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New Rulings from the Fourth and Eleventh Circuit Shed New Light on RESPA Liability and the Filed Rate Doctrine

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Congress enacted the Real Estate Settlement Procedures Act ("RESPA") to "insure that consumers throughout the Nation … are protected from unnecessarily high settlement charges caused by certain abusive practices that have developed in some areas of the country." 12 U.S.C. § 2601(a). Some, including the Department of Housing and Urban Development ("HUD"), point to this language to argue that RESPA provides broad relief for "overcharges" and that the statute is aimed at reducing the cost of real estate settlement services. 66 Fed. Reg. 53052 (Oct. 18, 2001). RESPA's precise prohibitions, however, are primarily limited to "certain abusive practices," not excessive fees in general. RESPA prohibits real estate settlement service providers from giving "kickbacks" for referrals and, similarly, from charging or splitting fees for unperformed services. *See* 12 U.S.C. § 2607(a)–(b). But RESPA is silent on whether a provider violates RESPA merely by charging rates that are above the market rate, above the rate that was filed and approved by a state regulatory authority ("the filed rate"), or otherwise excessive.

The Eleventh and Fourth Circuits Hold That Charges In Excess Of A Filed Rate Do Not Violate Section 8(b) Of RESPA, And May Not Violate Section 8(a). The Eleventh Circuit recently confronted the issue of overcharges and filed rates in *Hazewood v. Foundation Financial Group, LLC,* 551 F.3d 1223 (11th Cir. 2008) (per curiam). The plaintiff, Hazewood, conceded that the defendants performed some settlement services for her, but alleged that they violated RESPA by charging fees in excess of the rates the defendants had filed with, and were approved by, the Alabama Insurance Commissioner. *Id.* at 1224–1225. The court affirmed the district court's dismissal of Hazewood's claim and held that RESPA "does not provide a cause of action for excessive fees—that is, charges where a service was performed, but the plaintiff feels she was overcharged by the service provider." *Id.* at 1225. The court also refused Hazewood's invitation to divide the fees into "reasonable" and "unreasonable" portions by ruling that the amount of any fees in excess of the filed rate (the allegedly "unreasonable" portion) violated RESPA. The court instead held that "where a plaintiff concedes that a service is actually performed in exchange for a settlement fee, she may not avoid dismissal of her RESPA claim by arguing that the 'excessive' portion of the fee was 'unearned.'" *Id.* at 1226.

This result, on its face, is unremarkable. The terms of RESPA do not prohibit overcharges or fees in excess of a provider's filed rate. As many courts have noted, RESPA is not a price-control statute. *See, e.g.*, *Kruse v. Wells Fargo Home Mortg., Inc.*, 383

F.3d 49, 57 (2d Cir. 2004); *Krzalic v. Republic Title Co*., 314 F.3d 875, 881 (7th Cir. 2002*); Boulware v. Crossland Mortg. Corp*., 291 F.3d 261, 268 (4th Cir. 2002). But the *Hazewood* decision is more intriguing when cast against the backdrop of another defense to RESPA claims: the filed rate doctrine.

Not all courts considering RESPA claims have followed the filed rate doctrine. Those who do hold that a plaintiff has not been injured and thus lacks standing to sue under RESPA, even assuming impermissible fee-splitting or kickbacks, if the fees for title insurance and settlement services were at or below the rate the provider filed with the state's regulatory agency for insurance. *See, e.g.*, *Alston v. Countrywide Fin. Corp*., 2008 U.S. Dist. LEXIS 76763, at *14–*19 (E.D. Pa. 2008); *Morales v. Attorneys' Title Ins. Fund*, 983 F. Supp. 1418, 1427 (S.D. Fla. 1997). In short, these courts hold that a plaintiff who is not overcharged for settlement services—as measured by the service provider's filed rate—cannot pursue a RESPA claim.

Hazewood takes this approach one step further. It holds that, even if the defendant charged more than the state-regulated filed rate, there is no RESPA claim under section 8(b) because any claim must be brought, if at all, under state law. In *Hazewood*, the court did not address whether a plaintiff could pursue a section 8(a) claim under RESPA if the plaintiff alleges that he or she was overcharged for settlement services (in excess of the filed rate) and there are valid allegations of kickbacks or fee-sharing arrangements with a party that did not perform any services.

The Fourth Circuit recently held that a title insurer is not liable under RESPA even though it split fees and ultimately charged fees above its filed rate when both the insurer and the recipient of the split fees performed settlement services in exchange for those fees. *Arthur v. Ticor Title Ins. Co. of Fla.,* 2009 U.S. App. LEXIS 13090 (4th Cir. 2009). The court characterized the plaintiffs' argument that the fees could be divided into a reasonable, legal portion (the amount of the filed rate) and an unreasonable, illegal portion (the amount in excess of the filed rate) as "ingenious," but "unpersuasive." *Id.* at *10–*11. In the court's words, "[t]he statutory language [of RESPA] does not authorize a court to divide charges into valid and invalid parts and to decide that the invalid part is not for services performed[,]" and RESPA's language does not allow the court to "create liability for improper pricing." *Id*. at *11–*12, *15. Notably, the court also rejected the plaintiffs' assertion that fee-splitting constituted a “kickback” in violation of section 8(a) of RESPA, because the agents receiving the split fees “indisputably performed settlement services” for the plaintiffs. *Id.* at *15 n.2. The court based the latter holding on section 8(c)(1) of RESPA, which provides:

> Nothing in this section shall be construed as prohibiting (1) the payment of a fee ... by a title company to its duly appointed agent for services actually performed in the issuance of a policy of title insurance[.]

12 U.S.C. § 2607(c)(1).

Other Courts Hold That Allegations of Kickbacks Alone Are Actionable. In jurisdictions that do not follow the filed rate doctrine, allegations of an overcharge are irrelevant. Kickbacks or fee-splitting arrangements alone can give rise to a private cause of action under RESPA in these jurisdictions. *See, e.g.*, In re Carter, 553 F.3d 979, 989 (6th Cir. 2009); *Capell v. Pulte Mortg., L.L.C.*, 2007 U.S. Dist. LEXIS 82570, at *9–*15 (E.D. Pa. 2007); *Robinson v. Fountainhead Title Ins. Group Corp.*, 447 F. Supp. 2d 478, 489 (D. Md. 2006) (*Robinson* was decided before the Fourth Circuit's recent *Arthur* decision.) These cases are consistent with *Hazewood* and *Arthur* insofar as they remove the amount of the fee from the RESPA analysis; they differ, however, when a court combines the filed rate doctrine with the *Hazewood/Arthur* approach to create two layers of defenses to a RESPA claim—the fact that there was not an overcharge, *or* the fact that services were actually performed.

HUD Advocates That Overcharges or "Unreasonable" Fees Are Actionable. HUD advocates a third approach, one that is not necessarily tied to kickbacks, split fees, or the provider's filed rate. In a 2001 Statement of Policy, HUD urged a relaxation of prerequisites for bringing a private RESPA claim. 66 Fed. Reg. 53052 (Oct. 18, 2001). According to HUD, a private plaintiff has a RESPA claim if (1) the total or any component of fees for settlement services are unjustified in light of the work connected to those fees, or (2) "the fee is in excess of the reasonable value" of the services rendered. *Id.* at 53057. Thus, HUD interprets RESPA as permitting a private cause of action when "one settlement service provider charges a fee to a consumer where no work is done or the fee exceeds the reasonable value of the services performed by that provider[,]" even if no fee-splitting or kickbacks to a third party occur. *Id.* Further, HUD does not necessarily view the rate that is acceptable to, and filed with, a state regulatory body as reasonable within the meaning of RESPA. Indeed, HUD has consistently opposed the filed rate doctrine, most recently in an amicus brief to the United States Court of Appeals for the Third Circuit in *Alston v. Countrywide Financial Corp.*, No. 08-4334, which is currently pending and urges the reversal of *Alston*, 2008 U.S. Dist. LEXIS 76763. Under the HUD approach, RESPA is—at least in part—a price-control statute.

Conclusion. In short, while the per curiam *Hazewood* decision and the *Arthur* decision appear uncontroversial, their underpinnings and ramifications are the subject of significant and continuing debate among courts and HUD. The question of what constitutes an actionable RESPA violation, under both section 8(a) and section 8(b) remains open in most jurisdictions.

Both section 8(a) and section 8(b) remains open in most jurisdictions.

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