



# BURR BULLETIN

## *The Long Arm of RESPA: Judicial Expansion of Section 8(b) in 2009*

By John R. Chiles and Zachary D. Miller\*

August 2010

### **I. Introduction**

Over the last several years, federal courts have seen an upsurge in the number of cases alleging violations of Section 8 of the Real Estate Settlement Procedures Act (RESPA).<sup>1</sup> Of particular interest to plaintiffs has been Section 8(b), which prohibits charging certain types of fees during “settlement.”<sup>2</sup> Federal courts have struggled in their interpretation of Section 8(b), with some courts holding that two culpable parties are required to split an unearned settlement fee before a claim can be actionable, while others have concluded that one culpable party can violate the statute by itself.

These two camps have divided along circuit lines, making it difficult for settlement service providers, mortgage brokers, and lenders to harmonize their policies with the different rules in each jurisdiction. In the 2009, compliance became even more difficult, with federal district courts in several circuits finding that undivided, unearned fees are actionable and setting the standards for what types of fees violate RESPA. These decisions have developed new guidelines for what types of fees are actionable under RESPA and provided examples of damages that can result from violations.

This article explores and seeks to explain the decisions of these federal district courts, in particular considering what a settlement service provider must do to comply with the RESPA requirements in these jurisdictions. This discussion includes a detailed analysis as to the types of fees that have been found to violate RESPA and the common characteristics of an illegal fee. Also included is an analysis of the connection that must be maintained between the fee charged and any settlement work that is performed in exchange for the fee. The discussion examines the current status of the Section 8(b) circuit split and the circuit court decisions that may have an impact on whether the circuit split ultimately develops into “majority” and “minority” camps.

Finally, this article comments on other recent RESPA developments, including decisions from federal circuit courts that are having an effect on the number of plaintiffs that can assert RESPA claims. We briefly analyze recent decisions finding that it is unnecessary for a plaintiff to allege that he or she suffered an “overcharge” in order to have standing to bring a RESPA claim. Also, the discussion provides an update on RESPA title insurance claims, in order to determine whether these claims are now viable or, as in the past, are claims that cannot survive dismissal.

---

\*The authors would like to express their thanks to John Ropiequet for his valuable editing suggestions with respect to this article.

<sup>1</sup> Pub. L. No. 93-53, § 8, 88 Stat. 1727, 1727 (1974), (codified at 12 U.S.C. § 2607).

<sup>2</sup> See 12 U.S.C. § 2607(b).

Many questions remain unanswered regarding RESPA's scope and effect; however, recent decisions provide helpful clues as to how settlement service providers can ensure RESPA compliance and also insight as to the severity of penalties for violating the statute. While many commentators may remain focused on the new rules regarding the standardized Good Faith Estimate (GFE) and HUD-1 Settlement Statement,<sup>3</sup> there is reason to believe that RESPA's biggest challenge could prove to be decades old, namely, the ever-changing interpretations of Section 8(b).

## II. A Quick Synopsis of Section 8(b) and the Circuit Split<sup>4</sup>

### A. The Statutory Text

The text of Section 8(b) of RESPA is short, but ambiguous, and contains little legislative history to assist in its interpretation. The provision is entitled "Splitting Charges"<sup>5</sup> and it follows its more easily understood sibling, Section 8(a), which prohibits kickbacks and referrals in exchange for business.<sup>6</sup>

The text of Section 8(b) provides:

#### (b) Splitting charges

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.<sup>7</sup>

### B. The 2001 HUD Statement of Policy and the Circuit Split

Since the enactment of RESPA, courts have struggled to determine exactly what is prohibited by Section 8(b). In 2001, the Seventh Circuit United States Court of Appeals issued a decision in *Echevarria v. Chicago Title & Trust Co.*,<sup>8</sup> concluding that Section 8(b) requires two culpable parties "splitting" an unearned fee in order to create liability in a broker or lender.<sup>9</sup>

---

<sup>3</sup> See generally Stephen F. J. Ornstein, Matthew S. Yoon & John P. Holahan, *The Final RESPA Rule*, 63 Consumer Fin. L. Q. Rep. 296 (2009).

<sup>4</sup> For a more detailed analysis into Section 8(b) and the federal circuit court split regarding the actionability of markups and undivided, unearned fees, see John R. Chiles & Zachary D. Miller, *Will RESPA Litigation Under Section 8(b) Reach More Than Fee Splits?*, 62 Consumer Fin. L.Q. Rep. 183 (Fall-Winter 2008).

<sup>5</sup> As has been noted elsewhere, the title "splitting charges" was not a legislative creation, because when RESPA was enacted it contained no subsection titles. See *Cohen v. JP Morgan Chase ("Cohen I")*, 498 F.3d 111, 121 (2d Cir. 2007) (citing RESPA, Pub. L. No. 93-533 § 8(b), 88 Stat. 1727, 1727 (1974)). Therefore, the majority of courts place very little interpretive weight in the title of a statutory provision. *Id.*

<sup>6</sup> See RESPA Section 8(a), 12 U.S.C. § 2607(a). Section 8(a) provides:

#### (a) Business referrals

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 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).

<sup>7</sup> 12 U.S.C. § 2607(b).

<sup>8</sup> 256 F.3d 623 (7th Cir. 2001).

<sup>9</sup> *Id.* at 629-30.

## 1. 2001 HUD Statement of Policy

In response to the ruling in *Echevarria*, the Department of Housing and Urban Development (HUD) released its 2001 Statement of Policy (2001 SOP),<sup>10</sup> which attempted to definitively set forth what charges are actionable under Section 8(b). The 2001 SOP identified four types of settlement service fees that, according to HUD, give rise to Section 8(b) violations:

(1) For two or more persons to split a fee for settlement services, any portion of which is unearned; or (2) for one settlement service provider to mark-up the cost of the services performed for goods provided by another settlement service provider without providing additional actual, necessary and distinct services, goods, or facilities to justify the additional charge; or (3) for one settlement service provider to charge the consumer a fee where no, nominal, or duplicative work is done, or the fee is in excess of the reasonable value of goods of facilities provided or the services actually performed.<sup>11</sup>

## 2. Four Categories of Fees

Since the issuance of the 2001 SOP, commentators and courts have found that while the statement contains three subparagraphs for actionable settlement service fees, the statement more accurately describes four distinct types of fees.

### a. Unearned Split Fees

Unearned split fees are the classic type of “fee split” and there is virtually no disagreement among the courts that this situation is prohibited by Section 8(b).<sup>12</sup> As stated in a recent federal district court decision, the situation results when “A charges B (the borrower) a fee of some sort, collects it and then either splits it with C or gives C a portion or percentage (other than 50 percent - the situation that the statutory term ‘split’ most naturally describes) of it.”<sup>13</sup> In order for this situation to be actionable, however, the plaintiff “must allege that the defendant shared an unearned fee with a third party to the real estate transaction.”<sup>14</sup>

### b. Markups

Markups are the second category of fee discussed in the 2001 SOP and occur when a fee is charged to a borrower and retained by the settlement service provider for third-party services in excess of the value of those services.<sup>15</sup> The markup carries two significant features: first, there is a division of the fee such that the person adding the markup only receives a portion of the final fee; and second, the vendor who actually provided the service receives only the legitimate charge for his service, but does not receive any part of the markup. As described below, federal circuit courts are hopelessly divided on whether this type of fee is actionable.

---

<sup>10</sup> See Real Estate Settlement Procedures Act Statement of Policy 2001-1: Clarification of Statement of Policy 1999-1 Regarding Lender Payments to Mortgage Brokers, and Guidance Concerning Unearned Fees Under Section 8(b), 66 Fed. Reg. 53052-01 (Oct. 18, 2001) (codified at 24 CFR pt. 3500.14) (hereinafter 2001 SOP).

<sup>11</sup> *Id.*

<sup>12</sup> See *Krzalic v. Republic Title Co.*, 314 F.3d 875, 881 (7th Cir. 2002); see also *Weizeorick v. ABN AMRO Mortg. Group, Inc.*, 337 F.3d 827, 831 (7th Cir. 2003); *Haug v. Bank of America, N.A.*, 317 F.3d 832 (8th Cir. 2003); *Boulware, et al. v. Crossland Mortg. Corp.*, 291 F.3d 261 (4th Cir. 2002).

<sup>13</sup> *Freeman, et al. v. Quicken Loans, Inc., et al.*, Nos. 08-1626, 08-1627, 08-4744, 2009 WL 2448033, at 12 (E.D. La. Aug. 10, 2009).

<sup>14</sup> *Weizeorick*, 337 F.3d at 831.

<sup>15</sup> *Freeman*, 2009 WL 2448033, at \*12.

### c. Undivided, Unearned Fees

This settlement service fee, described by the first part of the third subparagraph of Section 8(b), occurs when fees are charged to the borrower by a single lender or service provider for which no correlative service is performed.<sup>16</sup> The significant feature of this charge is that there is no division of the fee with any person, so that the person making the charge receives all or 100 percent of it. The United States Court of Appeals for the Second Circuit, in *Cohen v. JP Morgan Chase & Co.*, became the only federal circuit court to definitively determine that this type of settlement service charge is actionable.<sup>17</sup> This decision, as well as the opinions of the federal district courts that have attempted to follow *Cohen I*, is discussed in much more detail below.

### d. Overcharges

The final category of settlement service fees described by the 2001 SOP has been held not to be actionable by every court that has analyzed the fee.<sup>18</sup> Overcharges are simply “charges in excess of the reasonable value of the actual services provided that are nonetheless retained by a single lender/settlement service provider.”<sup>19</sup> Despite language in the 2001 SOP indicating that this type of fee is actionable, federal circuit courts that have analyzed overcharges have unanimously refused to give *Chevron*<sup>20</sup> deference to HUD’s statement and have refused to find overcharges actionable.

## 3. Circuit Split

Federal circuit courts have struggled with the 2001 SOP and have divided into two distinct camps: those who require an unearned fee to be split between two parties to be actionable, and those who require only one party to charge an unearned fee.

### a. A Split Fee Is Required

The Fourth, Seventh and Eighth Circuit United States Courts of Appeal were first to address the interplay between the 2001 SOP and Section 8(b) of HUD. Each of these courts held that when an unearned fee is not split with a third-party, the plaintiff may not claim a violation of RESPA.<sup>21</sup> Each of these courts held that the language of Section 8(b) is unambiguous and that the term “and” which conjoins “no person shall give” with “no person shall accept” denotes that both elements must be present.

---

<sup>16</sup> *Id.* at \*13.

<sup>17</sup> *See Cohen I*, 498 F.3d 111.

<sup>18</sup> *See Kingsberry v. Chicago Title Ins. Co.*, 586 F. Supp. 2d 1242, 1247 (W.D. Wash. 2008) (holding that RESPA is not intended to function as a price-fixing statute that dictates the reasonable value of loan settlement services); *see also* *Kruse v. Wells Fargo Home Mortg., Inc.*, 383 F.3d 49, 55-57 (2d Cir. 2004) (holding that nothing in RESPA permits a court to divide a charge into “earned” and “unearned” portions).

<sup>19</sup> *Freeman*, 2009 WL 2448033, at \*13.

<sup>20</sup> *See Chevron U.S.A. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 841 (1984). In *Chevron*, the Supreme Court held that no deference is to be given to an agency interpretation that is at odds with the plain meaning of the statute being interpreted. *Id.* at 841. However, regulations issued by an agency with express delegation of authority to elucidate a specific provision of a statute “are given controlling weight unless they are arbitrary, capricious, or manifestly contrary to the statute.” *Id.* at 843-44.

<sup>21</sup> *See Boulware*, 291 F.3d 261 (when defendant charged \$65 for a credit report that only cost the defendant \$15 to obtain, plaintiff did not have a valid RESPA claim); *Krzalic*, 314 F.3d 875 (holding that a plaintiff could not recover for allegation that defendant closing agent charged them \$50 for recording their mortgage, yet only paid the county recorder \$36 for the service); and *Haug*, 317 F.3d 832 (plaintiff could not recover for RESPA violation when defendant charged plaintiff \$50 for a credit report that only cost the defendant \$15 to purchase from a third party credit reporting agency).

Also, the court in *Krzalic v. Republic Title Co.* concluded that the 2001 SOP was not an appropriate promulgation from HUD, as it was adopted without a formal notice and comment ruling.<sup>22</sup> Judge Posner referred to the 2001 SOP as “perfunctory” and lacking “evidence or interpretive methodology.”<sup>23</sup>

#### **b. Fee Not Required To Be Split**

Since the decisions in *Boulware, et al. v. Crossland Mortgage Corp.*, *Krzalic* and *Haug v. Bank of America, N.A.*, three more circuit courts have addressed the 2001 SOP and Section 8(b), each holding that the provision requires only one culpable party to charge an unearned fee.<sup>24</sup> The Second, Third and Eleventh Circuit<sup>25</sup> United States Courts of Appeal have determined that the “and” in “no person shall give and no person shall accept” is troublesome and could be read as outlawing both the “giving” and “accepting” of a split fee separately. The Second Circuit, in *Kruse*, went further, stating that because of the ambiguity in the statute, the provision of the 2001 SOP prohibiting markups was entitled to full *Chevron* deference.<sup>26</sup>

Since the decisions by the Second, Third and Eleventh Circuits, no additional federal circuit courts have issued a decision on whether Section 8(b) requires two culpable parties, or only one. Instead, federal district courts have been left to struggle with harmonizing the decisions of each court with the 2001 SOP, while attempting to stay true to the statutory language contained with Section 8(b) itself.

### **III. Undivided/Unearned Fees: The New Frontier**

In the past year, the majority of federal court decisions on Section 8(b) have revolved around the issue of undivided, unearned fees. As noted above, only the Second Circuit Court of Appeals has determined that the collection of undivided, unearned fees is actionable.<sup>27</sup> However, although no other federal circuit court has since elaborated on the topic, several federal district courts have addressed *Cohen I*, with some following the Second Circuit’s reasoning and holding that the levy undivided, unearned fees is actionable under RESPA.

#### **A. The *Cohen* Decision: Opening the Door to Undivided, Unearned Fees**

By the time that the Second Circuit United States Court of Appeals was faced with the question of whether undivided, unearned fees are actionable under Section 8(b), the circuit split regarding markups had already been established, with three circuit courts on either side of the debate. In fact, in *Kruse v. Wells Fargo Home Mortgage*,<sup>28</sup> the Second Circuit had already determined that Section 8(b) was “not clear and unambiguous with respect to its coverage of markups” and that *Chevron* deference was

---

<sup>22</sup> *Krzalic*, 314 F.3d at 881.

<sup>23</sup> *Id.*

<sup>24</sup> See *Sosa, et al. v. Chase Manhattan Mortg. Corp.*, 348 F.3d 979 (11th Cir. 2003); *Kruse v. Wells Fargo Home Mortg., Inc.*, 383 F.3d 49 (2d Cir. 2004); and *Santiago v. GMAC Mortg. Group, Inc.*, 417 F.3d 384 (3d Cir. 2005).

<sup>25</sup> It must be noted that the Eleventh Circuit’s opinion in *Sosa* has been questioned by both commentators and federal district courts within the Eleventh Circuit. See *Wooten v. Quicken Loans*, No. 07-00478-CG-C, 2008 WL 687379 (S.D. Ala. Mar. 10, 2008) (“The undersigned is not persuaded that *Sosa* stands for the proposition that an unsplit fee . . . can violate section 8(b) of RESPA.”); see also *Chiles & Miller, supra* note 4, at 189-190.

<sup>26</sup> *Kruse*, 383 F.3d at 59-61.

<sup>27</sup> *Cohen I*, 498 F.3d 111, 113.

<sup>28</sup> 383 F.3d 49-55-57 (2d Cir. 2004).

appropriately accorded to the 2001 SOP.<sup>29</sup> However, the *Kruse* court had refused to defer to HUD's interpretation regarding overcharges, finding that Section 8(b) does not authorize a court to break down a fee into reasonable and unreasonable parts.<sup>30</sup> Therefore, the *Kruse* court "invalidated that part of the Policy Statement's third prong prohibiting fees exceeding the 'reasonable value' of the services rendered."<sup>31</sup>

With the Second Circuit firmly entrenched in the camp holding that only one culpable party is required for a Section 8(b) violation, the court was faced with whether to take that view a step further in *Cohen v. JP Morgan Chase & Co. (Cohen I)*.<sup>32</sup> The plaintiff had sued her mortgage lender, arguing that the lender's "collection of an unearned [\$225] 'post-closing fee' in connection with its refinancing of her home mortgage violated Section 8(b) of RESPA."<sup>33</sup> The district court had dismissed the plaintiff's claim, holding that the fee at issue was analogous to an "overcharge," and concluding that because of the decision in *Kruse* the plaintiff's claim had to be dismissed.<sup>34</sup>

In *Cohen I* the Second Circuit rejected the defendant's contention that *Kruse* controlled the outcome of the case, stating instead that the question presented was:

whether RESPA § 8(b)'s reference to "any portion, split, or percentage of any charge" clearly and unambiguously indicates Congress's intent to prohibit unearned fees only when incorporated in charges divided among two or more persons, thereby precluding HUD's construction of the statute to prohibit "one service provider" from "charg[ing] the consumer a fee where no, nominal, or duplicative work is done."<sup>35</sup>

The *Cohen I* court definitively answered the above question in the negative, holding that Section 8(b) mandates that one culpable party is liable for a violation of RESPA when charging a settlement service fee for which no, nominal, or duplicative work is done.<sup>36</sup> Therefore, because the mortgage lender had charged the borrower a "post-closing fee" and the borrower had adequately alleged that no services could be linked to the fee, the lender could be liable under Section 8(b).

## **B. Interpreting *Cohen I*, What Exactly is Prohibited?**

In 2009, several courts followed the *Cohen I* line of reasoning and have found that undivided, unearned fees are actionable under Section 8(b).<sup>37</sup> However, the decision in *Cohen I* may have raised more questions than it answered. After all, if some unilateral fees are now actionable, what types of unilateral fees are actionable? How much and what type of service has to be performed? What if the fee charged is earned, but also duplicative of work that had already been performed? These are the questions that federal district courts have been struggling with over the last year.

---

<sup>29</sup> *Id.* at 58, 61.

<sup>30</sup> *Id.*

<sup>31</sup> *Id.*

<sup>32</sup> 498 F.3d 111 (2d Cir. 2007).

<sup>33</sup> *Id.* at 113.

<sup>34</sup> *Id.*

<sup>35</sup> *Id.* at 116 (citing 2001 SOP, *supra* note 11.)

<sup>36</sup> *Id.* at 126.

<sup>37</sup> See *Contos v. Wells Fargo Escrow Co., LLC (Contos I)*, No. C08-838Z, 2008 WL 4460300 (W.D. Wash. Oct. 1, 2008); see also *Busby v. JRHBW Realty, Inc.*, No. 2:04-CV-2799-VEH, 2009 WL 1181902 (N.D. Ala. Apr. 20, 2009); (*Cohen II*), 608 F. Supp. 2d 330 (E.D.N.Y. Jan 28, 2009); *Bushbeck v. Chicago Title Ins. Co.*, 632 F. Supp. 2d 1036 (W.D. Wash. 2008).

## 1. Several Federal Courts Have Followed *Cohen I*'s lead

The first federal district court to follow the reasoning of *Cohen I* did so quietly, without even mentioning that decision by the Second Circuit. In *Contos v. Wells Fargo Escrow Co., LLC (Contos I)*,<sup>38</sup> the U.S. District Court for the Western District of Washington was faced directly with the question of whether undivided, unearned fees are actionable.<sup>39</sup> At closing, the defendant Wells Fargo Escrow Company charged the plaintiffs two \$30.00 “wire transfer fees,” however, the fees were for deposits made on the plaintiffs’ behalf for which the defendant was charged no fee itself and, allegedly, for which the defendant did no work.<sup>40</sup> In determining whether these charges violated Section 8(b), the court analyzed the language of both Section 8(b) and the 2001 SOP.<sup>41</sup> Interestingly, after concluding that the language of Section 8(b) was ambiguous, the court noted that the Ninth Circuit United States Court of Appeals had never addressed the issue but,<sup>42</sup> without citing to *Cohen I*, “g[ave] deference to HUD’s interpretation that unearned fees do not need to be split with a third-party to violate [Section 8(b)].”<sup>43</sup>

Soon after the decision in *Contos I*, another federal district court from the Western District of Washington chimed in with its decision in *Bushbeck v. Chicago Title Ins. Co.*<sup>44</sup> In *Bushbeck*, the plaintiff alleged that the defendant Chicago Title had charged a reconveyance fee for which it had not actually performed a service.<sup>45</sup> After Chicago Title argued that Section 8(b) was inapplicable because the fee was not split with a third-party, the court looked to the decision in *Cohen I*,<sup>46</sup> holding that *Cohen I* was “persuasive,” that Section 8(b) was ambiguous, and that the 2001 SOP must be afforded *Chevron* deference.<sup>47</sup>

Finally, two subsequent decisions have demonstrated what life will be like for settlement service providers, post-*Cohen I*, as courts grapple with what types of unilateral fees are prohibited. The first court to make this determination was the U.S. District Court for the Eastern District of New York, in *Cohen* itself, on remand. In *Cohen v. J.P. Morgan Chase & Co.* (hereinafter “*Cohen II*”),<sup>48</sup> the court struggled to determine whether a “post-closing fee” that was charged at closing, but was allegedly for services performed after closing, would violate RESPA.<sup>49</sup> Similarly, in *Busby v. JRHBW Realty, Inc.*

---

<sup>38</sup> No. C08-838Z, 2008 WL 4460300 (W.D. Wash. Oct. 1, 2008).

<sup>39</sup> *Id.* at \*1.

<sup>40</sup> *Id.*

<sup>41</sup> *Id.* at \*3.

<sup>42</sup> It is worth noting that the court in *Contos I*, did cite to an opinion from another Ninth Circuit district court in *Morales v. Countrywide Home Loans, Inc.*, 531 F. Supp. 2d 1227, 1227 (C.D. Cal. 2008). In *Morales*, the court determined that the language “no person shall give and no person shall accept” was “clear and unambiguous and must be read in the conjunctive.” *Id.* at 1228. Therefore, the court ruled that undivided, unearned fees, as well as markups, were not prohibited by RESPA. *Id.* The decision in *Contos I* created an “intra-circuit split,” which may force the Ninth Circuit U.S. Court of Appeals to issue a decision that would create a true majority and minority among federal circuits that have addressed the fee split.

<sup>43</sup> *Id.*

<sup>44</sup> 632 F. Supp. 2d 1036 (W.D. Wash. Dec. 4, 2008).

<sup>45</sup> *Id.* at 1040.

<sup>46</sup> *Id.* at 1041.

<sup>47</sup> *Id.*

<sup>48</sup> 608 F. Supp. 2d 330 (E.D.N.Y. 2009).

<sup>49</sup> *Id.*

(“*Busby II*”),<sup>50</sup> the U.S. District Court for the Northern District of Alabama was faced with the question of whether an “administrative brokerage fee” (“ABC fee”) was actionable if proven that no services were performed.<sup>51</sup> The district court was required to interpret a mandate from the Eleventh Circuit United States Court of Appeals<sup>52</sup> in which the Eleventh Circuit had stated that all that was needed from the district court was a “*simple binary determination of ‘any services’ or ‘no service’*” in order to determine liability.<sup>53</sup>

## 2. The Characteristics of an “Unearned” Fee

In analyzing the types of fees that are prohibited by the Section 8(b), courts following the *Cohen I* reasoning will have already made the determination regarding whether the fee is “undivided.” However, what remains unclear is the definition of “unearned.” The courts in both *Cohen II* and *Busby II* devoted long portions of their opinions to this topic. It is this evaluation that perhaps intimidates settlement service providers, mortgage brokers, and lenders the most, as it will require an individualized analysis for each fee that is charged during the closing process.

### a. “Duplicative” Fees or Work

For plaintiffs seeking to bring an action under RESPA alleging that they were charged either a fee for duplicative work, or a duplicative fee, the future may be grim. The debate surrounding whether an unearned fee can also be a “duplicative” fee comes from Regulation X and the 2001 SOP. The language of both is presented below for a quick comparison.

<u>24 C.F.R. § 3500.14(c) (“Regulation X”)</u>	<u>2001 SOP</u>
“A charge by a person for which no or nominal services are performed or for which duplicative fees are charged is an unearned fee and violates this section.”	“It may violate Section 8(b) . . . (3) for one settlement service provider to charge the consumer a fee where no, nominal, or duplicative work is done . . . .”

At first glance the provisions appear similar, however, as was noticed by the *Cohen II* court, while the regulation speaks in terms of “duplicative fees,” the 2001 SOP speaks of “duplicative work.”<sup>54</sup> The court in *Cohen II* had little help analyzing the two provisions, as no court had previously examined whether HUD’s prohibition on charging a fee for duplicative work was due *Chevron* deference.<sup>55</sup>

Citing the Second Circuit’s decision in *Kruse*, the *Cohen II* court determined that duplicative fees, or those mentioned in Regulation X, must clearly be permitted as the duplicative fees could only be accurately described as an overcharge.<sup>56</sup> The reasoning of *Cohen II* certainly seems to be logical.

<sup>50</sup> No. 2:04-CV-2799-VEH, 2009 WL 1181902 (N.D. Ala. Apr. 20, 2009).

<sup>51</sup> *Id.*

<sup>52</sup> See *Busby v. JRHBW Realty, Inc.*, 513 F.3d 1314 (11th Cir. 2008) (*Busby II*). For a more detailed analysis of the Eleventh Circuit’s *Busby I* opinion, see Chiles & Miller, *supra* note 4, at 190-92.

<sup>53</sup> *Busby II*, 2009 WL 1181902, at \*8 (citing *Busby I*, 513 F.3d at 1324).

<sup>54</sup> *Cohen II*, 608 F. Supp. 2d at 341.

<sup>55</sup> *Id.*

<sup>56</sup> *Id.*

Numerous courts have expressed a reluctance to “split” fees into “earned” or “unearned” portions,<sup>57</sup> and two fees charged for the same service would seem to require such an effort. There is no logical difference between two \$25 fees for one wire transfer, or one \$50 fee for one wire transfer.<sup>58</sup>

More complex was the *Cohen II* court’s determination regarding whether a fee for duplicative work would be actionable under Section 8(b). The issue had been previously discussed by only one court, the U.S. District Court for the District of New Jersey in *Szczubelek v. Cendant Mortg. Corp.*<sup>59</sup> In *Szczubelek*, the plaintiff had alleged that the defendant lender and appraisal management service had unlawfully combined the actual cost of appraisal with administrative cost associated with the appraisal of the plaintiff’s home.<sup>60</sup> The court permitted the plaintiff to survive summary judgment, holding that if the two pieces of work performed by the defendants were duplicative, and the plaintiff was charged for the work of both, the plaintiff could bring a claim under Section 8(b).<sup>61</sup> *Cohen II* rejected the analysis of *Szczubelek*, holding that an analysis was necessary to determine whether the 2001 SOP was entitled to deference regarding its duplicative work language.<sup>62</sup>

Section 8(c) of RESPA provides that “[n]othing in this section shall be construed as prohibiting . . . payment for goods or facilities actually furnished or for services actually performed.”<sup>63</sup> This language cannot be considered ambiguous and, therefore, must prohibit an action being brought for “duplicative work” because the term in itself implies that some “work” was completed. This was the tack taken by *Cohen II*, in which the court determined that “[i]f settlement services are actually performed, then RESPA permits charging a fee, even if those services are performed twice and billed twice.”<sup>64</sup>

In an inexplicable departure from the *Cohen II* decision, the *Busby II* court indicated that duplicative fees are, in fact, unearned fees that are actionable under RESPA. The court failed to provide any analysis, list the support for this conclusion, or state any reason for its deviation from *Cohen II*. In attempting to explain what the ABC fee was for, the defendant in *Busby II* argued that it covered the help that the plaintiff received from its agent in locating and buying the house that she purchased. The court rejected this explanation for the fee, stating that it “struggl[ed] to see how charging [the plaintiff] for helping her to find a house would not be a duplication (and thus unearned) of those percentage commission charges already accounted for on the HUD-1.”<sup>65</sup> The court’s phrase “and thus unearned” was not from *Cohen II* or from any other case that has addressed Section 8(b). Instead, in one sentence, *Busby II* appeared to adopt the phrasing of the 2001 SOP and create new law, holding that duplicative fees violate the statute.

---

<sup>57</sup> See *infra* Part IV.B.; see also *Kruse v. Wells Fargo Home Mortg., Inc.*, 383 F.3d 49, 58, 61 (2d Cir. 2004); *Hazewood v. Foundation Fin. Group, LLC*, 551 F.3d 1223, 1226-27 (11th Cir. 2008) (Section 8(b) does not permit the courts to divide fees into earned and unearned components).

<sup>58</sup> See *Edwards v. Accredited Home Lenders, Inc.*, No. 07-0160-KD-C, 2008 WL 2952075, at \*10 (S.D. Ala. July 29, 2008) (“Therefore, even were the recording fee a duplicative fee, charging such a fee would not violate RESPA § 8(b) under Eleventh Circuit precedent because it would be an over-charge rather than a fee ‘other than for services actually performed.’”) (citing 12 U.S.C. § 2607(b)).

<sup>59</sup> 215 F.R.D. 107 (D.N.J. 2003).

<sup>60</sup> *Id.*

<sup>61</sup> *Id.* at 124.

<sup>62</sup> *Cohen II*, 608 F. Supp. 2d at 342.

<sup>63</sup> 12 U.S.C. § 2607(c).

<sup>64</sup> *Cohen II*, 608 F. Supp. 2d at 342.

<sup>65</sup> *Busby II*, 2009 WL 1181902, at \*14 (emphasis added).

Until addressed by a subsequent federal court, it will be difficult to understand whether this one sentence was merely an oversight by the *Busby II* court or was, in fact, a dramatic departure from current precedent.

## **b. Valid “Settlement Service”**

For a settlement service provider to escape a determination that it has charged an “unearned fee,” it must prove that the “settlement service” provided in exchange for the fee is actually a settlement service that would be acceptable under Section 8(b). This is because of the language of Section 8(b), which prohibits charging a settlement service fee “other than for services actually performed.”<sup>66</sup> In the only two federal decisions that have discussed this issue when considering the validity of an undivided fee, *Cohen II* and *Busby II*,<sup>67</sup> each court spent a considerable amount of time examining the fees that were charged and what made the charged fee an “earned settlement item.”<sup>68</sup> For settlement service providers contemplating compliance post *Cohen I*, it will be necessary that this determination be made for each settlement service that is performed, and ultimately, tied to a fee that is charged to the borrower.

### **i. Relationship Between the Fee and the Service Rendered**

What has been made clear by the decisions in *Cohen II* and *Busby II* is that a settlement service provider will not be able to explain away an amorphous fee by arguing that an “array of services” was provided in exchange for the charge.<sup>69</sup> Instead, the settlement service provider must be able to point to a clear connection between charging the fee and the service provided. The issue was squarely presented in *Busby*, where the defendant realty agency charged what was called an “administrative brokerage commission (“ABC”) fee that it described as a charge for numerous services.<sup>70</sup> Those services varied, but

---

<sup>66</sup> 12 U.S.C. § 2607(b).

<sup>67</sup> See *Busby II*, 2009 WL 1181902, at \*8.

<sup>68</sup> *Id.*; see *Cohen II*, 608 F. Supp. 2d at 342.

<sup>69</sup> It is worth noting that *Cohen II* and *Busby II* appear to be the only published decisions dealing with the validity of the “array of services” defense. As the court noted in *Busby II*, “the Eleventh Circuit has never directly spoken to the validity of this type of defense in response to a § 8(b) claim of no services provided in a published opinion; nor apparently has any other circuit.” *Id.* n. 11. The *Busby* court distinguished this defense from the “array of services” defense utilized by several mortgage brokers and lenders when attempting to validate charges of improper yield spread premiums. *Id.* (citing *Culpepper v. Irwin Mortg. Corp.* (Culpepper IV), 491 F.3d 1260, 1273 (11th Cir. 2007)) (“In undertaking this [*i.e.* array of services] analysis, we do not ask whether the services the broker performed were linked to the YSP in particular; rather, we look at all of the services performed and evaluate them in light of all the compensation (not just the YSP in isolation) the mortgage broker received from the source.”) (internal citations omitted).

<sup>70</sup> *Busby II*, 2009 WL 1181902, at \*8. The *Busby II* court analyzed the defendant’s explanation for the ABC fee as such:

One definition is that it is an amount charged to a borrower as an increase in the price for brokerage services generally (as opposed to a specific identifiable service or group of services). Another explanation is that it accounts for RealtySouth’s costs associated with regulatory compliance.

A third description is that it helps defray significant increases in overhead incurred by RealtySouth in the past and presently. A fourth is that it is one component of the collective costs a buyer (or seller) incurs to do business with RealtySouth (with the other piece being the percentage commission charge that is split with the real estate agent).

A fifth is that it relates to RealtySouth’s costs attributable to providing facilities, offices, equipment, a far more functional and enhanced web-site and other technological departments, greater availability of information along with a better ability to search for and access such information, and contracts and other business forms for its agents and customers. A sixth suggestion relating to [the plaintiff] specifically is that the ABC Fee (at least part of it) is connected to the time spent in locating and buying the house that Busby desired to purchase [sic].

included, *inter alia*, those that it contended directly benefited the borrower (for time spent locating the borrower's house) and those that did not (upgrades in the defendant's facilities and website).<sup>71</sup> The court concluded that an array of services defense, when considering the types of services allegedly provided by the defendant, was not a valid defense to defeat a Section 8(b) claim.<sup>72</sup> This is because, as is described in more detail below, the services provided must be "settlement-related" and provide some benefit to the borrower.<sup>73</sup>

The issue was also addressed in *Cohen II*, where the district court agreed with the plaintiff's analysis that there must be some sort of "nexus" between the fee and the settlement service.<sup>74</sup> The court found support for this proposition in *Cohen I*, in which the court stated that RESPA prohibited "one service provider from charging the customer a fee *for which no . . . work is done.*"<sup>75</sup> The court noted that any other interpretation would permit a lender or settlement service provider to "make an after-the-fact justification of the fee."<sup>76</sup> Instead, the message from *Cohen II* is clear, the relationship between the fee and the services must be "more than coincidental," the "fee must be for the services."<sup>77</sup>

Therefore, instead of providing a list of services that are only peripherally related to the fee charged, the settlement service provider must be able to point to a specific service that was provided for the fee.

## ii. Temporal Proximity

Of utmost importance when examining whether a settlement service is causally related to the fee charged is when the fee was charged in relation to when the service was performed. In determining whether a "settlement service" could be performed after closing, the *Cohen II* court placed heavy reliance on the definitions of the term. In Regulation X, HUD defines the term "settlement" as follows: "Settlement means the process of executing legally binding documents regarding a lien on property that is subject to a federally related mortgage loan. This process may also be called 'closing' or 'escrow' in different jurisdictions."<sup>78</sup> The definition provided by *Black's Law Dictionary* is not much different, and defines a "closing," also known as a "settlement" as "the final meeting between the parties to a transaction, at which the transaction is consummated; esp[ecially] in real estate, the final transaction between the buyer and seller, whereby the conveyancing documents are concluded and the money and property transferred."<sup>79</sup>

Using these definitions as a guide, both *Cohen II* and *Busby II* concluded that services performed post-closing could not properly be considered "settlement services" under Section 8(b). This was a novel step, as the temporal analysis had previously been used by federal courts only when analyzing whether a plaintiff could institute a RESPA action for services that were performed and fees that were charged

---

*Id.* at \*8-9.

<sup>71</sup> *Id.*

<sup>72</sup> *Id.*

<sup>73</sup> *Id.* at \*9.

<sup>74</sup> *Cohen II*, 608 F. Supp. 2d at 338.

<sup>75</sup> *Id.* (citing *Cohen I*, 498 F.3d at 126).

<sup>76</sup> *Id.*

<sup>77</sup> *Id.*

<sup>78</sup> 24 CFR § 3500.2.

<sup>79</sup> BLACK'S LAW DICTIONARY (8th ed. 2004).

after closing.<sup>80</sup> Of particular importance to the *Cohen II* court was the location of the fee disclosure on the HUD-1 form. The court noted that, because the defendant had charged its illegal “post-closing” fee in Section 800 of the HUD-1, it was disclosed as a “settlement cost” and for “Items Payable in Connection with Loan.”<sup>81</sup> The court implied that things might have been different had the defendant disclosed the fee in Section 900 of the HUD-1, which is specifically for “Items Required By Lender to be Paid in Advance” and normally includes insurance premiums and other items.<sup>82</sup>

Because neither the “post-closing fee” charged in *Cohen II* nor the ABC fee charged in *Busby II* compensated the settlement service provider for services provided prior to closing, both courts determined that the fees could not be “settlement fees.”<sup>83</sup> Therefore, a settlement service provider must ensure that the fees it charges at settlement are for services that are provided prior to settlement, or that fees charged for services performed after settlement have a direct benefit that inures to the borrower. Unless the service is performed prior to settlement courts adhering to the doctrine that undivided, unearned fees are actionable are likely to determine that these fees are not “settlement services” that could justify the imposition of an undivided fee charged at settlement.

### iii. Benefit to Plaintiff

For settlement service providers, perhaps the most disconcerting aspect of the *Cohen II* and *Busby II* decisions is the “benefit analysis” that was undertaken by each court.<sup>84</sup> The requirement imposed by these two courts, that the settlement services have some benefit that inures to the plaintiff, does not appear to be based in the statutory language of RESPA. Several commentators have expressed disbelief that such a requirement could be read into Section 8(b), with one noting when discussing the *Busby II* opinion that “[i]t was a strained and determined approach to find no services . . . . Where does this come from? It may come from *Cohen [II]*, but certainly not from RESPA.”<sup>85</sup>

Contrary to the assertions in *Cohen II* and *Busby II*, RESPA and Regulation X permit lenders to charge borrowers for title examination services and title insurance policies that protect a lender.<sup>86</sup> Moreover, as was pointed out by the defendants, HUD has refused, and even called it infeasible, to classify

---

<sup>80</sup> See *McAnaney v. Astoria Fin. Corp.*, 357 F. Supp. 2d 578, 589-90 (E.D.N.Y. Feb. 17, 2005) (holding that the plaintiff was not permitted to bring a RESPA claim based upon the levying of fees required at loan-payoff); see also *Bloom v. Martin*, 77 F.3d 318, 320 (9th Cir. 1996) (affirming dismissal of the plaintiff’s complaint that alleged a RESPA violation for fees that were assessed at the time repayment of the loan was complete); *Greenwald v. First Fed. Sav. & Loan Ass’n*, 446 F. Supp. 620, 625 (D. Mass. 1978), *aff’d*, 591 F.2d 417 (1st Cir. 1979) (holding that interest payments on escrow accounts are not a settlement practice under RESPA because they “can continue long after the closing of the mortgage transaction and which can continue to occur during the entire life of the mortgage); but see *Weizeorick v. ABN AMRO Mortg. Group, Inc.*, 337 F.3d 827 (7th Cir. 2003) (permitting plaintiff to survive dismissal on allegation that defendant illegally split \$10.00 to record the release of the plaintiff’s mortgage); *DeLeon v. Beneficial Const. Co.*, 55 F. Supp. 2d 819 (N.D. Ill. 1999) (failing to conduct a temporal analysis when it appeared settlement service and fee were charged after the closing).

<sup>81</sup> *Cohen II*, 608 F. Supp. 2d at 346-47.

<sup>82</sup> *Id.* at 346 (citing HUD, *Your Settlement Costs*, available at <http://www.hud.gov/offices/adm/hudclips/forms/files/1.pdf>.)

<sup>83</sup> See *Id.* at 346; see also *See Busby II*, 2009 WL 1181902, at \*14.

<sup>84</sup> See *Cohen II*, 608 F. Supp. 2d at 347-48.

<sup>85</sup> Sue Johnson, *Making Sense of Busby: Is Your Pricing RESPA Compliant?*, RESPRO Magazine 21 (Second Quarter 2009) (quoting Phillip L. Schulman, RESPRO Audio Seminar (May 20, 2009)).

<sup>86</sup> See 12 U.S.C. § 2602(3); 24 CFR § 3500.2(b).

settlement services as being “for the benefit of the borrower” or “for the benefit of the lender.”<sup>87</sup> Finally, the only case published before *Cohen II* and *Busby II* that appeared to address the question directly, a Fifth Circuit United States Court of Appeals decision in *Knighton v. Merscorp, Inc.*,<sup>88</sup> held that the text of Section 8(b) does not require that there be a benefit that inures to the borrower.<sup>89</sup>

However, the legislative history of RESPA, in which the Senate stated that in the case of unearned fees “the payment or thing of value furnished by the person to whom the settlement business is referred tends to increase the cost of settlement services *without providing any benefits* to the home buyer” is contrary to the language of HUD's 2001 SOP.<sup>90</sup> It is this language, and this language alone, that *Cohen II* used to support the holding that the borrower must benefit from the settlement service in order for it to be valid.<sup>91</sup> The court held that a “post-closing” fee charged for several services, including a “post-closing review,” did not benefit the borrower in the creation of her particular loan and, therefore, was not a settlement service.<sup>92</sup> Likewise, the *Busby II* court concluded that the ABC fee was an “amorphous . . . moving target” in which no specific benefit inured to the plaintiff.<sup>93</sup>

#### iv. Definition of a Settlement Service

Despite the lack of support for their conclusions, the *Cohen II* and *Busby II* courts have altered the RESPA landscape, forcing settlement service providers to specifically tie a tangible service to a fee and insure that the borrower receives some benefit from the service. Recognizing that it had changed the scope of Section 8(b), the *Cohen II* court offered what it termed a “working definition” of a “settlement service,” stating that it was “that which either directly benefits the consumer, or is performed at or before the closing.”<sup>94</sup> The court stated that this definition accounted for certain fees that were charged for actions taken by the lender before closing, such as “underwriting, credit reports, and appraisals,” for which

---

<sup>87</sup> The 1999 Statement of Policy (1999 SOP) seems to preclude the conclusion reached by the *Cohen II* and *Busby* courts, providing:

The Department recognizes that some of the goods or facilities actually furnished or services actually performed by the broker in originating a loan are “for” the lender and other goods or facilities actually furnished or services actually performed are “for” the borrower. HUD does not believe that it is necessary or even feasible to identify or allocate which facilities, goods or services are performed or provided for the lender, for the consumer, or as a function of State or Federal law. All services, goods and facilities inure to the benefit of both the borrower and the lender in the sense that they make the loan transaction possible (e.g., an appraisal is necessary to assure that the lender has adequate security, as well as to advise the borrower of the value of the property and to complete the borrower’s loan).

The consumer is ultimately purchasing the total loan and is ultimately paying for all the services needed to create the loan.

Real Estate Settlement Procedures Act Statement of Policy 1999-1: Regarding Lender Payments to Mortgage Brokers, 64 Fed. Reg. 10080-01 (Mar. 1, 1999) (codified at 24 CFR pt. 3500) (hereinafter 1999 SOP).

<sup>88</sup> 34 Fed. Appx. 285 (5th Cir. 2008).

<sup>89</sup> *Id.* at 288 (“As we understand [the plaintiff’s] argument, Section 2607(b) allegedly prohibits charging fees that are not for settlement services even when those services are actually performed. The more straightforward reading of the statute, and the one we adopt, is that what it prohibits is charging a fee for a settlement service that is not performed.”).

<sup>90</sup> Senate Report No. 39-866 (1974), *as reprinted in* 1974 U.S.C.A.N. 6546, 6551.

<sup>91</sup> *Cohen II*, 608 F. Supp. 2d at 348.

<sup>92</sup> *Id.*

<sup>93</sup> *Busby II*, 2009 WL 1181902, at \*15.

<sup>94</sup> *Cohen II*, 608 F. Supp. at 348.

RESPA clearly permits fees to be charged, but do not have a benefit to the borrower.<sup>95</sup> Likewise, it also accounts for actions performed after closing, but for which the borrower benefits, including prepaid insurance premiums.<sup>96</sup>

**c. Does *Cohen II*'s Analysis Work for *Busby II*?**

While there is no doubt that both *Cohen II* and *Busby II* drastically expanded Section 8(b)'s scope, *Busby II* has been justifiably criticized for borrowing analytical elements from *Cohen II* that are not applicable to the factual scenario presented in *Busby II*. Several glaring examples highlight *Busby II*'s disjointed analysis.

First, *Busby II* provides that the ABC fee is for real estate services that are duplicative of those for which the real estate commission is charged. The *Busby II* court stated that, because the fee is duplicative, it is therefore unearned and not a valid explanation for the charged fee. This analysis strays from the *Cohen II* opinion, which found that a duplicative fee was nothing more than a mere overcharge.

Second, the court in *Cohen II* specifically refused to apply the "benefit" analysis to services rendered prior to, or at, closing. This was evidenced by *Cohen II*'s definition of a settlement service, which stated that a settlement service was one that "either directly benefits the consumer, or is performed at or before the closing."<sup>97</sup> *Busby II* essentially deleted the "or" from *Cohen II*'s definition and substituted "and." For example, the *Busby II* court provides that "to the extent that the ABC Fee goes to pay for [the defendant's] past and future increases in overhead . . . such variables fall outside the parameters of a loan settlement and, substantively, the borrower receives no benefit."<sup>98</sup> However, were the *Busby II* court strictly following the *Cohen II* decision, a fee covering "past" expenses would fall within the definition of "settlement service" even if there was no benefit that directly inured to the borrower. *Busby II* ignored this integral part of *Cohen II*'s reasoning, implying that every settlement fee must benefit the plaintiff.

Third, *Busby II* fails to account for the fact that, unlike *Cohen II*, it made its determination regarding the ABC fee at summary judgment in favor of the plaintiff.<sup>99</sup> Such was not the case in *Cohen II*, where the court merely denied a summary judgment motion submitted by the defendant.<sup>100</sup> The *Busby II* court's willingness to determine a factual issue on a motion for summary judgment is disconcerting. With a quick class certification process and summary judgment possible for the plaintiff, *Busby II* may go farther in expanding the scope of Section 8(b) than the *Cohen II* court ever could have imagined.

The bottom line is that *Busby II* appears to use *Cohen II*'s analysis inappropriately, and in an inapplicable situation. While *Cohen II* was the only case issued prior to *Busby II* dealing with the validity of a settlement fee charged as an undivided, unearned fee, the actual "post-closing fee" in *Cohen II* hardly resembles the ABC fee charged in *Busby II*. Instead, the use of the *Cohen II* analysis in *Busby II* is awkward at best and does not fit the facts at issue; indeed, *Busby II*'s use of *Cohen II*'s analysis may be a simple case of trying to fit a round peg into a square hole.

---

<sup>95</sup> *Id.*

<sup>96</sup> *Id.*

<sup>97</sup> *Cohen II*, 608 F. Supp. 2d at 348 (emphasis added).

<sup>98</sup> *Busby*, 2009 WL 1181902, at 14 (emphasis added).

<sup>99</sup> *Id.*

<sup>100</sup> *Cohen II*, 608 F. Supp. 2d at 350.

#### D. Taking Sides: The Fifth Circuit Dilemma

While the cases noted above in Part III.C. dealt with life after *Cohen I* in a circuit where undivided, unearned fees are actionable, other federal courts have continued to struggle with whether undivided fees are actionable, and it appears the Fifth Circuit may soon have to make a decision.

In *Knighton v. Merscorp, Inc.*,<sup>101</sup> the Fifth Circuit United States Court of Appeals was presented with the opportunity to decide whether a claim under Section 8(b) could be brought when only one culpable party received an unearned fee. However, the court sidestepped the issue. The case was brought before the court on an appeal from the district court's dismissal of a multi-district litigation case for failing to state a claim on which relief could be granted.<sup>102</sup> The plaintiffs brought claims against Merscorp, Inc. and Mortgage Electronic Registrations Systems, Inc. (collectively, MERS), entities that served as the mortgagee of record in the public land records and had charged a one-time and nominal fee for each registered mortgage.<sup>103</sup> The bulk of the plaintiffs' Section 8(b) claim was that MERS violated RESPA because the services performed by MERS did not benefit the borrower.<sup>104</sup>

MERS advanced several arguments in favor of dismissal, one being that for an actionable claim under Section 8(b), a plaintiff must allege that an unearned fee be split between two parties.<sup>105</sup> While acknowledging the decision by the Second Circuit in *Cohen I*, the *Knighton* court refused to decide whether a split in the fee is required, instead holding that there was no allegation that the fee was *unearned*.<sup>106</sup> The court found that there was no requirement that the service performed have a benefit that inured to the borrower, and that in exchange for the fee, "MERS performed the service of being the permanent record mortgagee in the public land records, regardless of how many times the beneficial and servicing rights to the mortgage loans were bought and sold."<sup>107</sup> Therefore, the court affirmed the dismissal because there was no allegation of an unearned fee.

However, the Fifth Circuit may not be able to escape taking a position on whether a split fee is required for much longer, as a recent decision in the Eastern District of Louisiana may force the court's hand. In *Freeman v. Quicken Loans, Inc.*,<sup>108</sup> the plaintiffs filed suit against both Quicken Loans and Title Source, alleging that Quicken Loans charged a loan discount fee with no concomitant interest rate reduction and that Title Source charged an appraisal fee that was either split with Quicken, unearned and/or duplicative, and/or was excessive in relation to the services rendered.<sup>109</sup> After a lengthy and thorough discussion regarding the current circuit split and the Second Circuit's decision in *Cohen*, the *Freeman* court divided the plaintiffs' allegations in three categories, namely that there were: (1) undivided, unearned loan discount fees for which the plaintiffs received no interest rate discount; (2) split appraisal fees which the plaintiffs alleged were improperly charged and split between the two defendants; and (3)

---

<sup>101</sup> 304 Fed. Appx. 285 (5th Cir. 2008).

<sup>102</sup> *Id.* at 286.

<sup>103</sup> *Id.*

<sup>104</sup> *Id.* at 287-88.

<sup>105</sup> *Id.* at 288.

<sup>106</sup> *Id.*

<sup>107</sup> *Id.*

<sup>108</sup> Nos. 08-1626, 08-1627, 08-4744, 2009 WL 2448033 (E.D. La. Aug. 10, 2009).

<sup>109</sup> *Id.* at \*1.

undivided, unearned loan origination and loan processing fees which were charged by Quicken for no, nominal, or duplicative work.<sup>110</sup>

With regard to the first and third allegation,<sup>111</sup> the court dismissed the plaintiffs' claims, "find[ing] the reasoning of the circuit decisions that have *rejected* claims for unearned and/or undivided fees - *Boulware*, *Echevarria*, *Krzalic*, and *Haug* - to be the more well-reasoned decisions on the issue . . . ."<sup>112</sup> Additionally, the placed great emphasis into dicta that was contained within the *Knighton* decision, which stated that "the statutory language [of Section 8(b)] refers to a split fee or the payment of a percentage of the fee [but] does not mention undivided fees."<sup>113</sup> As a result, the court refused to give deference to the 2001 SOP and concluded that only split fees are actionable under Section 8(b).

On September 10, 2009, a notice of appeal was filed by the plaintiffs.<sup>114</sup> Barring a procedural hiccup, it would appear that in order to resolve the question of whether the loan discount fee and the origination/processing fees charged by the defendants are prohibited by Section 8(b), the Fifth Circuit will be forced to make a decision on the issue of split fees. With the Eleventh Circuit still considering the appeal in *Wooten v. Quicken Loans*,<sup>115</sup> the *Freeman* decision could have the effect of creating a majority in the "one culpable party versus two culpable parties" split. Considering the dicta from *Knighton*, it would appear that the Fifth Circuit would likely issue the first federal circuit court opinion since *Haug* refusing to give deference to the 2001 SOP on the split fee issue. Settlement service providers, mortgage brokers, and lenders should follow this case closely, even after a decision is reached by the Fifth Circuit, as it also would present the issue squarely for a decision by the United States Supreme Court.

#### **IV. Recent RESPA Developments in Section 8(b)**

While recent developments regarding undivided, unearned fee cases have dominated the Section 8(b) headlines, several other decisions have been issued in the past year which will have an effect on how these cases are litigated. We would be remiss for not mentioning them, as these cases directly influence how settlement service providers do business.

##### **A. Standing: The Third and Sixth Circuits' Rejection of the Overcharge Necessity**

In recent years, a question has lingered amongst consumer finance litigators as to whether Section 8(b) requires some sort of actual damage, or overcharge, in order for a plaintiff to have standing to assert a violation. Settlement service providers have long contended that without an actual overcharge being

---

<sup>110</sup> *Id.* at \*21.

<sup>111</sup> The court also rejected the plaintiffs' claim in regard to the second type of violation that was alleged, noting that both of the defendants had presented affidavits in support of their motion for summary judgment that demonstrated that the appraisal fees were not split between the parties. *Id.* at \*22. The court rejected the plaintiff's argument that the relationship between the two defendants suggested that the appraisal fees were split and stated that the "merely oblique suggestion of a possible business relationship between Quicken and Title Source does not refute the direct summary judgment evidence that indicates the appraisal fees were not shared between Quicken and Title Source." *Id.*

<sup>112</sup> *Id.* (emphasis in original).

<sup>113</sup> *Id.* (emphasis in original).

<sup>114</sup> See *Freeman et al v. Quicken Loans, Inc. et al*, No. 2:08-cv-01626-CJB-ALC, Doc. 49 (Notice of Appeal) (E.D. La. Sept. 10, 2009).

<sup>115</sup> No. 1:07-cv-00478-CG-C, Doc. 43 (Notice of Appeal) (S.D. Ala. Mar. 18, 2008).

alleged, a plaintiff has not suffered an injury which could give a plaintiff standing to sue. The Third and Sixth Circuit United States Courts of Appeal have now rejected that line of reasoning.

In *Carter v. Welles-Bowen Realty, Inc.*,<sup>116</sup> the plaintiffs alleged that the defendant WB Realty and Title had violated RESPA Section 8(b) by operating a sham title company that did not perform any real estate settlement services, but rather charged a fee for services that were actually performed by Chicago Title.<sup>117</sup> The allegation was that Chicago Title performed the settlement work and that WB Title received illegal kickbacks in exchange for referring the settlement work.<sup>118</sup> However, at the heart of the Sixth Circuit's decision was something absent from the plaintiffs' complaint: any allegation that the plaintiffs were actually overcharged for settlement services.<sup>119</sup>

The court noted that while several district courts had addressed the issue — with some concluding that a plaintiff needs to allege an overcharge<sup>120</sup> and some concluding that a plaintiff need not<sup>121</sup> — no federal circuit court had squarely confronted the standing question.<sup>122</sup> The court first analyzed the plain language of Section 8(b), noting that the language of the statute forbids that a “portion, split, or percentage of any charge made or received for the rendering of real estate settlement” be paid for services that are not actually rendered to the customer.<sup>123</sup> Citing *Webster's Dictionary*, which defines “any” to mean “one or some indiscriminately of whatever kind” and “all — used to indicate a maximum or whole,” coupled with the conspicuous absence of the word “overcharge,” the court concluded that the statute unambiguously provides that a defendant is liable for charges assessed the home buyer “as a whole, and not just for overcharges.”<sup>124</sup>

In addition to the plain language of the statute, the court noted that legislative history,<sup>125</sup> agency interpretation,<sup>126</sup> and the statutory purpose<sup>127</sup> of RESPA all favored a broad reading of the statute that

---

<sup>116</sup> 553 F.3d 979 (6th Cir. 2009); see Robert Volk, *Plaintiffs Need Not Allege Overcharge To Bring RESPA Claim*, Bankers Letter of the Law 03-09 (2009).

<sup>117</sup> *Id.* at 982.

<sup>118</sup> *Id.*

<sup>119</sup> *Id.*

<sup>120</sup> See *Carter v. Welles-Bowen Realty, Inc.*, 493 F. Supp. 2d 921, 927 (N.D. Ohio 2007) (*Carter I*); *Contawe v. Crescent Heights of America, Inc.*, No. Civ.A. 04-2304, 2004 WL 2244538, at \*3-4 (E.D. Pa. Oct. 1, 2004); *Mullinax v. Radian Guaranty, Inc.*, 311 F. Supp. 2d 474, 486 (M.D.N.C. 2004); *Moore v. Radian Group, Inc.*, 233 F. Supp. 2d 819, 825-26 (E.D. Tex. 2002); *Morales v. Attorneys' Title Ins. Fund*, 983 F. Supp. 1418, 1427 (S.D. Fla. 1997); *Durr v. Intercounty Title Co. of Ill.*, 826 F. Supp. 259, 260-62 (N.D. Ill. 1993).

<sup>121</sup> See *Alexander v. Washington Mut., Inc.*, No. 07-4426, 2008 WL 2600323, at \*6 (E.D. Pa. June 30, 2008); *Capell v. Pulte Mortg. LLC*, No. 07-1901, 2007 WL 3342389, at \*4-5 (E.D. Pa. Nov. 7, 2007); *Edwards v. First Am. Corp.*, 517 F. Supp. 2d 1199, 1204 (C.D. Cal. 2007); *Yates v. All American Abstract Co.*, 487 F. Supp. 2d 579, 582 (E.D. Pa. 2007); *Robinson v. Fountainhead Title Group Corp.*, 447 F. Supp. 2d 478, 488-89 (D. Md. 2006); *Patton v. Triad Guar. Ins. Corp.*, No. CV100-132, at \*5-6, 12 (S.D. Ga. Oct. 10, 2002); *Pedraza v. United Guar. Corp.*, 114 F. Supp. 2d 1347 (S.D. Ga. 2000).

<sup>122</sup> *Carter*, 553 F.3d at 983.

<sup>123</sup> 12 U.S.C. § 2607(b) (emphasis added); see *Carter*, 553 F.3d at 986.

<sup>124</sup> *Carter*, 553 F.3d at 986 (emphasis added) (citing WEBSTER'S NINTH NEW COLLEGIATE DICTIONARY, 93 (9th ed. 1988)).

<sup>125</sup> The court noted that RESPA's damages provision initially stated that a person who violated § 2607 was liable for “three times the amount of the *proscribed payment*, kickback or referral fee.” *Id.* at 987 (citing S. Rep. No. 93-866, at 16 (1974), as reprinted in 1947 U.S.C.C.A.N. 6546, 6552). Specifically, the court stated that the 1974 language provided that the person was liable for three times “the value or amount of the fee or *thing of value* . . . .” However, the *Carter* court noted that the Senate changed the language due to concerns regarding harms that could result to the consumer outside of the fees charged

would result in plaintiff's having standing to sue under Section 8(b) without alleging an overcharge.<sup>128</sup> Therefore, because "injuries need not be financial in nature to be concrete and individualized," the court concluded that the plaintiffs had standing to bring suit under RESPA because they were "sullied by kickbacks in violation of [the statute.]"<sup>129</sup>

Until the decision by the Third Circuit United States Court of Appeals in *Alston v. Countrywide Financial Corp.*,<sup>130</sup> few district courts had occasion to address the analysis of the Sixth Circuit in *Carter*.<sup>131</sup> In *Alston*, the Third Circuit agreed with *Carter*, holding that "it is clear to us that the plain, unambiguous language of section 8(d)(2) indicates that damages are based on the settlement service amount with no requirement that there has been an overcharge."<sup>132</sup> In reaching this conclusion, *Alston* was certainly referring to the "any charge paid" language contained within Section 8(d)(2) that was referred to in *Carter*. Summing up its opinion, the *Alston* court concluded that, regardless of whether there was an overcharge, a consumer is entitled to damages for a violation of Section 8 for the individual settlement service that was involved in the violation. In other words, the court stated:

[A] single real estate closing may involve several different services, but the charge for each distinct service will not necessarily violate section 8 . . . . [A] homebuyer is entitled to three times any charge paid, but only for the service connected to the kickback or fee-split.<sup>133</sup>

It appears that until another circuit court addresses the issue, the decisions in *Carter* and *Alston* will indicate another step by the courts to broaden the scope of Section 8. Holding that a plaintiff does not have to have a cognizable economic injury in order to bring suit, the decisions in *Carter* and *Alston* drastically increase the number of potential plaintiffs with Section 8 lawsuits and will surely increase the litigation over settlement service fees.

---

for settlement services. *Id.* Congress therefore amended RESPA to replace the "thing of value" language with the phrase "any charge paid for such settlement services." *Id.*

<sup>126</sup> The court noted that while HUD had not issued any regulation on the specific topic, that it has "announced its opinion that whether an overcharge occurs 'is irrelevant in determining whether the act is prohibited' by RESPA." *Id.* (citing 24 CFR § 3500.14(g)(2)). Additionally, HUD also appeared as *amicus curiae* in the case and argued that the "language of section 8(d)(2) . . . [indicates that] a person who violates section 8 is liable . . . , regardless of whether the consumer alleges that he was charged too much for the service." *Id.*

<sup>127</sup> Because the purpose of RESPA is "ultimately, . . . to prevent certain practices that are harmful to all consumers by establishing that consumer have a right *not to be subject to those practices and providing both public and private remedies of that right*," the court determined that the statutory purpose of RESPA supports a broad reading permitting plaintiffs to sue without alleging an overcharge. *Id.* at 988 (citing *Kahrer v. Ameriquest Mortg. Co.*, 418 F. Supp. 2d 748, 756 (W.D. Pa. 2006)).

<sup>128</sup> *Id.* at 987-89.

<sup>129</sup> *Id.* at 989 (citing *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 562-63 (1992)).

<sup>130</sup> --- F.3d ----, 2009 WL 3448264 (3d Cir. Oct. 28, 2009).

<sup>131</sup> The issue had been addressed by the Northern District of California. In *Spears v. Washington Mutual, Inc.*, No. C-08-00868-RMW, 2009 WL 2761331 (N.D. Cal. Aug. 30, 2009), the defendant argued that the plaintiff's RESPA claim was ripe for dismissal because they failed to allege that they were charged an above-market rate for appraisals. The court analyzed the *Carter* opinion, stating that it was the "only court of appeals decision to consider the question," and determined that *Carter's* analysis was sound. *Id.*

<sup>132</sup> *Alston*, 2009 WL 2761331, at \*5.

<sup>133</sup> *Id.*

## B. Title Charges: The Intricacies of Stating a Claim

A particularly prevalent, but relatively unsuccessful, theory being alleged in some RESPA litigation involves settlement service providers charging excessive rates for title insurance. These cases all have essentially identical allegations. First, the plaintiffs decide to refinance their mortgage loan, and, in the process of refinancing, they are charged a rate for title insurance. Second, the state in which they are refinancing has certain guidelines regarding rates for title insurance policies, granting a mandatory discount to borrowers who are refinancing their home, typically called a “reissue rate.” Third, when the settlement service provider charges the plaintiffs for the title insurance, it charges at the original issue rate, instead of the reissue rate, therefore overcharging the plaintiffs for title insurance. The plaintiffs then bring suit under RESPA Section 8(b), alleging that the overcharge violates the statute.

The vast majority of cases that have discussed this theory have concluded that these claims are not actionable.<sup>134</sup> This is because the plaintiffs’ theory of liability rests on dividing the rate for title insurance into two distinct parts: “the portion of the charge that plaintiffs say was valid under the [state] Insurance Code, and the portion of the charge that plaintiffs say was invalid.”<sup>135</sup> This argument has been found unpersuasive because of the plain language of Sections 8(b) and (c), which prohibits giving and accepting a fee where the fee is not “for” services performed,<sup>136</sup> and provides that there is no liability when a title insurance company pays its agent “for” services performed,<sup>137</sup> respectively. These courts have all concluded that the statutory language “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.”<sup>138</sup> This is because of the well accepted reasoning that this theory “would effectively turn [section] 8(b) into a price-control provision.”<sup>139</sup>

While several courts have permitted plaintiffs to escape dismissal on this theory by slightly amending the allegations contained within their complaints,<sup>140</sup> recent cases, even in the same district, have downplayed the significance of these decisions. In *Hamilton v. First American Title Company*,<sup>141</sup> however, the court held that a borrower stated a claim under RESPA when she alleged that the title insurer charged a fee for real estate settlement services above the filed rate, and then split that “unearned” portion of the fee with their title agents.<sup>142</sup> Importantly, the defendant attacked the plaintiff’s theory on grounds of Rule 12(b)(6), arguing that the complaint failed to state a viable claim.<sup>143</sup> However, distinguishing previous cases holding that such overcharges were not actionable, the court denied the defendant’s motion to dismiss, arguing that the plaintiff could survive dismissal by arguing

---

<sup>134</sup> See *Hazewood v. Found. Fin. Group, LLC*, 551 F.3d 1223, 1226 (11th Cir. 2008); see also *Arthur v. Ticor Title Ins. Co of Fla.*, 569 F.3d 154 (4th Cir. 2009); *Morrisette v. NovaStar Home Mortg., Inc.*, 484 F. Supp. 2d 1227, 1229-30 (S.D. Ala. 2007).

<sup>135</sup> *Arthur*, 569 F.3d at 159.

<sup>136</sup> *Id.* (citing 12 U.S.C. § 2607(b)).

<sup>137</sup> *Id.* (citing 12 U.S.C. § 2607(c)).

<sup>138</sup> *Id.*; see also *Hazewood*, 551 F.3d at 1226.

<sup>139</sup> *Hancock v. Chicago Title Ins. Co.*, No. 3:07-CV-1441-D, 2009 WL 2002919, at \*5 (N.D. Tex. July 9, 2009).

<sup>140</sup> See *Hamilton v. First Am. Title Co.*, 612 F. Supp. 2d 743, 746 (N.D. Tex. 2009); *Villafranca v. Ticor Title Ins. Co.*, No. 3:08-CV-0118-K (N.D. Tex. July 22, 2008); *Mims v. Stewart Title Guar. Co.*, 521 F. Supp. 2d 568 (N.D. Tex. 2007).

<sup>141</sup> 612 F. Supp. 2d 743 (N.D. Tex. 2009).

<sup>142</sup> *Id.* at 745.

<sup>143</sup> *Id.* (citing Fed. R. Civ. P. 12(b)(6)).

that the defendant “charged a fee it did not earn, and then split that fee with the title agent, who had performed no services in connection with that fee.”<sup>144</sup> This was similar to the holding in *Mims v. Stewart Title Guar. Co.*,<sup>145</sup> where the court stated that “excessive premiums, standing alone, do not violate section 8(b),” however, if the portion accepted by the title agent was “other than ‘for services actually performed,’ such that the portion would be in the nature of a kickback or referral fee,” then Section 8(b) does provide relief.<sup>146</sup>

These holdings were significantly downplayed by the decision in *Hancock v. Chicago Title Insurance Co.*,<sup>147</sup> where the court rejected this theory when considering a Rule 56 motion. The court noted that these theories can survive on a Rule 12(b)(6) challenge when plaintiff artfully alleges that the title agent did not perform services in exchange for the fee it received.<sup>148</sup> However, proving such an allegation is a different matter. The court noted that in its case, the factual record was developed and it was undisputed that “both Chicago Title and its title agents performed actual services in exchange for the fees they received.”<sup>149</sup>

Therefore, while the decisions in *Hamilton* and *Mims* appear to give plaintiffs hope that they may succeed on filed rate allegations, the realities of litigation demonstrate that proving that a title agent did not perform a service in exchange for its charged fee is nearly impossible. Therefore, more reasoned decisions, like those in *Hancock*, *Hazewood* and *Arthur* are more likely to prevail, and it does not seem likely that a plaintiff will succeed on a Section 8(b) claim alleging that the settlement service provider charged more for title insurance than is permissible under the state’s filed rate.

## V. Conclusion

While the current RESPA Section 8(b) litigation continues to be in a state of flux, there is no doubt that in some ways the landscape is clearer than in years past. However, the courts in *Cohen II* and *Busby II* have thrown down a gauntlet, making RESPA compliance that much more difficult. The courts have also sent a message to settlement service providers that the scope of RESPA may be much broader than once was thought. With undivided, unearned fees being found actionable in many jurisdictions, settlement service providers will need to examine their fees and charges to ensure RESPA compliance.

What is also apparent is that the RESPA landscape is far from being solidified. With important decisions still pending, *e.g.*, by the Eleventh Circuit United States Court of Appeals in *Wooten v. Quicken Loans* and from the Fifth Circuit United States Court of Appeals in *Friedman v. Quicken Loans*, the next year could see even more change. If the Eleventh Circuit finds that only one culpable party is necessary to violate Section 8(b) and the Fifth Circuit sides with the trio of *Haug*, *Krzalic* and *Boulware*, the circuit split will have a “minority” and “majority” camp, giving more credence to the view that a fee “split” is required.

However, should both the Eleventh and Fifth Circuits determine that a party may violate the statute without splitting an unearned fee, the trend of RESPA expansion would continue. This, coupled with the recent Sixth and Third Circuit decisions easing RESPA’s standing requirements, could serve to open up

---

<sup>144</sup> *Id.* at 746-47.

<sup>145</sup> 521 F. Supp. 2d 568, 572 (N.D. Tex. 2007).

<sup>146</sup> *Id.* (citing 12 U.S.C. § 2607(b)).

<sup>147</sup> No. 3:07-CV-1441-D, 2009 WL 2002919 (N.D. Tex. July 9, 2009).

<sup>148</sup> *Id.* at \*8.

<sup>149</sup> *Id.*

numerous settlement service providers to RESPA claims where they once appeared excluded from that law.

Of course, hanging over the head of any RESPA observer is the possibility of a United States Supreme Court decision settling the current circuit split. However, until such a decision is rendered, settlement service providers must continue upon the same arduous path, closely watching Section 8(b) decisions from federal courts and attempting to harmonize their RESPA policies mid-stream. This type of compliance is expensive, inefficient and certainly cannot be what Congress had in mind when passing RESPA. These are problems that the housing and credit markets can ill afford; one can only wish that legislators and regulators could heed the physicians' maxim to "first, do no harm."

**For more information, contact:**

**John R. Chiles** | Partner | Birmingham | Burr & Forman LLP

Phone (205) 458-5464 | Fax (205) 244-5619 | E-Mail [jchiles@burr.com](mailto:jchiles@burr.com)

**Zachary D. Miller** | Associate | Birmingham | Burr & Forman LLP

Phone (205) 458-5250 | Fax (205) 244-5615 | E-Mail [zachary.miller@burr.com](mailto:zachary.miller@burr.com)

No representation is made that the quality of services to be performed is greater than the quality of legal services performed by other lawyers.