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# Do Your Fees Comply with RESPA?

## What You Need to Know About the Busby Case and Section 8(b) of RESPA

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# Goals for Today's Webinar

- Introduce Section 8(b) of RESPA
- Describe the confusion and controversy surrounding Section 8(b) of RESPA
- Discuss the importance of the Busby case
- Provide tips for charging RESPA-compliant fees

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# Introduction

- Busby v. RealtySouth – U.S. District Court for Northern District of Alabama
- What this case is Not
- General state of the law

# Introduction

- Mark up = an increase in price above a third party vendor's fee
  - An appraiser charges a lender $300 for an appraisal, but the lender charges the consumer $400.  There is a $100 mark up.
- Undivided fee = a settlement service provider's own fee for its own services that is not divided with any other provider
  - A lender's underwriting fee, a doc prep fee charged by a title agent, or a real estate broker's administrative fee

## Section 8(a) of RESPA

- "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 related mortgage loan shall be referred to any person."

12 U.S.C. § 2607(a).

# Section 8(b) of RESPA

- "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."

12 U.S.C. § 2607(b).

# $7^{th}$ Circuit – Echevarria v. Chicago Title (2001)

- $7^{th}$ Circuit = Wisconsin, Illinois, and Indiana
- $30 recording fee, but $38 charged to consumer
- Allegation: Chicago Title violated Section 8(b) by marking up the recording fee without performing any real or actual additional services
- Court finds that the party marking up the fee must split a portion of the mark up with another person

# HUD Policy Statement 2001-1

- HUD issued guidance on its interpretation of Section 8(b) in response to the Echevarria case

- HUD says each of the following are violations of Section 8(b):
  - Two or more persons split a fee for settlement services, any portion of which is unearned;
  - One settlement service provider marks up the cost of the services performed or goods provided by another settlement service provider without providing additional actual, necessary, and distinct services, goods, or facilities to justify the additional charge; or
  - One service provider charges the consumer a fee where no, nominal, or duplicative work is done, or the fee is in excess of the reasonable value of goods or facilities provided or the services actually performed

## 4th Circuit – Boulware v. Crossland Mortgage (2002)

- 4th Circuit = Maryland, Virginia, NC, SC, and West Virginia
- \$15 credit report fee, but \$65 charged to consumer
- 7th Circuit view vs. HUD Policy Statement
- Court sides with 7th Circuit – the party marking up the fee must split a portion of the mark up with another person

## 8th Circuit – Haug v. Bank of America (2003)

- 8th Circuit = ND, SD, Nebraska, Minnesota, Iowa, Arkansas, and Missouri
- Also involved the mark up of a third party fee by the bank
- Court sides with 7th and 4th Circuits – two or more parties must split an unearned fee to violate Section 8(b) of RESPA

## 11th Circuit – Sosa v. Chase Manhattan (2003)

- 11th Circuit = Florida, Georgia, and Alabama
- Allegation:  Chase charged a $50 fee for courier services and retained the mark up without performing the actual deliveries
- Court finds, for the first time, that a single party can violate Section 8(b) of RESPA

## 2nd Circuit – Kruse v. Wells Fargo (2004)

- 2nd Circuit = New York, Vermont, Connecticut
- Mark up of flood certification fees, tax service fees, and document preparation fees
- Also, alleged excessive underwriting fees
- Defers to HUD's Policy Statement regarding mark ups – a single person may violate Section 8(b)
- Rejects HUD's Policy Statement regarding unilateral fees – RESPA is not a rate-setting statute

## 3rd Circuit – Santiago v. GMAC Mortgage (2005)

- 3rd Circuit = Pennsylvania, New Jersey, Delaware, and Virgin Islands
- Mark up of flood certification fee and tax service fee, as well as excessive funding fee
- Same outcome as 2nd Circuit – agrees with HUD on mark ups, but rejects HUD's interpretation of unilateral charges

# Scorecard

- Two parties must split a fee to violate Section 8(b): 7th, 4th, and 8th Circuits

- One party may violate Section 8(b) by marking up a vendor's fee and failing to perform additional services to justify the mark up: 11th, 2nd, and 3rd Circuits

- All Circuits do not consider and/or reject HUD's interpretation regarding excessive unilateral charges

## Cohen v. JP Morgan Chase 2nd Cir. (2007)

- Allegation: Chase charged a $225 post-closing fee and performed no services to justify the fee
- Court finds that HUD reasonably construed Section 8(b) to prohibit a settlement service provider from charging a fee for which no work is performed
- 2nd Circuit sends the case back to the district court to determine if Chase performed any services
- District court denied Chase's Motion for Summary Judgment in 2009 decision and set the stage for the Busby decision

# Cohen v. JP Morgan Chase E.D. NY (2009)

- A fee must be "for" services
  - District court focused on certain facts to suggest no link between post-closing services and fee
- Despite list of post-closing services actually performed by Chase in Cohen transaction, district court requires that services be settlement services under Section 8(b)
- District court offers its definition of "settlement service": that which either directly benefits the consumer, or is performed at or before the closing
  - District court finds that Chase's post-closing services neither benefited the consumer nor occurred at or before closing

# Busby v. RealtySouth – N.D. Ala. (2009)

- 11th Circuit overruled the district court on issue of class certification and remands to the district court: did RealtySouth perform any services or no services?

- Sosa case as 11th Circuit precedent – the performance of any service appears to be sufficient under Section 8(b) of RESPA

- RealtySouth enumerates its actual and distinct services, but the district court rejects the "array of services" argument

## Busby v. RealtySouth – N.D. Ala. (2009)

- District court declares that RealtySouth must perform actual and distinct settlement services for the direct benefit of the consumer that occur before or at the closing

- Court finds that RealtySouth did not perform sufficient services to justify the administrative brokerage commission fee

# Implications of Busby Decision

- Geography – where your business operates is relevant to your level of Section 8(b) risk
- Assume that a unilateral charge will be actionable under Section 8(b)
  - Contracts should make clear that fee is part of overall commission; or
  - Ensure that you perform separate and distinct services that justify a separate fee
- Pay attention to where the fee is disclosed on the HUD-1
- Avoid calling fees “administrative” fees or “compliance” fees

## Tips for Compliance

- Increase seller commission to 6.1%
- Show seller commission as 6% plus $400
- Show seller commission as 3% plus $200 and buyer commission as 3% plus $200
- If charge separate fee to buyer, ensure the fee is fair market value for actual and distinct services

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# QUESTIONS?

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