R. pts. 203 & 3500) [hereinafter "New Rule"], it was too late for us to include any significant discussion of the New Rule in this Survey. With but a few significant exceptions noted throughout the Survey, the New Rule closely tracks the Proposal.

2. Pub. L. No. 93-533, 88 Stat. 1724 (1974) (codified as amended at 12 U.S.C. §§ 2601–2617 (2006)).

3. Real Estate Procedures Settlement Act (RESPA); Simplifying and Improving the Process of Obtaining Mortgages to Reduce Settlement Costs to Consumers, 67 Fed. Reg. 49134 (proposed July 29, 2002) (to be codified at 24 C.F.R. pt. 3500). For background on this rule, see generally Joseph M. Kolar, *Analysis of the Proposed RESPA Rule*, 57 Consumer Fin. L.Q. Rep. 10 (2003).

4. Real Estate Procedures Settlement Act (RESPA): Proposed Rule to Simplify and Improve the Process of Obtaining Mortgages and Reduce Consumer Settlement Costs, 73 Fed. Reg. 14030, 14032 (proposed Mar. 14, 2008) (to be codified at 24 C.F.R. pts. 203 & 3500).

5. *See id.* at 14032–33.

6. *Id.* at 14030.

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If adopted, the Proposal would (1) dramatically change the current Good Faith Estimate ("GFE") form and establish consequences for inaccurate disclosures on that form; (2) change the way "yield spread premiums" paid by lenders to brokers in return for above-par loans ("YSPs") must be disclosed; (3) modify the HUD 1/1A Uniform Settlement Statement form; (4) require the reading of a "Closing Script" at settlement; (5) revise the definition of a prohibited "required use" in connection with referrals to affiliates, and clarify that average-cost pricing and volume discounts will not violate section 8 under certain conditions; and (6) simplify the servicing disclosure statement provided at application.[7] Each of these proposed changes is discussed in more detail below.

The New GFE

The proposed GFE differs from the current one in several regards. It is four pages long, cannot be held side-by-side to the HUD 1/1A to compare fees, and uses new terms, such as "our service charge," the "credit or charge for the specific interest rate chosen," and "your adjusted origination charges."[8] In contrast, the current (suggested) form is one page, with numbered lines for various fees that correspond to the numbered lines on the HUD 1/1A.[9]

Under the Proposal, the new GFE must be given to the consumer within three business days after receipt of a "GFE Application."[10] As part of the "GFE Application," lenders and mortgage brokers may require applicants to provide no more than their name, Social Security number, and monthly income, the property address, the applicant's best estimate of its value, and the loan amount.[11]

HUD hopes this new GFE form will be helpful to a consumer wishing to comparison shop for the best loan that will fulfill his or her needs.[12] The new GFE, for which the consumer may be charged only a nominal fee, will constitute an offer that essentially must remain open and fixed (except for the interest rate and items that will depend on the interest rate, unless the interest rate is locked) for at least ten days.[13] During this ten-day period, the consumer, presumably, can search elsewhere for better rates and terms. If the offer is accepted by the consumer, the terms listed on the GFE (again, except for the interest rate and items that will depend on the interest rate, unless the interest rate is locked) must effectively remain similarly fixed, within specified tolerances and barring unforeseen circumstances, until closing.[14]

The specified tolerance for the total of all lender-required settlement services paid to providers selected by the lender, all lender-required settlement services

7. *Id.* at 14056–61.
8. *Id.* at 14095–98. The New Rule reduces the GFE to three pages and eliminates the concept of a GFE Application. *See* Real Estate Settlement Procedures Act (RESPA): Rule to Simplify and Improve the Process of Obtaining Mortgages and Reduce Consumer Settlement Costs, 73 Fed. Reg. 68204, 68240–41 (Nov. 17, 2008).
9. 24 C.F.R. pt. 3500 app. C (2008).
10. Real Estate Procedures Settlement Act (RESPA), 73 Fed. Reg. at 14057.
11. *Id.* at 14056.
12. *Id.* at 14033.
13. *See id.* at 14057.
14. *Id.*

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paid to providers selected by the borrower from lender-provided lists, and premiums for optional owners' title insurance is 10 percent, meaning that the sum of the actual charges for these items may not exceed the sum disclosed on the GFE by more than 10 percent.[15] The specified tolerance for lender and broker origination fees, recording and transfer fees, and, if the interest rate has been locked, discount points and YSPs is zero, meaning that none of these items may exceed the amount disclosed on the GFE.[16] Any other charges disclosed on the GFE would be permitted to change at closing by any amount.[17]

If these tolerances are not met, the lender or broker must document that the cause was due to "unforeseen circumstances."[18] Unforeseen circumstances include only (i) acts of God, war, disaster, or other emergency making it impossible or impracticable for the lender to complete the transaction; and (ii) circumstances that could not have been reasonably foreseen by the lender or broker at time of the GFE Application and that result in increased costs, e.g., a change in the purchase price of the property, the need for a second appraisal or flood insurance, or environmental problems, but not changes due to market fluctuations alone.[19]

Disclosure of YSPS

For brokered and table-funded loans, the following items would have to be separately disclosed on the GFE: (i) "Our service charge" (the "Service Charge")—the sum of all non-third party charges relating to loan origination imposed by the lender and the mortgage broker, including application fees, processing fees, underwriting fees, origination fees, mortgage broker fees, points (excluding "Discount Points" paid to buy down the interest rate), and any anticipated YSPs; (ii) "Your credit ... for the interest rate chosen"—any YSP the mortgage broker expects to receive; (iii) "Your ... charge for the specific interest rate chosen (points)"—Discount Points; and (iv) "Your Adjusted Origination Charges"—the Service Charge less any YSP credit plus any Discount Points, or essentially the amount of money the borrower must pay "out-of-pocket" or from the loan proceeds.[20] The Service Charge and the YSP credit may not change once the interest rate has been locked.[21]

HUD 1/1A Revisions

The Proposal links the fees listed on the HUD 1/1A to the fees listed on the GFE (i) by giving them the same names on both forms; (ii) by printing the fees on the HUD 1/1A that also appear on the GFE in bold type; and (iii) by printing the line number of each fee on the GFE next to its corresponding fee on the HUD 1/1A.[22] HUD also included a new line 1113 on the revised HUD 1/1A, titled "Agent's portion of the total

15. *Id.*
16. *Id.*
17. *Id.*
18. *Id.*
19. *Id.* at 14056.
20. *Id.* at 14096.
21. *Id.*
22. *Id.* at 14063.

title insurance premium,"[23] which seemingly would require title agents, for the first time, to disclose the portion of the title insurance premium that they will retain.

Closing Script

The Proposal requires that a "Closing Script," prepared by the closing agent using information supplied by the lender, be read aloud to the borrower at the closing by the closing agent.[24] Its purpose is to explain to the borrowers the loan terms that they are actually receiving, and whether the fees they are paying, and the terms of the loan they are receiving, are consistent with what was promised to them on the GFE.[25] Examples of closing scripts for various types of loans are included in the Proposal.[26]

The requirement to read a "Closing Script" raises several legal and practical issues. For example, how would it be effectuated in escrow states where there are no in-person "closings"? How would it impact title agent profitability? Would title agents who comply with the requirement be at risk of engaging in the unauthorized practice of law? And, would it serve to place title agents in the unenviable position of referee between borrowers and lenders?

Average-Cost Pricing/Volume Discounts/Required Use

Average-Cost Pricing

Average-cost pricing is where a lender or broker charges each borrower the same "average" price for a third-party service even though the actual price that it pays for such service may differ from one loan to the next.[27] HUD indicates that this practice would not violate section 8 so long as the average price is calculated by dividing the total amount paid for the service for all loans that it closes (on a national or more limited basis) during a recent six consecutive month period designated by the lender or broker (the "Averaging Period") by the number of loans in which the service was obtained during that same period.[28] If a tiered-pricing contract will be in effect, the projected average price must be calculated based on the contractual tiered-pricing formula using the actual number of transactions in which the service was obtained during the Averaging Period.[29]

Volume Discounts

Volume discounts are discounts negotiated by the lender or broker with a third-party settlement service provider based on volume of business.[30] HUD indicates

23. *Id.*

24. *Id.* at 14058. The New Rule eliminates the Closing Script and, instead, adds an extra page to the HUD-1/1A comparing the loan received to the loan offer disclosed on the GFE. *See* Real Estate Settlement Procedures Act (RESPA): Rule to Simplify and Improve the Process of Obtaining Mortgages and Reduce Consumer Settlement Costs, 73 Fed. Reg. 68204, 68229–30, 68248–52 (Nov. 17, 2008).

25. Real Estate Settlement Procedures Act (RESPA), 73 Fed. Reg. at 14058.

26. *Id.* at 14066–92.

27. *See id.* at 14052.

28. *Id.* at 14058. The New Rule clarifies that all settlement service providers may take advantage of average cost pricing and gives them more flexibility than did the Proposal as to how to calculate the average price. *See* Real Estate Settlement Procedures Act (RESPA), 73 Fed. Reg. at 68241–42.

29. Real Estate Settlement Procedures Act (RESPA), 73 Fed. Reg. at 14058.

30. *See id.* at 14051.

that volume discounts will not violate section 8 so long as the full amount of the discount is passed through to the borrower.[31]

Required Use

RESPA provides that payments made in connection with affiliated business arrangements are not subject to scrutiny under section 8 of RESPA subject to three conditions, one of which is that there is no "required use" of the affiliate,[32] and Regulation X currently defines a "required use" to exclude a situation where the consumer is offered a package of settlement services at a discount.[33]

Under the Proposal, a "required use" includes situations where borrowers become eligible to receive a discount, rebate, or other economic incentive only if they use a particular settlement service provider.[34] However, HUD also indicates that an offer of a combination of settlement services at a price that is less than the sum of the prices for each such service would not be deemed to constitute a "required use" so long as the borrower may elect not to accept the offer.[35]

Simplified Servicing Disclosure Statement

HUD proposes to replace the current form for this disclosure, which appears in Appendix MS-1 to Regulation X, with a much simpler form.[36] The new form would no longer need to be acknowledged by borrowers and would simply inform them, within three business days following receipt of a GFE Application, whether "[w]e may," "[w]e intend to," or "[w]e do not intend to," "assign, sell, or transfer the servicing of your mortgage loan."[37]

Status of the Proposal

On August 19, 2008, despite the request of 243 members of Congress to withdraw it, HUD sent the Proposal to the Office of Management and Budget ("OMB") for review.[38]

HUD Advice to NAR

On August 6, 2008, HUD provided the NAR with written guidance indicating that (i) a lender may pay a real estate agent under certain conditions for performing

31. *See id.* at 14059. HUD declined to adopt as part of the New Rule this aspect of the Proposal. *See* Real Estate Settlement Procedures Act (RESPA), 73 Fed. Reg. at 68230–32.

32. RESPA § 8(c)(4), 12 U.S.C. § 2607(c)(4) (2006). Customers may, however, be required by a lender to use an affiliated attorney, credit reporting agency, or real estate appraiser, or by an attorney to use an affiliated title insurance agency. *Id.*

33. 24 C.F.R. § 3500.2(b) (2008).

34. Real Estate Procedures Settlement Act (RESPA), 73 Fed. Reg. at 14056. The New Rule effectively prohibits homebuilders from offering incentives or discounts to buyers that use an affiliated settlement service provider. *See* Real Estate Settlement Procedures Act (RESPA), 73 Fed. Reg. at 68234–36, 68239–40.

35. Real Estate Settlement Procedures Act (RESPA), 73 Fed. Reg. at 14056.

36. *Id.* at 14099.

37. *Id.*

38. Press Release, Real Estate Servs. Providers Council, Inc., HUD Declines Congressional Request to Withdraw RESPA Rule, Sends It to OMB for Final Review (Aug. 20, 2008), http://newsmanager.commpartners.com/respro/issues/2008-08-20.html.

loan origination services without violating section 8; and (ii) accelerating payment to a person (such as paying him or her at closing when he or she would normally be paid after closing) or making a donation to the person's favorite charity, in return for a referral of settlement service business, constitutes the giving of a "thing of value," which is prohibited by section 8.[39]

With respect to the first issue, HUD stated that, to be permissible, the agent's compensation must be bona fide and reasonable, and the loan origination services that the agent performs must be actual, necessary, and distinct from his or her real estate brokerage services.[40] HUD then referred the NAR to Statement of Policy 1999-1[41] for further guidance on this issue.[42]

HUD also indicated that a real estate agent may not receive any compensation from a lender for referral activities unless he or she is a bona fide "employee" of the lender, and that factors such as method of payment, provision of training and benefits, type of supervision, work schedule, and the factors relied upon by the Internal Revenue Service are instructive but not determinative as to whether a person is a bona fide employee for purposes of RESPA.[43]

Enforcement Actions and Settlements

Over the past year, HUD and state regulators have continued to pursue enforcement actions against, and to enter into settlements with, settlement service providers and captive title reinsurance arrangements based on alleged violations of RESPA. These actions are summarized below.

HUD Settlements During 2008

Pulte Homes, KB Home, Beazer Homes, Meritage Homes, Ryland Group, and Technical Olympic USA—October 2007

On October 29, 2007, HUD announced that it had reached separate settlement agreements with six major homebuilders (Pulte Homes, Inc., KB Home, Beazer Homes USA, Inc., Meritage Homes Corp., The Ryland Group, Inc., and Technical Olympic USA, Inc.) that had engaged in business arrangements involving captive title reinsurance.[44] In these cases, title insurance companies transferred a portion

39. U.S. Dep't of Hous. & Urban Dev., HUD Responses to RESPA Questions: Real Estate Agent and Other Settlement Services 1, 3 (2008), http://www.hud.gov/offices/hsg/sfh/res/settleservices.pdf [hereinafter "HUD Responses"].

40. *Id.* at 1.

41. Real Estate Settlement Procedures Act (RESPA) Statement of Policy 1999-1 Regarding Lender Payment to Mortgage Brokers, 64 Fed. Reg. 10080 (Mar. 1, 1999).

42. HUD Responses, *supra* note 39, at 1.

43. *Id.* at 2.

44. Press Release, U.S. Dep't of Hous. & Urban Dev., HUD Announces Six Settlement Agreements with Builders Involved in Captive Title Reinsurance Arrangements (Oct. 29, 2007) (HUD No. 06-162), *available at* http://www.hud.gov/news/release.cfm?content=pr06-162.cfm [hereinafter "HUD No. 06-162 Press Release"]. The settlement agreements are available at U.S. Department of Housing and Urban Development, Homes & Communities, RESPA Settlement Agreements, http://www.hud.gov/offices/hsg/sfh/res/resetagr.cfm (last visited Nov. 23, 2008).

of insurance premiums to the homebuilders' captive title reinsurance businesses after the homebuilders referred business to the title insurance companies.[45] HUD alleged that these payments were not bona fide and thus violated section 8 of RESPA.[46] Although the homebuilders denied any violation of RESPA, they agreed to pay a total of $1.4 million to settle the cases.[47]

These six settlement agreements constituted HUD's third round of settlements with recipients of payments from title insurance companies to captive title reinsurers for reinsurance. As reported in last year's *Annual Survey*, HUD's previous two rounds of settlements were reached with five major homebuilders and one lender and totaled $3.55 million.[48]

First American Title Insurance Company—November 2007

On November 16, 2007, HUD announced that it, in connection with the Florida Department of Financial Services and the Florida Office of Insurance Regulation ("state agencies"), reached a settlement with First American Title Insurance Company ("First American") for alleged violations of section 8 of RESPA and similar Florida laws.[49] First American, over several years, formed or acquired numerous limited partnerships in Florida to act as title insurance agents.[50] HUD and the state agencies alleged that First American performed all regular title services and the partnerships acted merely as "pass-throughs" to pay real estate agents, mortgage brokers, builders, and other limited partners for referring business to First American.[51] First American denied any violation of federal or state law but, as part of the settlement, agreed to terminate eighty-four partnerships and pay a total of $5 million to the federal and Florida state governments.[52]

Property I.D. Corporation, Realogy Corporation, Cendant Corporation, and Coldwell Banker Residential Brokerage Corporation—August 2008

On August 8, 2008, HUD settled a Central District of California RESPA lawsuit against Property I.D. Corporation, a California natural hazard reporting company,

45. *See* U.S. Department of Housing and Urban Development, Homes & Communities, RESPA Settlement Agreements, http://www.hud.gov/offices/hsg/sfh/res/resetagr.cfm (last visited Nov. 25, 2008) (settlement agreements with Pulte Homes, Inc., KB Home and KB Mortgage Company, Beazer Homes USA, Inc., Meritage Homes Corporation, The Ryland Group, Inc., and Technical Olympic USA, Inc.).

46. *See supra* note 45.

47. HUD No. 06-162 Press Release, *supra* note 44.

48. *See* Robert Jaworski, Joseph Kolar & Jonathan Cannon, *2008 Survey of RESPA Developments*, 63 Bus. Law. 611, 614 (2008) (in the *2008 Annual Survey*).

49. Press Release, U.S. Dep't of Hous. & Urban Dev., HUD and State of Florida Settle Case Against First American Title Co. in Alleged Kickback Scheme (Nov. 16, 2007) (HUD No. 07-170), *available at* http://www.hud.gov/news/release.cfm?content=pr07-170.cfm.

50. *Id.*

51. *Id.*

52. *Id.* The settlement agreement is available at U.S. Department of Housing and Urban Development, Homes & Communities, RESPA Settlement Agreements, http://www.hud.gov/offices/hsg/sfh/res/firstametitOct3107.pdf (last visited Nov. 23, 2008).

Realogy Corporation, Cendant Corporation (now known as Avis Budget Group, Inc.), and Coldwell Banker Residential Brokerage Corporation.[53] The settlement reflects the judge's ruling that HUD has the authority to seek court-ordered permanent injunctions and disgorgement of illegal profits from companies that collect "kickbacks" in violation of RESPA.[54] HUD initiated the lawsuit in 2007, alleging that Property I.D. violated section 8 by forming numerous sham joint ventures with real estate brokers that did not actually produce hazard disclosure reports and apparently existed solely to transmit payments in exchange for the brokers' referrals of business.[55] All of the joint ventures were located at Property I.D.'s Los Angeles address, had no dedicated employees, and shared bank accounts.[56] As part of the settlement, no admission of liability was made, and HUD agreed that payment of a combined $35 million award in a related private class action lawsuit would satisfy HUD's demand that the companies disgorge illegal profits.[57]

HUD Action

On July 14, 2008, HUD's Office of the Inspector General issued an audit report concluding that First Magnus Financial Corporation ("First Magnus") violated RESPA by paying volume-based incentives to brokers for originating and processing FHA mortgages.[58] The Inspector General found that First Magnus, a Federal Housing Administration ("FHA") approved mortgagee, made incentive payments of $58,571 for the period between January 1, 2003, and December 31, 2005.[59] The Inspector General asserted that First Magnus's incentive compensation structure violated RESPA because the incentives constituted inducements associated with referrals of brokered FHA mortgages.[60] Although First Magnus ceased operating and filed for bankruptcy on August 21, 2007, the Inspector General's report recommended that FHA (i) require First Magnus to discontinue its incentive program; (ii) remove First Magnus from active mortgagee status; and (iii) take administrative actions against the principal owners and management of First Magnus.[61]

53. Press Release, U.S. Dep't of Hous. & Urban Dev., HUD Settles Lawsuit with California Hazard Reporting Company and Real Estate Brokerage (Aug. 8, 2008) (HUD No. 08-120), *available at* http://www.hud.gov/news/release.cfm?content=pr08-120.cfm.

54. *Id.*

55. *Id.*

56. *Id.*

57. *Id.* The settlement agreements are available at U.S. Department of Housing and Urban Development, Homes & Communities, RESPA Settlement Agreements, http://www.hud.gov/offices/hsg/sfh/res/resetagr.cfm (last visited Nov. 23, 2008).

58. First Magnus Financial Corporation Violated the Real Estate Settlement Procedures Act When Paying Incentives to Brokers for Generating Federal Housing Administration Mortgages, HUD Audit Report No. 2008-LA-1013, at 1 (July 14, 2008), *available at* http:/www.hud.gov/offices/oig/reports/files/ig0891013.pdf.

59. *Id.* at 4.

60. *Id.* at 5.

61. *Id.* at 7–8.

State Actions

Title Insurance Kickbacks

On December 10, 2007, the Connecticut Attorney General, the Connecticut Department of Consumer Protection, and the Connecticut Insurance Department announced that a law firm (Reiner, Reiner & Bendett, P.C. ("Reiner")), a mortgage company (Absolute Mortgage Solutions, LLC ("Absolute")), and a real estate broker (Access America, LLC, DBA Century 21 Access America ("Access America")) would pay $700,000 to settle allegations that they engaged in illegal kickback and inducement schemes.[62] Of the $700,000, around $125,000 would be restitution to approximately 500 Absolute consumers who allegedly overpaid for certain mortgage-related services, $425,000 would be deposited in the state's General Fund, and the remainder would be used for consumer education.[63] This agreement settled a lawsuit alleging that Reiner, which also sold title insurance, used sham service, rental, and other agreements to conceal $142,000 in kickbacks and unlawful inducements to Absolute and Access America between 2002 and 2005, and that Absolute and Access America allegedly steered title insurance business to Reiner.[64]

In addition, on February 19, 2008, the Minnesota Department of Commerce (the "Department") announced that it took action against Premier Title Insurance Agency ("Premier") and six title companies for a scheme in which Premier allegedly set up the six title companies as sham affiliated business arrangements, and paid kickbacks or other things of value to these referral partners for the referral of title insurance business and real estate closings.[65] The Department fined Premier $175,000 and revoked the six title companies' title insurance licenses.[66] This action was part of the Department's continuing effort to end sham affiliated business arrangements.[67]

RESPA Litigation Developments During 2008

Clarification of RESPA's Scope

Excessive Fees Outside Scope of Section 8(b)—Eleventh Circuit Decisions

Several recent decisions of the U.S. Court of Appeals for the Eleventh Circuit have clarified that section 8(b) of RESPA is not a price control provision to prohibiting

62. Press Release, Conn. Attorney Gen.'s Office, Attorney General, Consumer Protection, Insurance Dept Announce $700,000 Settlement in Alleged Title Insurance Kickback Scheme (Dec. 10, 2007), http://www.ct.gov/ag/cwp/view.asp?A=2788&Q=400598.

63. *Id.*

64. *Id.*

65. Press Release, Minn. Dep't of Commerce, More Sham Title Insurance Businesses Shut Down: Consumers Paying Too Much for Title Insurance to Support Kickbacks and Illegal Referrals (Feb. 19, 2008), http://www.state.mn.us/portal/mn/jsp/content.do?id=536882793&subchannel=null&sc2=null&sc3=null&contentid=536915789&contenttype=EDITORIAL&programid=536912012&agency=Commerce.

66. *Id.*

67. *Id.*

excessive fees, but rather a prohibition on charging fees "other than [for] services actually performed."[68] In 2008, seminal case on this issue was *Friedman v. Market Street Mortgage Corp.*[69] In *Friedman*, the U.S. Court of Appeals for the Eleventh Circuit joined the Second, Third, Fourth, Seventh, and Eighth Circuits in holding that section 8(b) does not govern excessive fees because it is not a price control provision.[70] Rather, section 8(b) prohibits only the charging of fees "'other than for services actually performed.'"[71] The plaintiffs in *Friedman* alleged that the defendant lender violated section 8(b) by charging an escrow waiver fee that was excessive in relation to services or goods actually rendered, but the court found that the language of section 8(b) does not authorize courts to divide a charge into what they deem to be its reasonable and unreasonable components.[72] Although HUD's 2001 Statement of Policy lent support to the plaintiffs' argument, the court found that because section 8(b) is clear and unambiguous, "'there is not enough play in the statutory joints to allow HUD to impose its own 'interpretation.'"[73]

Earlier in the year, prior to *Friedman* but in line with it, the Eleventh Circuit, in *Busby v. JRHBW Realty, Inc.*, overturned a district court's denial of class certification based on the determination that section 8(b) claims do not require individual inquiry because "a simple binary determination of 'any services' or 'no services' is all that need be done."[74] The plaintiff (Busby) had purchased a home and, in addition to paying a real estate brokerage commission, paid an Administrative Brokerage Commission Fee ("ABC Fee") of $149 at closing.[75] Busby filed suit on behalf of herself and all others who were charged an ABC Fee, alleging that the fee violated section 8(b) as a fee for unperformed services.[76] Although the district court denied Busby's motion for class certification, finding that individual factual issues predominated, the Eleventh Circuit reversed, emphasizing that Busby and the purported class claimed that no work had been done in exchange for the ABC Fee—not that the fee was excessive—and, as such, class treatment was appropriate.[77]

The Eleventh Circuit, citing *Friedman*, also issued three unpublished opinions holding that section 8(b) does not govern excessive fees because the provision is not a mechanism for price control, and that section 8(b) requires a plaintiff to allege that the defendant rendered no services in exchange for a settlement

68. Section 8(b) provides 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 a real estate settlement service in connection with a transaction involving a federally related mortgage loan other than for services actually performed." 12 U.S.C. § 2607(b) (2006).

69. 520 F.3d 1289, 1296–98 (11th Cir. 2008).

70. *See id.* at 1296.

71. *Id.* at 1297 (quoting 12 U.S.C. § 2607(b) (2006)).

72. *Id.*

73. *Id.* (quoting Krzalic v. Republic Title Co., 314 F.3d 875, 881 (7th Cir. 2002), *cert. denied*, 539 U.S. 958 (2003)).

74. 513 F.3d 1314, 1324 (11th Cir. 2008).

75. *Id.* at 1319.

76. *Id.*

77. *Id.* at 1324–26.

fee.[78] The court rejected the argument that it should break single fees into various "components" for evaluation, finding that the plaintiffs merely claimed that they were charged an inflated fee for title insurance—a service that was indisputably provided.[79]

In addition, the U.S. District Court for the Southern District of Alabama cited *Friedman* as a basis for its holding as to the scope of section 8(b) in *Mallory v. GMS Funding, LLC*, a putative class action.[80] In *Mallory*, the plaintiff in her amended complaint challenged eight fees, each under a separate line item on the HUD-1 settlement statement ("HUD-1"), charged by the title company and lender defendants.[81] The plaintiff's allegation was not that the defendants performed no work with respect to the eight challenged charges, but rather that they were fully compensated for all such services on other line items on the HUD-1, leaving nothing (beyond third-party costs) to be compensated on the eight challenged lines.[82] Quoting *Friedman*, the *Mallory* court noted that "'[s]ubsection 8(b) does not apply to settlement fees that are alleged to be excessive,'" but rather "'requires a plaintiff to allege that no services were rendered in exchange for a settlement fee.'"[83] Nevertheless, finding, among other things, that the court in *Friedman* did not address the ramifications of the plaintiff's allegation that the defendants were fully compensated on other line items of the HUD-1, the court denied dismissal of the case.[84]

Overcharge Not Required for Injury Under RESPA

In *Edwards v. First American Corp.*,[85] the U.S. District Court for the Central District of California held that a plaintiff in a putative class action alleging violations of RESPA's anti-kickback provisions "need not have suffered an overcharge to invoke the protection of RESPA."[86] The consumer plaintiff's settlement agent had referred her to First American Title Insurance Corporation ("First American") for the purpose of obtaining title insurance.[87] According to the plaintiff, First

78. Williams v. Countrywide Home Loans, Inc., No. 08-10303, 2008 WL 2609339, at *1 (11th Cir. July 3, 2008); Moody v. Commonwealth Land Title Ins. Co., No. 07-14999, 2008 WL 2610765, at *1 (11th Cir. July 3, 2008); Morrisette v. Novastar Home Mortgage, Inc., No. 08-10036, 2008 WL 2610550, at *1 (11th Cir. July 3, 2008).

79. *See supra* note 78.

80. No. 07-0680-WS-C, 2008 WL 2782886, at *2 (S.D. Ala. July 8, 2008).

81. *Id.*

82. *Id.*

83. *Id.* (quoting Friedman v. Mkt. St. Mortgage Corp., 520 F.3d 1289, 1291, 1298 (11th Cir. 2008)).

84. *Id.* at *3–4.

85. 517 F. Supp. 2d 1199 (C.D. Cal. 2007). The court subsequently denied class certification, determining that the proposed class was not maintainable under Federal Rule of Civil Procedure 23(b). *See* No. 2:07-cv-03796 SJO (FFMx), 2007 WL 5255734, at *4 (C.D. Cal. Dec. 10, 2007); 2008 WL 2461703, at *5 (C.D. Cal. June 6, 2008).

86. *Edwards*, 517 F. Supp. 2d at 1204. Section 8(a) of RESPA provides that "[n]o person shall give and no person shall accept any fee, kickback, or thing of value pursuant to any agreement or understanding, oral or otherwise, that business incident to or a part of a real estate settlement service involving a federally related mortgage loan shall be referred to any person." 12 U.S.C. § 2607(a) (2006).

87. *Edwards*, 517 F. Supp. 2d at 1201.

American violated RESPA by paying large sums of money to various title agencies in exchange for exclusive referral arrangements with such title agencies.[88] First American argued that the plaintiff lacked standing to bring the suit because she did not suffer an injury—as the cost of title insurance in Ohio is regulated so that all insurance providers charge the same price.[89]

After analyzing RESPA's legislative history, the *Edwards* court concluded that, by amending RESPA's damages provision to make violators liable for three times the amount of "any charge paid" for a settlement service, "Congress created a right to be free from referral-tainted settlement services."[90] Therefore, if the plaintiff could prove her claim, a statutory injury fairly traceable to the defendants' actions would exist despite the lack of an overcharge.[91]

Similarly, in *Alexander v. Washington Mutual, Inc.*, the court ruled that the plaintiffs' failure to allege an overcharge for settlement services did not preclude a finding of injury in fact for purposes of Article III standing because "RESPA provides that plaintiffs have a right to purchase settlement[] services from providers who do not participate in an illegal kickback scheme."[92]

Affiliated Business Arrangements: Required Use

Federal courts in Georgia recently clarified RESPA section 8(c)'s prohibition on "required use" for affiliated business arrangements.[93] In *Spicer v. Ryland Group, Inc.*, the U.S. District Court for the Northern District of Georgia ruled in a putative nationwide class action that builder Ryland Group ("Ryland") and its affiliated mortgage lender, Ryland Mortgage Company ("Ryland Mortgage"), did not violate section 8(a) or 8(b) of RESPA when Ryland conditioned a $10,500 credit toward settlement services on borrowers obtaining financing with Ryland Mortgage.[94] The homebuyer plaintiff argued that, under this pricing scheme, the defendants violated section 8(a) by accepting a fee, kickback, or thing of value in exchange for the referral of real estate settlement services, and violated section 8(b) by accepting or giving a charge made or received for a real estate settlement service other than for services actually rendered.[95] The plaintiff further argued that Ryland's referral to Ryland Mortgage was not exempt under section 8(c) because the plaintiff was "essentially required to use" Ryland Mortgage to finance the home purchase.[96]

88. *Id.*
89. *Id.* at 1202.
90. *Id.* at 1204.
91. *Id.*
92. C.A. No. 07-4426, 2008 WL 2600323, at *6 (E.D. Pa. June 30, 2008).
93. Section 8(c) of RESPA provides that an affiliated business arrangement is permissible under certain conditions, including that a person may not be required to use any particular provider of settlement services. 12 U.S.C. § 2607(c)(4)(B) (2006). There are certain exceptions to this bar on required use. Note that as discussed at *supra* note 34, HUD recently promulgated a new RESPA rule that alters the "required use" regulations by effectively preventing homebuilders from offering incentives or discounts to buyers that use an affiliated settlement services provider. The "required use" provision of the New Rule was to become effective January 16, 2009, but is being delayed due to HUD's disputes with industry growth over the provision.
94. 523 F. Supp. 2d 1356, 1361–63 (N.D. Ga. 2007).
95. *Id.* at 1361.
96. *Id.*

However, the court concluded that Ryland's offering of a discount on settlement costs in association with the use of Ryland Mortgage did not constitute a "required use" and fell within the section 8(c) exemption for affiliated business arrangements.[97]

In line with *Spicer*, in *Yeatman v. D.R. Horton, Inc.*, the U.S. District Court for the Southern District of Georgia dismissed a putative class action in which the plaintiffs claimed that a homebuilder, D.R. Horton, Inc., engaged in "economic coercion" by allegedly requiring the plaintiffs to use the homebuilder's affiliated mortgage company, DHI Mortgage Co., Ltd.[98] The named plaintiffs purchased a home using the builder's affiliated mortgage company.[99] The purchase agreement provided that the builder would pay some of the closing costs if the plaintiffs used the affiliate, but the agreement also informed the plaintiffs that using the affiliate was optional.[100] The court dismissed the case, noting that RESPA's "required use" prohibition applies only when the use of a particular service is mandatory, and emphasized that RESPA allows homebuilders to offer legitimate discounts for the use of an affiliated service provider.[101]

Revenue Neutral Cost-Spreading Arrangements Do Not Violate RESPA

In *Krupa v. Landsafe, Inc.*, the Eleventh Circuit held that a mortgage lender and its affiliate did not violate RESPA by entering into a cost-spreading arrangement for credit report fees.[102] Historically, residential mortgage loan broker Countrywide Home Loans, Inc. ("Countrywide"), had received nearly all of its consumer credit reports for loan applicants from its affiliate Landsafe Credit, Inc. ("Landsafe").[103] Prior to 2002, Landsafe charged Countrywide $25 for each credit report; Countrywide passed the $25 cost on to each borrower who obtained a loan from Countrywide, but absorbed the cost for applicants who did not obtain a loan from Countrywide.[104] In August 2002, Landsafe implemented Countrywide's request that Landsafe charge a $35 credit report fee for each loan that closed with Countrywide and no credit report fee for a loan that did not close with Countrywide.[105] The new policy was "revenue-neutral" to Landsafe, and Countrywide no longer had to absorb the cost for loans that did not close.[106]

The borrower plaintiffs initiated a putative class action lawsuit, claiming that, by charging the $35 fee, Countrywide and Landsafe violated sections 8(a) and 8(b) of RESPA.[107] The theory of the section 8(a) claim was that the new pricing

97. *Id.* at 1363.
98. No. 407CV081, 2008 WL 1847087, at *1 (S.D. Ga. Apr. 23, 2008).
99. *Id.*
100. *Id.*
101. *Id.* at *2–3.
102. 514 F.3d 1153, 1157 (11th Cir. 2008).
103. *Id.* at 1154.
104. *Id.* at 1154–55.
105. *Id.* at 1155.
106. *Id.*
107. *Id.*

policy provided Countrywide with free credit reports for customers who did not lock in loans, or at least allowed Countrywide to pass along all of its credit report costs to its customers, as a kickback for Countrywide referring its credit reporting business to Landsafe.[108] The theory of the section 8(b) claim was that some of the $35 fee that borrowers paid to Countrywide for their credit reports was unrelated to the costs of those reports, and instead subsidized Countrywide for credit reports for customers who did not lock in loans.[109] The plaintiffs argued that such cost-spreading amounted to an illegal markup.[110]

The district court granted summary judgment against the plaintiffs on both claims, and the Eleventh Circuit affirmed.[111] With respect to the section 8(a) claim, the Eleventh Circuit concluded that the revised pricing policy did not violate RESPA because it was undisputed that (i) Landsafe made no more or less money as a result and (ii) Countrywide purchased the same percentage (nearly all) of the credit reports from Landsafe that it had before the pricing policy change.[112] With respect to the section 8(b) claim, the court noted that (i) all of the money that Countrywide charged from the credit reports was paid to Landsafe and (ii) the increase in price was related to services actually performed for the locked-in customers.[113]

Captive Reinsurance Arrangement Challengeable Under RESPA

In *Alexander v. Washington Mutual, Inc.*, the U.S. District Court for the Eastern District of Pennsylvania recently held that captive reinsurance arrangements are challengeable under RESPA.[114] The court refused to dismiss a class action complaint alleging a mortgage lender and its captive mortgage reinsurer violated sections 8(a) and 8(b) of RESPA.[115] The borrowers alleged that their mortgage lender directed them and other borrowers to private mortgage insurance providers who had agreed to reinsure the borrowers' mortgage insurance with the lender's captive reinsurance company.[116]

The court found that section 8(c) of RESPA did not preclude the lawsuit, as the plaintiffs alleged that the reinsurance premiums at issue constituted payments for services not actually performed.[117] To support their claim, the plaintiffs alleged that, from 2000 to 2005, the lender's captive reinsurer received over $295 million in reinsurance premiums, but never paid for a single loss.[118] In addition, the court

108. *Id.*
109. *Id.* at 1156–57.
110. *See id.*
111. *Id.* at 1157.
112. *Id.* at 1156.
113. *Id.* at 1157.
114. No. 07-4426, 2008 WL 2600323, at *6–7 (E.D. Pa. June 30, 2008). For a discussion of other aspects of this case, see *supra* note 92.
115. *Alexander*, 2008 WL 2600323, at *7.
116. *Id.* at *1.
117. *Id.* at *4.
118. *Id.*

found that the filed rate doctrine did not bar the plaintiffs' RESPA claims, as the plaintiffs were not challenging the reasonableness of any rate set by the state, but were alleging that the defendants' captive reinsurance arrangement involved an illegal kickback or fee-splitting scheme.[119] The lenders had argued that, because Pennsylvania law requires that rates for property insurance policies be filed with the Department of Insurance (in part to ensure that they are not excessive), mortgage insurance rates are per se reasonable and, therefore, unassailable in a judicial proceeding.[120]

Servicer Obligations to Make Insurance Payments Out of Escrow

Two federal district courts recently issued decisions clarifying servicers' obligations to make insurance payments out of escrow under section 6(g) of RESPA.[121] In *Marks v. Quicken Loans, Inc.*, the U.S. District Court for the Southern District of Alabama found that section 6(g) does not obligate a loan servicer to make payments from a borrower's escrow account immediately when an insurance renewal bill is received; rather, it only obligates the loan servicer to make payments in a "timely manner"—in other words, before the insurer's deadline to avoid a penalty.[122]

In *Marks*, the borrowers obtained a mortgage loan from Quicken Loans, Inc. ("Quicken"), which subsequently transferred servicing rights to the loan to Washington Mutual Home Loans ("Washington Mutual").[123] Quicken did not pay the borrowers' homeowners insurance premium at the time of renewal, despite the fact that there were sufficient funds in escrow to make the payment and the borrowers' insurance coverage had lapsed.[124] The borrowers sued Quicken for, among other things, violating section 6(g) by failing to make the insurance payments.[125] Quicken claimed that Washington Mutual, not it, was obligated to make the insurance payments because the premium did not become due until seven weeks after Quicken relinquished servicing rights.[126] The court found that making payments in a "timely manner" means making payments before the insurer's deadline to avoid a penalty, and dismissed the borrowers' section 6(g) claim because no payment was required during the time Quicken held the servicing rights to the loan.[127]

119. *Id.* at *2–3.
120. *Id.*
121. Section 6(g) provides that "[i]f the terms of any federally related mortgage loan require the borrower to make payments to the servicer of the loan for deposit into an escrow account for the purpose of assuring payment of taxes, insurance premiums, and other charges with respect to the property, the servicer shall make payments from the escrow account for such taxes, insurance premiums, and other charges in a timely manner as such payments become due." 12 U.S.C. § 2605(g) (2006).
122. 561 F. Supp. 2d 1259, 1264 (S.D. Ala. 2008).
123. *Id.* at 1261.
124. *Id.*
125. *Id.*
126. *Id.* at 1263.
127. *Id.* at 1266.

Similarly, in *Webb v. Chase Manhattan Mortgage Corp.*, a putative class action in the U.S. District Court for the Southern District of Ohio, a plaintiff claimed, among other things, that Chase Manhattan Mortgage Corp. ("Chase") violated section 6(g) by failing to make payments of insurance from escrow accounts.[128] Chase, however, argued that it should not be held liable because the borrower failed to respond to Chase's repeated requests for insurance information.[129] The court found that Chase took "reasonable" measures to obtain current insurance information from the plaintiff, which entitled Chase to summary judgment on this RESPA claim.[130]

Qualified Written Requests

As reported in last year's *Annual Survey*, an increasingly popular claim being filed against mortgage loan servicers is for their failure to provide a timely and proper response to a borrower's "qualified written request" ("QWR") for information, as required by section 6 of RESPA.[131] In *McLean v. GMAC Mortgage Corp.*, the U.S. District Court for the Southern District of Florida rejected a lender's motion for summary judgment in a case involving alleged violations of the QWR requirement and RESPA's prohibition against negative credit reporting within sixty days of the receipt of a QWR.[132] The borrowers sent a QWR to the lender seeking an explanation of various specific issues, and the lender's response merely stated that the borrowers should "disregard any payment information ... [and that] [t]he payments w[ould] not be adjusted due to the current status of the account."[133] The court found that the lender's response raised a genuine issue of material fact regarding whether the lender was sufficiently responsive to the QWR to satisfy RESPA.[134] In rejecting the lender's summary judgment motion on the section 6(e)(3) negative credit reporting claim, the court ruled that it was not necessary for the borrower to show economic damage to sustain such a claim.[135]

In *Andrew v. Ivanhoe Financial, Inc.*, the U.S. District Court for the Eastern District of Pennsylvania dismissed the borrower plaintiffs' RESPA claims based on failure of the servicer to respond to a QWR.[136] The court found that the plaintiffs

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128. No. 2:05-cv-0548, 2008 WL 2230696, at *15 (S.D. Ohio May 28, 2008).
129. *Id.* at *16.
130. *Id.*
131. *See* Jaworski, Kolar & Cannon, *supra* note 48, at 33; 12 U.S.C. § 2605(e) (2006). RESPA requires that servicers acknowledge receipt of a QWR in writing within twenty days, respond to the QWR in writing (by making corrections or providing information, a written explanation, or any necessary clarifications) within sixty days after receipt, and not engage in negative credit reporting within sixty days of the receipt of a QWR. *See* 12 U.S.C. § 2605(e)(1)–(3) (2006). RESPA provides a private right of action for damages for a violation of these requirements. *Id.* § 2605(f).
132. No. 06-22795-CIV, 2008 WL 1956285, at *9 (S.D. Fla. May 2, 2008); *see also* 12 U.S.C. § 2605(e)(3) (2006).
133. *McLean*, 2008 WL 1956285, at *4.
134. *Id.* at *9.
135. *Id.* at *11.
136. No. 07-729, 2008 WL 2265287, at *6 (E.D. Pa. May 30, 2008).

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had provided no information concerning making a QWR and that the plaintiffs' argument that the Second Amended Complaint should serve as the QWR was "absurd."[137]

Similarly, in *Webb v. Chase Manhattan Mortgage Corp.*, a putative class action, the U.S. District Court for the Southern District of Ohio granted summary judgment to the defendant on the plaintiff's RESPA claim based on the failure of the defendant to respond to a QWR, in part because there was no proof that the defendant ever received a QWR.[138] Additionally, the court found that the defendant had responded to all correspondence it received from the plaintiff within the timeframes prescribed by RESPA.[139]

137. *Id.* at *6 n.8.
138. No. 2:05-cv-0548, 2008 WL 2230696, at *13 (S.D. Ohio May 28, 2008).
139. *Id.*