Published in ABA BUSINESS LAWYER, Volume 66 in February 2011.
Reprinted with permission.

2010 Survey of RESPA Developments

*By John P. Kromer, Sanford Shatz, and Jonathan W. Cannon**

Introduction

The year 2010 was one of the most significant in the history of the Real Estate Settlement Procedures Act ("RESPA"),[1] and its implementing Regulation X.[2] The year began with the implementation of the long-awaited amendments to Regulation X to rewrite the core residential mortgage loan origination disclosure requirements of RESPA, including the Good Faith Estimate ("GFE") and HUD-1/1A Settlement Statements.[3] In July 2010, the reform legislation known as the Dodd-Frank Wall Street Reform and Consumer Protection Act[4] was signed into law. In addition to revising RESPA, the Dodd-Frank Act created a new independent Bureau of Consumer Financial Protection (the "CFPB") within the Federal Reserve System and provides for the transfer of the U.S. Department of Housing and Urban Development's ("HUD's") rulemaking and enforcement authority under RESPA to the CFPB on July 21, 2011.[5] Finally, RESPA litigation continued on several fronts, including several important cases addressing RESPA section 8.[6]

Revised GFE, HUD-1/1A Settlement Statement

On November 17, 2008, HUD published its final rule revising a number of sections of Regulation X with the intent of protecting consumers from "unnecessarily

* John P. Kromer is a partner with BuckleySandler LLP in Washington, D.C. and is the Chair of the Housing Finance and RESPA Subcommittee of the Consumer Financial Services Committee of the American Bar Association Section of Business Law. Sanford Shatz is a practicing attorney in Los Angeles, California, and is the Vice Chair of the Housing Finance and RESPA Subcommittee of the Consumer Financial Services Committee of the American Bar Association Section of Business Law. Jonathan W. Cannon is an associate with BuckleySandler LLP in Los Angeles, California.

1. Real Estate Settlement Procedures Act, Pub. L. No. 93-533, 88 Stat. 1724 (1974) (codified as amended at 12 U.S.C. §§ 2601–2617 (2006)). The Dodd-Frank Act amended RESPA. *See infra* note 4.
2. 24 C.F.R. pt. 3500 (2010).
3. *See infra* notes 7–20 and accompanying text.
4. Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, 124 Stat. 1376 (2010) [hereinafter Dodd-Frank Act]; *see also* Julie R. Caggiano, Jennifer L. Dozier, Richard P. Hackett & Arthur B. Axelson, *Mortgage Lending Developments: A New Federal Regulator and Mortgage Reform Under the Dodd-Frank Act*, 66 Bus. Law. ___ (2011) (in this *Annual Survey*); Ralph T. Wutscher & David L. Beam, *The Dodd-Frank Act's New Federalism*, 66 Bus. Law. ___ (2011) (in this *Annual Survey*).
5. *See infra* notes 24–34 and accompanying text.
6. 12 U.S.C. § 2607 (2006).

high settlement costs" by improving disclosures and making it easier for consumers to comparison shop for mortgage loan products.[7] Specifically, HUD's final rule completely revamped the GFE disclosure and HUD-1/1A Settlement Statement, requiring loan originators to begin using the revised documents and complying with the attendant rules no later than January 1, 2010.[8]

The revised rules and forms brought about significant changes by, among other things,

- creating new GFE and HUD-1/HUD-1A settlement statement forms that facilitate the required comparison between the GFE and the settlement statement at closing; these forms are intended to ensure better compliance with the new tolerance restrictions that limit the increases between estimated and actual costs for settlement services;[9]
- limiting the charge originators may impose on consumers for delivery of the GFE, limiting the additional documents that may be required in connection with the delivery of a GFE, and requiring an affirmation by the consumer to proceed with the transaction before fees may be charged;[10]
- requiring inclusion of yield spread premiums in the "origination charge" disclosed on the GFE, and treating lender payments to mortgage brokers as a credit toward settlement charges;[11]
- requiring the delivery of a list of available settlement service providers when the loan originator allows the consumer to shop for settlement service providers;[12]
- allowing for most fees disclosed on the GFE to increase only when justified as a "changed circumstance," or when the change is a result of a borrower request;[13]
- clarifying that all RESPA disclosures may be provided to consumers in electronic form, as long as the consumer consents to receive such disclosures in electronic form and the other specific conditions of ESIGN are met. The final rule also permits documents required to be retained under RESPA to be retained in electronic format, as long as the ESIGN requirements for document retention are met.[14]

Significantly, the final rule and revised forms create three categories of settlement charges: charges that cannot increase at settlement (basically, the originator-retained charges and transfer taxes, including the yield spread premium); charges

7. Real Estate Settlement Procedures Act (RESPA): Rule to Simplify and Improve the Process of Obtaining Mortgages and Reduce Consumer Settlement Costs, 73 Fed. Reg. 68204 (Nov. 17, 2008) (to be codified at 24 C.F.R. pts. 203 & 3500) [hereinafter RESPA Rule].

8. 24 C.F.R. § 3500.1(b)(2) (2010).

9. *See* RESPA Rule, *supra* note 7, 73 Fed. Reg. at 68248 (to be codified at 24 C.F.R. pt. 3500 app. A, app. C).

10. *Id*. at 68240 (to be codified at 24 C.F.R. § 3500.7).

11. *Id*. at 68253 (to be codified at 24 C.F.R. pt. 3500 app. C).

12. *Id*. at 68254 (to be codified at 24 C.F.R. pt. 3500 app. C).

13. 24 C.F.R. § 3500.7 (2010).

14. *See* RESPA Rule, *supra* note 7, 73 Fed. Reg. at 68243 (to be codified at 24 C.F.R. § 3500.23).

that cannot increase in total more than 10 percent (most third-party charges that the originator requires or for which the originator identifies the provider); and charges that can increase at settlement (such as per diem interest, homeowners' insurance, and initial escrow deposit).[15] The revised HUD-1/1A contains a comparison chart that reflects the fees disclosed on the GFE and actual fees charged at settlement.[16] If a charge collected at closing exceeds the tolerance threshold, the loan originator has the opportunity to "cure" the exceeded tolerance by reimbursing to the borrower the excess amount within thirty calendar days after the settlement.[17]

These revisions marked a significant change from the pre-2010 GFE and HUD-1/1A, which did not impose any tolerance thresholds, or any accuracy and redisclosure requirements, beyond being issued in "good faith." According to HUD, the revised rules and forms are designed to "ensure that at settlement borrowers are aware of final costs as they relate to their particular mortgage loan and settlement transaction,"[18] and to facilitate shopping by consumers among various loan originators and settlement service providers.[19] HUD also stated that another goal is "limiting bait-and-switch methods whereby the originator uses the GFE to draw in a borrower and, after a significant application fee is paid or burdensome documentation demands are made, claims that a material change has resulted in a more expensive loan offering."[20]

HUD's FAQs and Other Guidance

Owing to these sweeping changes, HUD was deluged with requests from loan originators, lending regulators, and other interested parties for additional guidance. On August 13, 2009, HUD issued the first version of its informal guidance in the form of RESPA frequently asked questions ("FAQs"). By April 2, 2010, HUD had issued thirteen versions of its FAQs, running to more than 300 questions and answers.[21] Following the release of the FAQs on April 2, 2010, HUD transitioned to issuing its informal guidance in the form of the newsletter *RESPA Roundup*.[22] Also, on November 13, 2009, HUD announced a 120-day period of "restrained enforcement" for FHA-approved originators who demonstrate a "good faith effort" to implement the changes.[23]

15. *Id*. at 68248 (to be codified at 24 C.F.R. pt. 3500 app. A, app. C).
16. *See id*. at 68227–29.
17. *Id*. at 68241 (to be codified at 24 C.F.R. § 3500.7(i)).
18. *Id*. at 68204.
19. *Id*.
20. *Id*. at 68212.
21. *See New RESPA Rule FAQs*, U.S. Dep't Housing & Urb. Dev. (Apr. 2, 2010), http://www.hud.gov/offices/hsg/ramh/res/resparulefaqs422010.pdf.
22. *See RESPA Roundup*, U.S. Dep't Housing & Urb. Dev. (July 2010), http://www.hud.gov/offices/hsg/ramh/res/roundupjuly.pdf. The July 2010 issue states that HUD intends to produce issues of *RESPA Roundup* "periodically." *Id*. at 1.
23. Press Release, U.S. Dep't of Hous. & Urban Dev., HUD Announces Restraint in RESPA Enforcement for First Four Months of New Rule (Nov. 13, 2009) (No. 01-215), *available at* http://portal.hud.gov/portal/page/portal/HUD/press/press_releases_media_advisories/2009/HUDNo.09-215.

Bureau of Consumer Financial Protection and RESPA

Under the Dodd-Frank Act, authority for the interpretation and enforcement of RESPA will be transferred from HUD to the CFPB on July 21, 2011.[24] In addition to assuming all of the consumer protection obligations of HUD under RESPA, the CFPB is required to implement a combined RESPA and Truth in Lending Act ("TILA") disclosure document within one year of the transfer date (i.e., July 21, 2012), unless HUD and the Board of Governors of the Federal Reserve System (which exercises TILA interpretative authority until that authority is also transferred to the CFPB) implement a combined disclosure prior to that date.[25] Further, under the Dodd-Frank Act, state attorneys general are given the authority to bring a civil action in that state to enforce the provisions of RESPA and Regulation X.[26]

The Dodd-Frank Act also enacted a number of specific amendments to RESPA. The Dodd-Frank Act requires the CFPB to prepare and revise, at least once every five years, the "Home Buying" information booklet under section 5 of RESPA.[27] The booklet must include significantly more information than the current version of the booklet and must jointly address compliance with the requirements of RESPA and TILA.[28]

The Dodd-Frank Act also requires, in connection with certain mortgage loans, the establishment of escrow accounts.[29] Servicer-collected escrow funds must be deposited into a bank account and must be administered pursuant to RESPA, the flood insurance requirements, and state law, if applicable.[30] For loans with required escrows, the creditor must provide a notice, at least three business days

24. *See* Dodd-Frank Act, *supra* note 4, § 1062, 124 Stat. at 2039–40 (to be codified at 12 U.S.C. § 5582). On September 20, 2010, the Treasury Department announced that July 21, 2011, is the "designated transfer date" on which certain authorities are transferred to the CFPB. *See* Designated Transfer Date, 75 Fed. Reg. 57252, 57252 (Sept. 20, 2010).

25. Dodd-Frank Act, *supra* note 4, §§ 1032(f), 1098(2), 124 Stat. at 2007, 2103–04 (to be codified at 12 U.S.C. §§ 5532(f), 2603). The stated purpose of the integrated disclosure form is to "facilitate compliance with the disclosure requirements of . . . [RESPA and TILA], and to aid the borrower or lessee in understanding the transaction by utilizing readily understandable language to simplify the technical nature of the disclosures." *Id*. § 1098(2), 124 Stat. at 2103–04 (to be codified at 12 U.S.C. § 2603).

26. *Id*. § 1042, 124 Stat. at 2012–13 (to be codified at 12 U.S.C. § 5552).

27. *Id*. § 1450, 124 Stat. at 2174–76 (to be codified at 12 U.S.C. § 2604).

28. *Id*. § 1098(3), 124 Stat. at 2104 (to be codified at 12 U.S.C. § 2604). For the current booklet, see *Shopping for Your Home Loan: HUD's Settlement Cost Booklet*, U.S. Dep't of Housing & Urb. Dev., http://hud.gov/offices/hsg/ramh/res/settlement-cost-booklet03252010.cfm (last updated Aug. 17, 2010).

29. An escrow account must be established for first-lien closed-end mortgage loans when:

- federal/state law so requires;
- the loan is made, guaranteed, or insured by a federal/state lending/insuring agency;
- a first-lien mortgage loan is below the conforming loan limit and the annual percentage rate exceeds the average prime offer rate established by the Federal Reserve Board by at least 1.5 percent;
- a first-lien mortgage loan is above the conforming loan limit and the annual percentage rate exceeds the average prime offer rate by at least 2.5 percent; or
- is required by regulation.

Dodd-Frank Act, *supra* note 4, § 1461(a), 124 Stat. at 2178–79 (to be codified at 15 U.S.C. § 1639d(b)).

30. *Id*., 124 Stat. at 2180 (to be codified at 15 U.S.C. § 1639d(g)).

before closing, that includes the following: the amount initially deposited in the escrow account; an estimate of the first year's escrow charges for estimated taxes and hazard insurance (including flood insurance); the estimated monthly amount payable for such items into escrow; and a description of the borrower's responsibilities if the account is terminated in the future.[31]

In addition, the Dodd-Frank Act provides that mortgage loan servicers must not charge fees for responding to valid qualified written requests ("QWRs").[32] The Dodd-Frank Act also shortens the time periods servicers have to respond to QWRs, and increases the penalties under section 6 of RESPA, providing for individual awards of up to $2,000 (up from $1,000) and class action awards of up to $1,000,000 (up from $500,000).[33] The Dodd-Frank Act also amended RESPA to allow for the separate disclosure on the HUD-1/1A Settlement Statement of the fee paid directly to an individual appraiser by an appraisal management company and the administration fee charged by the appraisal management company.[34]

Required Use ANPR

On June 3, 2010, HUD issued an Advance Notice of Proposed Rulemaking to seek public comment on the issue of "required use" under RESPA.[35] In its 2008 RESPA rule, HUD amended the definition of "required use" in a way that would have prohibited a non-settlement service provider (such as a homebuilder) from offering a discount on settlement services (or an upgrade on other services, such as the home) tied to the use of a particular settlement service provider (such as the homebuilder's affiliated mortgage company).[36] This amendment was withdrawn by HUD amid industry complaints and litigation.[37] According to HUD, the requested comments may be used to inform a future revision or clarification of section 8 of RESPA, which prohibits the "required use" of an affiliated settlement service provider.[38] Comments were due by September 1, 2010.[39]

31. *Id.*, 124 Stat. at 2180–81 (to be codified at 15 U.S.C. § 1639d(h)).

32. *Id.* § 1463(a), 124 Stat. at 2182 (to be codified at 12 U.S.C. § 2605(k)(1)(B)).

33. *Id.* § 1463(b), 124 Stat. at 2184 (to be codified at 12 U.S.C. § 2605(f)). Servicers must acknowledge receipt of the QWR within five days (significantly reduced from the prior deadline of twenty days), and must take action on the QWR within thirty days (down from sixty days). *Id.* § 1463(c), 124 Stat. at 2184 (to be codified at 12 U.S.C. § 2605(e)). The thirty-day period may be extended for not more than fifteen days if the servicer notifies the consumer of the delay. *Id.* (to be codified at 12 U.S.C. § 2605(e)(4)).

34. *Id.* § 1475, 124 Stat. at 2200 (to be codified at 12 U.S.C. § 2603).

35. Real Estate Settlement Procedures Act (RESPA): Strengthening and Clarifying RESPA's "Required Use" Prohibition Advance Notice of Proposed Rulemaking, 75 Fed. Reg. 31334 (June 10, 2010) (to be codified at 24 C.F.R. pt. 3500) [hereinafter June 2010 ANPR].

36. RESPA, *supra* note 7, 73 Fed. Reg. at 68234 (to be codified at 24 C.F.R. § 3500.2). The proposed definition would have been effective January 16, 2009. *See id.* at 68239–40.

37. Real Estate Settlement Procedures Act (RESPA): Rule to Simplify and Improve the Process of Obtaining Mortgages and Reduce Consumer Settlement Costs; Withdrawal of Revised Definition of "Required Use," 74 Fed. Reg. 22822 (May 15, 2009) (to be codified at 24 C.F.R. pt. 3500); Nat'l Ass'n of Home Builders, NVR, Inc. v. Preston, No. 1:08-cv-013240 CMH/TCB (E.D. Va. filed Dec. 22, 2008).

38. June 2010 ANPR, *supra* note 35, 75 Fed. Reg. at 31334–35.

39. *Id.* at 31335.

Home Warranty Marketing Interpretative Rule

On June 25, 2010, HUD published an interpretive rule discussing whether compensation paid by home warranty companies ("HWCs") to real estate brokers and agents violates the anti-kickback provisions of section 8 of RESPA.[40] Under this rule, HUD will first determine whether the compensation is (i) contingent on an arrangement that prohibits the real estate broker or agent from performing services for other HWCs (this may be evidenced by a real estate broker or agent being compensated for performing HWC services for only one company); and (ii) based on, or adjusted to reflect, the number of transactions referred by the real estate broker or agent.[41] The interpretive rule also clarifies HUD's method of determining whether services were "actually performed" by the real estate broker or agent and whether the compensation is "reasonably related" to the value of the service provided.[42] HUD's interpretive rule emphasizes that services performed by real estate brokers and agents on behalf of HWCs are compensable as additional settlement services if the services are actual, necessary, and distinct from the primary services provided by the real estate broker or agent.[43] Further, the real estate broker or agent may accept a portion of the charge for the homeowner warranty only if the broker or agent provides services that are not nominal and for which there is not a duplicative charge.[44]

RESPA Litigation

Some of the most significant litigation involving RESPA centered around claims of violations of section 8(b), which prohibits fee splitting among settlement service providers and the charging of unearned fees.[45] In 2001 HUD issued its formal Statement of Policy 2001-1, in which it contended that one settlement service provider's marking up the cost of another settlement service provider's goods or services, without providing additional goods or services, violates RESPA's prohibition on fee splitting.[46] As in past years, courts have struggled with whether to give deference to that interpretation.[47] Courts have also addressed various affiliated

40. Real Estate Settlement Procedures Act (RESPA): Home Warranty Companies' Payments to Real Estate Brokers and Agents, 75 Fed. Reg. 36271 (June 25, 2010) (to be codified at 24 C.F.R. pt. 3500).

41. *Id*. at 36272.

42. *Id*.

43. *Id*. at 36272–73.

44. *Id*. at 36273.

45. 12 U.S.C. § 2607(b) (2006); *see*, *e.g.*, John R. Chiles & Zachery D. Miller, *The Long Arm of RESPA: Judicial Expansion of Section 8(b) in 2009*, 64 Consumer Fin. L.Q. Rep. 22 (2010).

46. 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, 53059 (Oct. 18, 2001) (to be codified at 24 C.F.R. pt. 3500).

47. *See* Elizabeth A. Huber & Dana Frederick Clarke, *2009 Survey of RESPA Developments*, 65 Bus. Law. 555, 565–66 (2009) (in the 2009 *Annual Survey*); Robert M. Jaworski, Joseph M. Kolar & Jonathan W. Cannon, *2008 Survey of RESPA Developments*, 55 Bus. Law. 611, 618–19 (2008) (in the 2008 *Annual Survey*).

business arrangements ("AfBAs") and a number of issues in the context of title insurance when rates are established by a regulator.[48]

One of the most significant RESPA judicial opinions came in the long-running *Carter v. Welles-Bowen Realty, Inc*. litigation.[49] In a June 30, 2010 opinion, the district court granted summary judgment to the defendants in a case alleging violations of RESPA's anti-kickback rule, finding that the defendants' AfBAs complied with RESPA's requirements and holding that HUD's Policy Statement 1996-2—aimed at identifying "sham" AfBAs[50]—was unconstitutionally vague.[51]

In *Carter*, the consumer plaintiffs alleged that the defendants (including a title insurance company and a real estate agency) violated RESPA by setting up sham title insurance companies as conduits for kickbacks.[52] The defendants moved for summary judgment, arguing that the title insurance providers were AfBAs exempt from RESPA's anti-kickback provisions because they: (i) disclosed the ownership arrangement; (ii) did not require the borrowers to use a particular provider; and (iii) compensated their owners based purely on an ownership interest.[53] In response, the plaintiffs argued that the court must also determine whether the entities were sham entities by application of HUD's ten-factor test for distinguishing a "sham" AfBA from a "bona fide provider of settlement services," as set forth in Policy Statement 1996-2.[54]

The defendants argued that HUD's ten-factor test is unconstitutionally vague, and the court—without addressing whether the Policy Statement is entitled to judicial deference—agreed.[55] The court noted that half of the factors in Policy Statement 1996-2 use inherently vague terms (e.g., whether the AfBA has "sufficient" operating capital and net worth, without providing guidance as to what level would be "sufficient").[56] The court also found that the vagueness of the individual factors was "compounded by the subjective balancing process inherent in the test" because the ten factors would be "considered together" to make a final determination.[57] According to the *Carter* court, "[a]ny entity wishing to operate as an [AfBA] (an arrangement RESPA specifically condones, with certain limitations)

48. *See infra* notes 49–59 and accompanying text.

49. No. 3:09 CV 400, 2010 U.S. Dist. LEXIS 64949 (N.D. Ohio June 30, 2010); *see also* Huber & Clarke, *supra* note 47, at 566.

50. Office of the Assistant Secretary for Housing-Federal Housing Commissioner; Real Estate Settlement Procedures Act (RESPA); Statement of Policy 1996-2 Regarding Sham Controlled Business Arrangements, 61 Fed. Reg. 29258 (June 7, 1996) (to be codified at 24 C.F.R. pt. 3500) [hereinafter Policy Statement 1996-2]. Policy Statement 1996-2 sets forth ten factors that HUD considers in determining whether any business venture, set up for the benefit of one or more of its parent entities, is a bona fide service provider under RESPA. *Id*. at 29262. Policy Statement 1996-2 also sets out four additional questions that HUD will consider in determining whether a payment by an AfBA to one or more parents is a return on ownership interest (a statutory requirement under RESPA for the safe harbor exemption) or a prohibited referral fee in violation of section 8(a) of RESPA. *Id*.

51. Carter, 2010 U.S. Dist. LEXIS 64949, at *21.

52. *Id*. at *2.

53. *Id*. at *8.

54. *Id*. at *9.

55. *Id*. at *21.

56. *Id*. at *16–17.

57. *Id*.

is thus confronted with a massive gray area [where] [a]t some point . . . both civil and criminal liability might attach."[58] Finding that Policy Statement 1996-2 was void for vagueness, and that the defendants had complied with the AfBA requirements set forth in the statutory text of RESPA, the court granted the defendants' motion for summary judgment.[59]

Courts have continued to address section 8(b) claims in a number of contexts. On March 9, 2010, the U.S. Court of Appeals for the Ninth Circuit affirmed that overcharges do not violate section 8(b).[60] In *Martinez*, the plaintiffs claimed that the defendant bank charged excessive fees for the refinancing of their home mortgage loans and that the overcharges violated RESPA.[61] The court found that "[s]ection 8(b) cannot be read to prohibit charging fees, excessive or otherwise, when those fees are for services that were actually performed."[62] In rejecting HUD's interpretation, the court found that "[s]ection 8(b) is unambiguous and does not extend to overcharges."[63]

Courts also have responded to the decision of the U.S. Court of Appeals for the Second Circuit in *Cohen v. J.P. Morgan Chase & Co.*,[64] in which the court held that section 8(b) liability may be based on the defendant's internal division of a fee into two portions, for one of which it performed no services.[65] A district court in New Jersey implied that *Cohen* was not the rule in the Third Circuit, holding that a recording fee overcharge by a title insurance agency was not actionable under section 8(b).[66]

A U.S. district court in the State of Washington, however, endorsed the holding in *Cohen* in a class-action dispute claiming that a reconveyance fee charged by the defendant violated section 8 because, while the fee consisted of both processing and tracking fees, the defendant did not perform the processing.[67] In *Bushbeck*, the plaintiff borrower refinanced a first-lien and second-lien mortgage loan, and, as part of the transaction, the prior liens were required to be extinguished through a reconveyance.[68] The title insurance company charged the borrower a reconveyance fee consisting of processing and tracking fees.[69] The lender completed the reconveyance and the title insurance company tracked the reconveyances.[70] The borrower alleged, among other things, that the title insurance company collected

58. *Id.* at *17–18.
59. *Id.* at *24.
60. Martinez v. Wells Fargo Home Mortg., Inc., 590 F.3d 549 (9th Cir. 2010).
61. *Id.* at 552.
62. *Id.* at 553–54.
63. *Id.* at 554.
64. 498 F.3d 111 (2d Cir. 2007).
65. *Id.* at 126.
66. *See* Kiley v. NRT Title Agency, LLC, No. 09-3549, 2010 WL 2541627, at *5–6 (D.N.J. June 17, 2010).
67. Bushbeck v. Chi. Title Ins. Co., No. C08-0755, 2010 WL 2262340 (W.D. Wash. June 1, 2010).
68. *Id.* at *10.
69. *Id.* at *2.
70. *Id.* at *3.

an unearned fee in violation of section 8(b) of RESPA.[71] The title insurance company claimed that it did not violate RESPA because it performed some reconveyance services (tracking the reconveyance); thus the fee was earned, and, even if the fee was marked up from its actual cost, RESPA does not apply to overcharges.[72]

The court held that section 8(b) "extends to any portion of the charge for which the service provider does not perform services."[73] Because the title insurance company conceded that the fee disclosed as a "reconveyance" fee on the HUD-1 actually consisted of component parts, and because the title company did not perform any services in connection with one of those component parts, the court denied the defendant's motion for summary judgment on the RESPA claims.[74] The court followed *Cohen* and denied the defendant's motion for summary judgment, noting that the parties agreed that the defendant performed no processing services attributable to the processing fee.[75]

In another section 8(b) case in which the court did not follow *Cohen*, a district court in Louisiana declined to hold a lender and a title insurance and settlement service provider liable for violating section 8(b) after finding that the defendants did not actually split any of the settlement service fees contested by the plaintiff borrowers.[76] In *Freeman*, the borrowers alleged that the defendants violated RESPA and Louisiana law by, among other things: (i) charging a loan discount fee, but failing to provide a corresponding interest rate reduction; and (ii) charging an appraisal fee that was improperly split between the defendants.[77]

In granting summary judgment for the defendants, the court agreed with the defendants that the borrowers' RESPA claims failed as a matter of law because the defendants provided evidence that they did not split or otherwise share the contested loan discount and appraisal fees–instead, the lender received and retained the loan discount fee, and the title insurance and settlement service provider received and retained the appraisal fee.[78] According to the *Freeman* court, section 8(b) of RESPA unambiguously requires "an allegation that the challenged fees have been split in some fashion."[79] The court noted that its decision stands at odds with decisions from the U.S. Courts of Appeals for the Second and Eleventh Circuits, holding that a single service provider can violate section 8(b) of RESPA, but is in line with decisions from the U.S. Courts of Appeals for the Fourth, Seventh, and Eighth Circuits.[80]

The U.S. District Court for the Northern District of Texas, in *Hamilton v. First American Title Insurance Co.*,[81] took the unusual step of certifying a class in a case

71. *Id.*
72. *Id.* at *9.
73. *Id.* at *8.
74. *Id.* at *10.
75. *Id.* at *8, *10.
76. Freeman v. Quicken Loans, Inc., No. 08-1626, 2009 U.S. Dist. LEXIS 69654 (E.D. La. Aug. 10, 2009).
77. *Id.* at *3–4.
78. *Id.* at *9, *64–69.
79. *Id.* at *65.
80. *Id.* at *65–66.
81. 266 F.R.D. 153 (N.D. Tex. 2010).

brought by a group of consumers who alleged that they paid unlawfully excessive premiums for title insurance. In *Hamilton*, the plaintiffs refinanced their mortgage loans and purchased reissued lenders' title insurance policies from the defendant title insurer.[82] The plaintiffs claimed that, although they obtained reissue policies, the defendant charged a higher, original-issue rate.[83] The plaintiffs filed suit, alleging violations of RESPA, along with a number of state-law claims.[84]

The *Hamilton* court, in certifying the class, noted that the analysis of whether damages are warranted would be "straightforward and mechanical."[85] In connection with the RESPA claims, the court noted that there were common questions of law in the plaintiffs' claims, namely, whether HUD's interpretation of RESPA (in which HUD posits that allegedly excessive charges can be bifurcated into "reasonable" and "unreasonable," and therefore unearned and earned, components) is viable, and whether the title company and its agents performed compensable services in connection with any portion of a fee charged in excess of the Texas Department of Insurance's published rates.[86] The court emphasized, however, that in certifying the class on these RESPA claims, it "intimates no view as to the merits of those claims."[87]

Courts also have continued to address a wide variety of other RESPA-related claims. The U.S. Court of Appeals for the Third Circuit weighed in on title insurance in *Alston v. Countrywide Financial Corp.*,[88] in which it reversed the dismissal of a putative class action. In this case, the plaintiff borrowers obtained mortgages from the defendant and were required to obtain private mortgage insurance from insurers that would reinsure their policies with the lender's affiliate reinsurer under a captive reinsurance agreement.[89] According to the borrowers, the captive reinsurance agreement violated RESPA's anti-kickback provisions because it allowed the defendant reinsurer to collect more than $892 million in reinsurance premiums without paying anything in claims.[90] The Third Circuit found that RESPA's plain language did not require the borrowers to allege an "overcharge."[91] According to the court, "the provision of statutory damages based on the entire payment, not on an overcharge, is a certain indication that Congress did not intend to require an overcharge to recover under section 8 of RESPA."[92]

As more borrowers seek loan modifications, there has been an upsurge in related litigation, such as cases arising from QWRs and broker price opinions ("BPOs"). In *Fitch v. Wells Fargo Bank, N.A.*,[93] the court found that a BPO taken in expecta-

82. *Id.* at 157
83. *Id.* at 157.
84. *Id.*
85. *Id.* at 167.
86. *Id.*
87. *Id.* at 169.
88. 585 F.3d 753 (3d Cir. 2009).
89. *Id.* at 756.
90. *Id.* at 757.
91. *Id.* at 759.
92. *Id.* at 760.
93. 709 F. Supp. 2d 510 (E.D. La. 2010).

tion of foreclosure proceedings is not a settlement service; therefore, the plaintiff's RESPA claim was dismissed.[94] In cases in the Ninth Circuit, courts have been careful to parse out the exact alleged violation of RESPA's QWR provisions from complicated fact patterns. The court in *Flores v. GMAC Mortgage Corp.*[95] granted the defendant's motion to dismiss because the bankrupt plaintiff's letter was not a QWR.[96] In *Phillips v. Bank of America Corp.*,[97] the court held that a document that did not allege any financial harm, requested only origination-related documents, and did not allege any servicing errors was not a QWR.[98]

94. *Id.* at 513–16.
95. No. 2:09-cv-01216-GEB-GGH, 2010 WL 582115 (E.D. Cal. Feb. 11, 2010).
96. *Id.* at *4.
97. No. C 10-0400 JF (HRL), 2010 WL 1460824 (N.D. Cal. Apr. 9, 2010).
98. *Id.* at *4.