

RESPA and other CFPB Enforcement

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INTRODUCTION

Real Estate Settlement Procedures Act (RESPA)

1. Most **important** and most **controversial** statute affecting settlement service industry
2. Statute that defies **BUSINESS LOGIC**
3. Section 8(a) Anti-Kickback Provision
 - No person shall give or receive a thing of value pursuant to an agreement or understanding to refer SS, in connection with a federally related mortgage loan
4. Treble damages and criminal penalties

Consumer Financial Protection Bureau

- Immense powers and budget
- Inclination to take aggressive new legal positions
- Tendency to use enforcement actions as a means of rule-making and ensuring compliance



CFPB Office of Enforcement



- Investigate potential violations of Federal consumer financial law
- Initiate enforcement actions
- Support the CFPB's supervisory function (examinations of bank and nonbank entities)

Consumer Financial Protection Act



- Gave CFPB broad litigation authority under 12 U.S.C. § 5564
- If any person violates a Federal consumer financial law, CFPB can commence a civil action to impose a civil penalty or to seek all appropriate legal or equitable relief
 - New RESPA enforcement tools

CFPB Theories on Referral Agreements

■ CFPB *amicus* brief in *Edwards*

- CFPB view that in a transaction involving the sale of ownership interests, plaintiff need not prove that defendant overpaid for those ownership interests
- Theory that RESPA and Reg X safe harbor that permits payments for goods, facilities, and services does not apply to referral agreements

CFPB Theories on RESPA ABA Safe Harbor Criteria



■ RealtySouth Consent Order

- ABA disclosure
- Required use
- Return on ownership theory

Collateral Litigation Risk



- RealtySouth copycat complaint
- Arbitration agreement as a tool?

“Sham” ABA Guidelines



HUD RESPA Statement of Policy 1996-2

- ABA must be “bona fide provider of settlement services” (plus satisfy § 8(c)(4) criteria), to qualify for safe harbor
- 10-factor test (“Guidelines”)

Sixth Circuit Court of Appeals *Carter* Decision

- Guidelines not entitled to deference because not binding, too indefinite
- Rule of lenity

CFPB Use of “Sham” ABA Guidelines



Paul Taylor consent order

- Claimed “sham” entities

Borders & Borders case

- Sham guidelines
- ABA safe harbor criteria

Practical Considerations



- ABA or Marketing Agreement?

Exceptions to Section 8(a) Anti-Kickback Provisions

1. Congress provided several exceptions

- Attorney
- Title Company
- Lender
- Cooperative Agreement
- Employer/Employee
- Secondary Market
- AfBAs

2. Catch all exception: 8(c)(2)

- RESPA does not prohibit payments for services rendered or goods/facilities actually provided

3. Two Part Test

- Good/Services must be actual, necessary and distinct
- Payment must be commensurate with the value of good/services

Interest In MSAs Has Increased

1. Significant increase in FHA net worth requirements soured many prospective AfBA members
2. New QM Rules
 - affiliated charges counted toward 3% cap
3. Advantages to MSAs
 - no capitalization
 - no infrastructure
 - payment not tied to volume

RESPA Interpretive Rule

A. Marketing and Service Agreements

1. Been around forever
2. HUD finally weights in June 25, 2010
3. Claims per-transaction agreements suspect

RESPA Interpretive Rule (cont'd)

B. Two Types of Marketing Agreements

1. Flat Fee Agreements

- most prevalent
- payment not for referral of particular transaction
- services include signage, web banners, brochures, customer lists, co-advertising, etc.

2. Per-Transaction Agreements

- Market to particular customers
- no sale = no fee earned

RESPA Interpretive Rule (cont'd)

C. HUD Interpretive Rule June 2010

1. HUD stuck with 8(c)(2) Exemption
2. But HUD chips away at Exemption
 - opposes direct consumer solicitations
 - opposes directly handing consumer information
 - opposes exclusivity
 - prefers referrer be an agent
 - prefers written agreement
 - prefers written disclosure
3. Individual analysis required

CFPB Weighs In: Lighthouse Title Consent Order

A. Background

1. Lighthouse enters into series of MSAs with various real estate brokers
 - in return, brokers would refer title business
 - without MSAs, Lighthouse feared loss of business
 - no determination of FMV under the MSA
2. CFPB alleges
 - monthly fee based upon revenues generated
 - monthly fee based on what competitors willing to pay brokers
 - failure to monitor brokers to confirm services actually provided

CFPB Weighs In: Lighthouse Title Consent Order

B. CFPB Pronouncements in Lighthouse Consent Order

1. Brokers with MSA referred more title business to Lighthouse than brokers that had no agreement
2. Entering a contract is a “thing of value” even if fees paid under contract are at FM
3. Entering into a contract with an understanding that brokers will refer title business violates Section 8(a) of RESPA

CFPB Weighs In: Lighthouse Title Consent Order

C. What Happened to Lighthouse?

1. Lighthouse and its officers, agents, servants and employees enjoined from violating RESPA
2. \$200,000 civil money penalty
3. All expenditures worth more than \$5 must be documented for 5 years
4. Forced to terminate all existing MSAs

Important MSA Considerations

A. Lessons from Lighthouse Title

1. CFPB makes clear that “quid pro quo agreements” violate RESPA
2. Contract considered a thing of value (one of the elements of a Section 8(a) violation)
3. Independent third party valuation a must
4. Audit to confirm services performed a must
5. Services should be geared to advertising

MSAs Not Without Risk (cont'd)

A. Lessons from Lighthouse Title (cont'd)

6. Do not pay for direct customer solicitations
7. Avoid exclusive arrangements
8. Avoid preferential designations
9. Disclosure Statement to consumers encouraged
10. Justify reasons for adjusting monthly fees

Compliance

1. New sheriff in town
 - HUD no longer calling shots
 - CFPB now in charge
2. Make sure Agreements reflect arrangement
 - actual services, actually performed
 - for fair market value
3. More CFPB enforcement actions likely

K&L GATES

QUESTIONS

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Recent CFPB Enforcement Actions: Focus on RESPA and UDAAP Violations

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RESPA Section 8

- RESPA Section 8(a), Prohibition Against Kickbacks and Unearned Fees, 12 U.S.C. § 2607
 - “No 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 regulated mortgage loan shall be referred to any person.”
- Implementing regulations at 12 C.F.R. § 1024.14
 - An agreement or understanding for the referral of business incident to or part of a settlement service need not be written or verbalized but may be established by a practice, pattern or course of conduct.
 - When a thing of value is received repeatedly and is connected in any way with the volume or value of the business referred, the receipt of the thing of value is evidence that it is made pursuant to an agreement or understanding for the referral of business.
 - 12 C.F.R. § 1024.14(e)

RESPA Section 8

- Permitted payments:
 - A payment to an attorney at law for services actually rendered
 - A payment by a title company to its duly appointed agent for services actually performed in the issuance of a policy of title insurance
 - A payment by a lender to its duly appointed agent or contractor for services actually performed in the origination, processing, or funding of a loan
 - A payment to any person of a *bona fide* salary or compensation or other payment for goods or facilities actually furnished or for services actually performed
 - A payment pursuant to cooperative brokerage and referral arrangements or agreements between real estate agents and real estate brokers
 - Normal promotional and educational activities that are not conditioned on the referral of business and that do not involve the defraying of expenses that otherwise would be incurred by persons in a position to refer settlement services or business incident thereto
 - An employer's payment to its own employees for any referral activities

UDAAP

- Title X of the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010 makes it, “unlawful for any covered person or service provider to engage in any unfair, deceptive, or abusive act or practice”
 - 12 U.S.C. § 5536(a)(1)(B)
- A representation, omission, act, or practice is:
 - **unfair** when: (1) it causes, or is likely to cause, substantial injury to consumers; (2) the injury is not reasonably avoidable by consumers; and (3) the injury is not outweighed by countervailing benefits to consumers or to competition; and
 - **deceptive** when: (1) it misleads or is likely to mislead the consumer; (2) the consumer’s interpretation of the representation, omission, act, or practice is reasonable under the circumstances; and (3) the representation, omission, act, or practice is material to the consumer.

UDAAP (Cont.)

- A representation, omission, act, or practice:
 - constitutes an **abusive act or practice** when: (1) it materially interferes with the ability of a consumer to understand a term or condition of a consumer financial product or service; or (2) when it takes unreasonable advantage of a lack of understanding on the part of the consumer of the material risks, costs, or conditions of the product or service, takes unreasonable advantage of the inability of a consumer to protect the interests of the consumer in selecting or using a consumer financial product or service or takes unreasonable advantage of the reasonable reliance by the consumer on a covered person to act in the interests of the consumer
- No implementing regulations
- Instead defined through enforcement actions

Recent CFPB Enforcement Actions

- *CFPB v. Genuine Title, LLC, et al.*, Stipulated Final Judgment and Order, Case No. 1:15-cv-01235-JFM (D. Md. Apr. 29, 2015).
- *In re: RMK Financial Corp.*, File No. 2015-CFPB-0007 (Apr. 9, 2015).
- *In re: New Day Financial, LLC*, File No. 2015-CFPB-0004 (Feb. 10, 2015).
- *In re: JPMorgan Chase Bank, N.A.*, File No. 2015-CFPB-0001 (Jan. 22, 2015).
- *In re: Wells Fargo Bank, N.A.*, File No. 2015-CFPB-0002 (Jan. 22, 2015).
- *In re: Lighthouse Title, Inc.*, File No. 2014-CFPB-0015 (Sept. 30, 2014).
- *In re: Stonebridge Title Services, Inc.*, File No. 2014-CFPB-0006 (June 12, 2014).
- *In re: Fidelity Mortgage Corp.*, File No. 2014-CFPB-0001 (Jan. 16, 2014).

In re: Fidelity Mortgage Corp.

Background

- Mortgage company and its president enter into exclusive joint venture with bank.
- Bank rents space to mortgage company.
- Bank referred customers who wanted mortgages.
- Mortgage company referred customers who wanted banking services.
- Determined to be *quid pro quo* relationship.
- Fee is not a flat monthly rate, but rather tied to loan volume generated.
- Fee is found to be substantially above fair market value for comparables.

Alleged Violations

- RESPA Section 8, 12 U.S.C. § 2607(a).
- Implementing regulations at 12 C.F.R. § 1024.14(e).

Consent Order

- Mortgage company pays \$27,076 as disgorgement for origination fees collected from loans procured as part of agreement.
- Mortgage company and president pay \$54,000 civil money penalty.

In re: Stonebridge Title Services, Inc.

Background

- Title company paid referral commissions of up to 40% of title insurance premiums received from consumers to sales people in exchange for referral of title insurance work to title company.
- Commission amount was solely determined by amount of title insurance premiums multiplied by previously agreed to commission percentage.
- Sales people were independent of title company and did not perform any title services for consumer.
- Sales people did not perform any other service for title company beyond referrals.
- Owners of title company were aware of, participated in, and directed activities.

Alleged Violations

- RESPA Section 8, 12 U.S.C. § 2607(a) and (b).
- Implementing regulations at 12 C.F.R. § 1024.14(b) and (c).

Consent Order

- Ordered to cease and desist paying illegal kickbacks and referral fees.
- Title company pays \$30,000 civil money penalty.
- Title company and owners subject to additional reporting requirements to CFPB upon triggering events for next 3 years.

In re: New Day Financial, LLC

Background

- Mortgage company entered into marketing relationship with veterans’ organization through the use of a broker.
- Mortgage company was designated as the exclusive vendor of the veterans’ organization.
- Mortgage company sent direct mail advertisements to veterans’ organization members that
 - Identified it as being from veterans’ organization;
 - Promoted mortgage company and recommended use;
 - Did not disclose relationship between mortgage company and veterans’ organization; and
 - Did not disclose payments made by mortgage company to veterans’ organization.
- Mortgage company paid broker \$15,000/month licensing fee.
- Mortgage company paid veterans’ organization “lead generation” fees for members who contacted mortgage company to inquire about reverse mortgages and completed mandatory counseling and for members who contacted mortgage company to inquire about refinancing and had their credit report pulled.

In re: New Day Financial, LLC (Cont.)

Alleged Violations

- UDAAP, 12 U.S.C. § 5536(a)(1)(B).
 - Deceptive because likely to mislead consumers.
 - Endorsed mortgage company based on payments, while providing other substantive reasons for endorsement.
 - Failed to disclose relationship or referral payments.

- RESPA Section 8, 12 U.S.C. § 2607(a).
 - Payments made to broker and veterans' organization in connection with marketing of home loans constituted illegal payments for referrals of mortgage origination business.

Consent Order

- Ordered to submit comprehensive compliance plan to CFPB within 60 days, including corrective actions to address activities in Consent Order.
- Mortgage company pays \$2,000,000 civil money penalty.
- Mortgage company subject to additional reporting requirements to CFPB upon triggering events for next 5 years.

In re: RMK Financial, Corp.

Background

- Mortgage company engaged in deceptive advertising practices.
- Used print advertisements which led consumers to believe company was affiliated with the U.S. government.
- Used FHA and VA names, logos, and seals.
- Inferred ads were coming from or endorsed by these agencies.
- Targeted towards service members and veterans.
- Made false and misleading statements regarding monthly payment amounts and interest rates.

Alleged Violations

- UDAAP, 12 U.S.C. § 5536(a)(1)(B).
- Mortgage Acts and Practices Rule, Regulation N, 12 C.F.R. § 1014.
- TILA, 12 U.S.C. §§ 1601 et seq. and implementing regulations at 12 C.F.R. § 1026.

Consent Order

- Ordered to submit comprehensive compliance plan to CFPB within 30 days, including corrective actions to address activities in Consent Order.
- Mortgage company pays \$250,000 civil money penalty.
- Mortgage company subject to additional reporting requirements to CFPB upon triggering events for next 5 years.

Genuine Title, JP Morgan & Wells Fargo

Background

- Executives at title company and loan officers at banks traded cash and marketing services in turn for referrals.
- Title company purchased, analyzed, and provided consumer data to loan officers.
- Title company created, printed, and mailed letters to consumers on loan officer's behalf.
- Loan officers referred homebuyers to title company for closing services.
- Certain loan officers received lump sum cash payments through companies they created and controlled.

Alleged Violations

- RESPA Section 8, 12 U.S.C. § 2607(a).
- 12 U.S.C. § 5536(a)(1)(A).
- Maryland Consumer Protection Act.

Consent Orders

- Genuine Title: \$662,500 in collective fines and banned from mortgage industry for 2-5 years
- JP Morgan: \$600,000 civil money penalty (6 loan officers in 3 branches)
- Wells Fargo: \$24,000,000 civil money penalty (100+ loan officers in 18 branches)
- Collective \$11,100,000 in redress to consumers

Lessons Learned

- Clearly disclose marketing relationships and any associated fees or payments.
- Set any resulting fees at fair market value – do not tie to loan volume in any way.
- Do not enter into exclusive marketing or referral relationships.
- Do not enter into *quid pro quo* relationships.
- It doesn't matter if an agreement is in writing, it can be inferred from actions.
- Keep UDAAP definitions in mind – consider consumer's point of view.
- Self-monitor and self-report.
- If you identify compliance issues, institute a corrective action plan immediately!

Thank you

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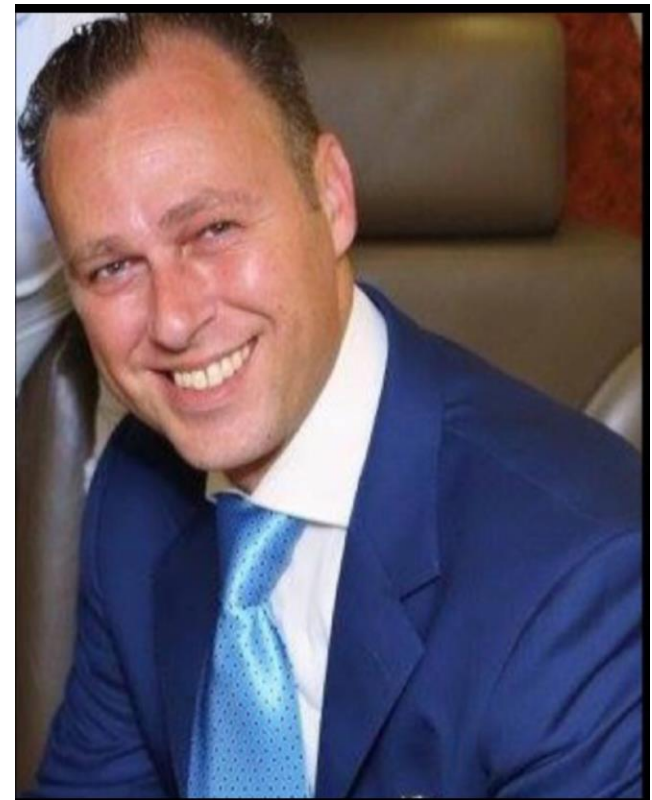
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As a Managing Member, Mr. Brody actively manages complex mortgage banking mitigation and litigation matters for the American Mortgage Law Group, P.C. (“AMLG”) and its diverse clientele (e.g., national mortgage lenders, warehouse lenders, secondary market investors, loan servicing companies, Wall Street banking firms and insurers). Being one of the AMLG’s founding attorneys, Mr. Brody has been instrumental in the Firm’s development and in its continued success.

Mr. Brody has successfully resolved hundreds of mitigation and litigation cases that involve complex mortgage fraud schemes, as well as large-scale repurchase and/or make-whole disputes. Mr. Brody’s experience centers on those legal issues that arise during and through loan originations, loan purchases/sales, loan securitizations, foreclosures/bankruptcy actions, and repurchase/make-whole claims.

Mr. Brody received his B.A. in International Relations from Drake University in 1997. He also received his J.D., with a certified concentration in Advocacy, from the University of the Pacific, McGeorge School of Law in 2000. In addition to being admitted to practice law in all State and Federal Courts in CA, Mr. Brody has served as lead litigation counsel for numerous mortgage banking and commercial related disputes venued in both State and Federal Courts, in a direct capacity or on a *pro hac vice* basis, in AZ, CA, FL, MD, MI, MO, OR, NJ, NY, PA, TN, and TX.

Mr. Brody has made numerous media appearances and industry presentations regarding the prevention, detection and resolution of mortgage fraud matters. In addition, Mr. Brody continues to be a featured speaker in the area of repurchase and make-whole claims. Mr. Brody may be reached at jbrody@americanmlg.com or at 415-878-0030.



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- AMLG is a nationally recognized full suite mortgage banking firm that represents a diverse clientele (e.g., mortgage lenders, warehouse banks, investors, servicers, Wall Street banking firms, insurers/insureds, etc.), both in and out of court, either directly or in a *pro hac vice* capacity, all across the country.
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