

## Advisory Bulletin

### RESPA Section 8 & Affiliated Business Arrangements

#### Private Right of Action without Concrete Injury

A Federal Appeals Court has ruled that a plaintiff has standing to bring a RESPA claim, even if there is no concrete injury. On January 23, 2009, the Sixth Circuit ruled that a plaintiff has a statutorily-authorized private right of action under the Real Estate Settlement Procedures Act (RESPA) and constitutional standing to sue, despite failing to allege that there was an overcharge for any settlement service.\*

The heart of the case pertains to this issue: whether a plaintiff must allege a concrete injury, such as an overcharge, in order to have standing for a RESPA violation.

The Plaintiffs-Appellants, Edward and Whitney Carter (Carter), brought a RESPA claim alleging that a title company, Chicago Title Insurance Company (Chicago Title) was improperly splitting fees with other service providers in exchange for referrals. Settlement service provider Welles-Bowen Realty (WB Realty), a realty agent, was owned by Chicago Title and Welles-Bowen Investors, LLC (WB Investors). And, Chicago Title owned 51.1% and WB Realty owned 49.9% of Welles-Bowen Title Agency, LLC (WB Title).

Based on WB Realty's referral, the Carters used WB Title for title insurance. The various charges associated with the title insurance were detailed in an Affiliated Business Arrangement Disclosure Statement, signed by the Carters prior to closing. The Carters never alleged that they were overcharged for the services at issue. Instead, they claimed that they were harmed by the lack of impartiality of the settlement service referral, given the relationship between WB Realty and Chicago Title.

Carter's complaint, filed on November 9, 2005, alleged that Chicago Title and WB Realty violated sections 8 (a) and 8 (b) of RESPA [12 USC §2607 (a)-(b)] by violating the anti-kickback and anti-fee-splitting provisions, because WB Title did not actually provide settlement services; that is, WB Title was alleged to be a sham title company that did not perform any settlement work, but received unearned revenues, while the real settlement work was done by Chicago Title. The illegal kickbacks or splits allegedly occurred when WB Realty was compensated for the referral out of its share of WB Title's profits, and Chicago Title would be compensated out of its ownership share of WB Title.

The Defendants-Appellees, WB Realty, et al., responded in December 2005 by asserting that WB Title is permissible as an "affiliated business arrangement" [12 USC § 2602 (7)]; and, further, that WB Title does not violate sections 8 (a) and (b) of RESPA because it satisfies the "safe-harbor" provision laid out in § 2607 (c) (4).

Subsequently, the Carters filed a Motion for Class Certification to certify a class of any individuals who paid WB Title for settlement services referred by WB Realty. The Appellees filed a Motion to Dismiss, alleging that the court lacked subject matter jurisdiction because the Carters had not actually suffered an injury-in-fact and, therefore, had no standing to bring a claim under § 2607 (a) or (b). The District Court granted the Motion to Dismiss on the lack of standing defense, based on the allegation that no "concrete, particularized injury" was sustained by the Carters. The ruling made moot the Carter's Motion for Class Certification.

Since the issue of standing in the absence of monetary injury has been addressed by several U S district courts, yet reached differing conclusions, the court notified HUD and the Attorney General that this case involved an "as-applied" constitutional challenge. [28 USC § 2403 (2); Fed.R.App.P.44(a)] It also solicited their view on whether a § 2607 (a)-(b) violation, absent an overcharge, can have standing and whether RESPA, as applied in this case, violates Article III. The government intervened, *amicus curiae*, with a brief in support of the Carter's interpretation of the Statute.

HUD's announced opinion has been that whether an overcharge occurs "is irrelevant in determining whether the act is prohibited" by RESPA. [24 CFR § 3500.14(g)(2)] Section 8 (a)-(b) of RESPA prohibits, in no uncertain terms, the payment of "any fee, kickback, or thing of value" from business referrals and also 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. The Court's statutory interpretation determined that the "ordinary definition of 'any' indicates that charges are neither restricted to a particular **type** of charge (such as an overcharge) nor limited to a specific part." The Court also noted not only the conspicuous absence of the term "overcharge" within the text of the statute, but also that the phrase "such settlement services" in the statute refers to the preceding phrase "settlement services involved in the violation." [§ 2607 (d)(s)] The Court determined, having taken these factors into consideration, that the defendants were liable for charges for "settlement services **as a whole**, and not just for overcharges." [All above emphases are in the appellate ruling.]

The Federal Appeals Court concluded that Carter's allegation that the Appellees violated section 8 as an injury-in-fact met the requirements of Article III and was sufficient to survive the Motion to Dismiss. The Court held that Congress created a private right of action to impose damages where kickbacks and unearned fees have occurred – even where there is no overcharge. Consequently, the Court reversed the District Court's ruling and remanded it for action consistent with its conclusions.

The Carter's allegation that they were injured by the deprivation of a right conferred by RESPA was upheld, because the Court determined that the statute creates an individual right to receive referral services untainted by kickbacks or fee-splitting. By alleging that the sole purpose for the creation of WB Title was to enable Chicago Title to provide kickbacks to WB Realty in exchange for referrals – and that the Carters themselves received a referral from WB Realty – the Court ruled that the Carters had adequately alleged that their own RESPA rights were violated.

The Court held that the plain reading of RESPA's text, its legislative history, and its regulatory scheme support a private right of action even in the absence of an overcharge or other concrete injury. Also, the Court held that an injury-in-fact test for standing was satisfied by the "deprivation of a right conferred by RESPA . . . the right to receive referral services untainted by kickbacks or fee splitting."

The Affiliated Business Arrangement (AfBA), when properly structured, is a RESPA-compatible means to developing strategic alliances between certain settlement service providers. Comprehensive planning and implementation are necessary to satisfy RESPA requirements and HUD's specified guidelines in order to satisfy the "safe harbor" test. Given the ruling outlined herein, we recommend that a critical evaluation of all aspects of any such affiliations be immediately and carefully evaluated by regulatory compliance professionals.

**LCG Library:** Carter v. Welles-Bowen Realty, Inc., No. 07-3965 (6th Cir. Jan. 23, 2009)

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