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New Day For RESPA: The UDAAPification Of Section 8

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The Real Estate Settlement Procedures Act has gone the "UDAAPified" way of debt collection — this time, through enforcement rather than guidance.

In July 2013, Consumer Financial Protection Bureau Bulletin 2013-07 announced that the principles underlying the Fair Debt Collection Practices Act broadly apply under Sections 1031 and 1036 of the Dodd-Frank Act, which prohibit unfair, deceptive, or abusive acts or practices (UDAAPs). The FDCPA prohibits a "debt collector" from engaging in any conduct, "the natural consequence of which is to harass, oppress or abuse any person in connection with the collection of debt," to "use any false, deceptive or misleading representation or means in connection with the collection of any debt," or to "use any unfair or unconscionable means to collect or attempt to collect any debt."

The FDCPA generally applies to third-party debt collectors, including collection agencies, debt purchasers and attorneys who engage in debt collection. It does not apply to companies collecting on their own behalf. CFPB Bulletin 2013-07 acknowledges that the FDCPA "does not include some persons who collect consumer debt," but warns that "all covered persons and service providers must refrain from committing UDAAPs" in the collection of debt.

On Feb. 10, 2015, the CFPB announced a consent order against NewDay Financial LLC, a mortgage lender offering mortgage loans guaranteed by the Veterans Benefits Administration. (In re NewDay Financial Inc., 2015-CFPB-0004 (Feb. 10, 2015)). The order is based on an allegedly deceptive advertising relationship with an unidentified third-party veterans' organization.

The NewDay action serves as a clear warning to lenders and other settlement service providers engaged in marketing arrangements with third parties to be cautious when paying for communications that might be considered endorsements, or risk UDAAP as well as RESPA liability. Specifically, NewDay suggests that the CFPB will likely consider the nondisclosure of a paid relationship between a settlement service provider and its third-party endorser to be both a deceptive practice prohibited by the Dodd-Frank Act and a violation of RESPA's Section 8 prohibition on giving or accepting a fee, kickback, or anything of value in exchange for referrals.

The NewDay enforcement action arose from a marketing relationship between mortgage lender NewDay and an unidentified, unrelated veterans organization. Under this arrangement, NewDay paid what the order characterized as “licensing” and “lead generation” fees to the veterans organization and its agent in exchange for, among other things, the opportunity to market NewDay’s products and services to the organization’s members by mail, email and telephone.

The marketing materials, some of which appeared to come to members directly from the organization, included statements that could be construed as endorsements by the organization of NewDay’s products and services. For example, one piece of collateral allegedly asserted that “[Veterans’ Organization] chose NewDay to be our exclusive Reverse Mortgage provider after spending significant time with the company’s management team and watching its loan professionals in action.”

In addition to the mailed and emailed advertisements, a website operated on behalf of the organization for its members allegedly displayed language “recommend[ing]” NewDay as a source for mortgage products, and provided links to NewDay’s website. As described in the order, the communications appearing to endorse NewDay did not disclose the existence of a paid relationship between NewDay and the organization.

Under Section 8 of RESPA, it is unlawful for a person to give or 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)). A referral is any oral or written action “directed to a person” that has the effect of affirmatively influencing that person’s selection of a settlement service provider. 12 C.F.R. § 1024.14(f)(1).

With respect to NewDay’s advertising arrangement, the CFPB found that by paying the organization for, among other things, the apparent endorsement of NewDay’s services in mailings, emails and online advertisements directed to the organization’s members, NewDay had violated the prohibition on referral fees in Section 8 of RESPA.

More interesting, the CFPB concluded that the organization’s paid endorsements of NewDay also constituted deceptive acts or practices in violation of the Dodd-Frank Act’s prohibition on UDAAPs. 12 U.S.C. § 5536. An act or practice is deceptive if (1) it misleads or is likely to mislead a consumer, (2) the consumer’s interpretation of the act or practice is reasonable under the circumstances, and (3) it is material. CFPB Supervision and Examination Manual, at Procedures 9 (Oct. 2012).

The CFPB found that NewDay’s failure to disclose the existence of a paid relationship “while making affirmative statements concerning a substantive basis for the endorsements” was deceptive because it was likely to mislead consumers who reasonably would have considered the payments material in evaluating the credibility of the endorsement and whether to select NewDay. The order’s conduct provisions include a prohibition on “misrepresenting, or assist[ing] others in misrepresenting, expressly or by implication, any material fact, including but not limited to the fact that an endorsement from a third party was made free of any material inducement or connection.”

By virtue of this shift, the prohibition on the exchange of payments for referrals is UDAAPified into a principle that consumers should not unwittingly be influenced in favor of a particular provider — at least without clear disclosure of joint marketing relationships. Lenders may wish to take a fresh look at all joint marketing collateral and agreements with considerations of consumer judgments as to “weight or credibility” in mind.

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