

Administrative Fees: A New Risk?

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On April 20, 2009, a federal judge in Alabama concluded that a broker's "administrative brokerage commission" fee of \$149 per transaction violated Section 8(b) of RESPA. The judge concluded that the administrative brokerage commission fee was not provided "in exchange for" the performance of any actual services. This decision received national publicity, sending shockwaves through the brokerage community. Brokers in Michigan keep posing the question as to how this decision changes the rules in Michigan with regard to charging a fee at closing attributable to general brokerage services and/or overhead expenses – whether an administrative, processing or similarly titled fee. A brief review of the law demonstrates that the Alabama decision changes nothing in Michigan.

Section 8(b) of RESPA provides in pertinent part:

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.

Section 8(b) of RESPA was long understood to prohibit two or more persons from splitting a fee for settlement services where part or all of one provider's share of the fee is not in return for goods or facilities

actually furnished or services actually performed. In other words, traditionally it was assumed that in order for there to be a Section 8(b) violation, there must be some type of fee splitting arrangement.

In October 2001, HUD issued a formal policy statement indicating that Section 8(b) would not apply only in fee splitting situations. HUD indicated that Section 8(b) could also be violated if one settlement service provider marks-up the cost of goods or services obtained from a third party and keeps the difference without providing actual goods or services to justify the additional charge. For example, a lender obtains a credit report for \$20 and on the closing statement charges the borrower \$40 for the credit report, without doing anything more. This type of charge has been referred to by courts as a “mark-up.”

HUD also indicated that Section 8(b) could also be violated where one settlement service provider imposes an “overcharge” – *i.e.*, a fee for no, nominal or duplicative work, or a fee that exceeds the reasonable value of goods or services provided. For example, a real estate broker charges a closing or administrative fee to a seller at closing in the amount of \$250 to cover general overhead costs and without a specific additional service to the seller. This was the situation in the Alabama decision, *i.e.*, broker's administrative brokerage commission fee of \$149 was deemed a prohibited “overcharge.”

Fortunately for REALTORS® in Michigan, the final say over the proper interpretation of Section 8(b) of RESPA is with the federal courts and not with HUD. Prior to the April decision by the Alabama court, only one of twelve of the Federal Circuit Courts of Appeals had explicitly held that an “overcharge” constituted a violation of RESPA. On the other hand, four federal circuits had explicitly held that an “overcharge” does not constitute a violation of Section 8(b). The remaining circuits have not yet directly addressed the issue. Fortunately for Michigan REALTORS®, they are governed by the law of the Sixth Circuit, which is one of the federal circuits that has held that an “overcharge” does not constitute a violation of Section 8(b).

In sum, brokers in Michigan may continue to charge closing fees which may well be deemed an “overcharge” by a court, but do not constitute a violation under Section 8(b) of RESPA as interpreted within the Sixth Circuit. No decision made by a federal court outside of the Sixth Circuit can change the law in Michigan, unless that Court is known as the United States Supreme Court, and it has not addressed the issue.

The issue of so-called administrative, processing or closing fees is still governed by the market in Michigan. In other words, Michigan brokers may charge these types of fees so long as the public is willing to pay them.