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# The News in General



## Split Decision: RESPA Provides Private Right to Sue Lender on Settlement Charge Markups in Third Circuit Court of Appeals

On August 4, 2005, the U.S. Circuit Court of Appeals for the Third Circuit released a much anticipated opinion in the case of Francis Santiago v. GMAC Mortgage Group, Inc. The decision in this case represents the most recent endorsement of a private cause of action under RESPA Section 8 (b) for settlement charge markups.

In Santiago, the borrower alleged that in January of 2002, he obtained a loan for a home from GMAC. In connection with the loan, GMAC charged and collected fees from Santiago for settlement services, including an \$85.00 tax service fee, a \$20.00 flood certification fee, and a \$250.00 funding fee. GMAC fully disclosed these charges to Santiago. However, Santiago alleged that GMAC retained third party vendors to perform the tax and flood certification services, and charged him more for these services than the amount paid by GMAC to the vendors or "marked up" the service. In addition, Santiago alleged that the reasonable

*However, of greater importance for title agents is the fact that the Third Circuit became the third of six federal appeals courts to permit a private cause of action for markups.*

value of the funding service was \$20.00, and GMAC charged Santiago more than that amount for providing the service or "overcharged" for the service.

On appeal to the Third Circuit Court of Appeals in Philadelphia, Pennsylvania, the Appellate Court over-

turned the District Court's order of dismissal on the issue of markups and affirmed the District Court's order of dismissal on the issue of overcharges. Thus, in the opinion of the Third Circuit, there is no private cause of action for overcharges through

RESPA Section 8 (b). However, of greater importance for title agents is the fact that the Third Circuit became the third of six federal appeals courts to permit a private cause

of action for markups. The case has been remanded to the district court for further proceedings on the markup case.

### Markups Illegal?

The Court in Santiago compared markup charges to kickbacks, which are specifically prohibited by RESPA Section 8(b). The court opined that in the kickback arrangement, the consumer would give the settlement service provider \$100 for a service, the settlement service provider would give the third party vendor \$100 for that service, and the third party vendor would return \$20 to the settlement service provider as a kickback for the referral of business.

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In a markup arrangement, the consumer still gives the settlement service provider \$100 for a service, but the settlement service provider keeps \$20 and gives the third party vendor \$80 for the service. In both scenarios, the borrower has been charged \$100, the settlement service provider has earned \$20 for a service it did not perform, and the third party vendor has earned \$80 for a service it did perform. The Court found the comparison between kickbacks and markups compelling.

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While the Court overturned the dismissal of the district court proceeding, the Third Circuit did not equivocally state that markups violate RESPA Section 8 (b). Rather, the decision in Santiago only permits the action to proceed to trial at the district court level. There may be mitigating factors presented by GMAC at trial to defuse this action, such as the following:

Whether the markup charges represented ancillary charges to justify the increase?

Whether the markup was reasonable in light of the ancillary services provided?

Whether the extra services were already included in some other settlement service charge paid by the borrower?

## What Now?

At this juncture, there are six federal appellate courts that have now reviewed the issue of whether markups are illegal or permit a private cause of action under RESPA Section 8(b). The score is now tied at three circuits apiece. Three appel-

late courts have said yes and three have said no. Ohio title agents are bound by the decisions of the Sixth Circuit Court of Appeals which has heretofore not entertained the issue of settlement charge markups under RESPA Section 8(b). However, the Company is quite certain that a challenge will be raised. Thus, all title agents should be aware that the imposition of settlement charge markups is a closely watched subject by industry and consumers alike.

The question as to whether markups are illegal is an unresolved issue. A possible U.S. Supreme Court challenge could be contemplated by GMAC in the Santiago case, thereby further delaying the effect of a subsequent ruling. However, at this point in time it is impossible to definitively provide guidance to title agents concerning the ramifications of this matter. Rather, the purpose of this memorandum is illustrative. This issue will remain in limbo until the courts resolve the obvious appellate court conflict. Title agents should closely monitor this case and we will provide updates accordingly.

## Second Major Affiliated Business Arrangement Class Action Lawsuit Filed in Ohio

The second Ohio class action lawsuit involving sham affiliated business arrangements has been filed in U.S. District Court, Northern District of Ohio, Cleveland under the heading Shahan, et al. v. Tower City Title Agency, Inc., et al Case No. 05CV1983. Unlike the Pettrey case which remains pending in the federal district court in Cleveland, Ohio, the Shahan case involves a mortgage broker driven AfBA and a national title insurance underwriter, First American Title Insurance Company. Here are the known details:



Plaintiffs, Roger D. Shahan and Leita E. Shahan, filed a class action lawsuit against Tower City Title Agency, Inc., Tower City Title Agency, LLC and several unknown mortgage brokers and title insurance underwriters. These recent home buyers seek relief from the alleged predatory practices of Tower City and its affiliates of an alleged sham affiliated business entity (Tower City LLC) for violations of federal and state law. First American Title Insurance Company is a co-owner of Tower City Title Agency, LLC.

The Shahans are represented by Edward G. Kramer and David G. Oakley staff attorneys with the Fair Housing Law Clinic which is a joint project of THE HOUSING ADVOCATES, INC. and CLEVELAND-MARSHALL COLLEGE OF LAW, CLEVELAND STATE UNIVERSITY, the same attorneys who are representing the plaintiffs in the Pettrey case. **This is the second anti-kickback RESPA class action filed in Ohio and the first to allege direct violations of RESPA against mortgage broker-styled AfBAs.**

The Shahans filed their lawsuit in Federal Court in Cleveland, Ohio and it has been assigned to U.S. District Judge Dan Polster. In the complaint the Shahan's claim that:

a. Tower City Title Agency, Inc. relies heavily on mortgage lenders, mortgage brokers, and real estate brokers to obtain business. In order to promote its title services, Tower City Title Agency, Inc., created Tower City Title Agency, LLC – which is an alleged sham entity – as a way to pay referral fees and kickbacks to the referring entity at the expense of the borrower and in circumvention of the provisions of the Real Estate Settlement Procedures Act (“RESPA”).

b. The Defendants’ scheme was that

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title work from a mortgage broker, promising that the mortgage broker could make additional money for each loan referred for closing and title work without performing additional work. Tower City Title Agency, LLC appeared on the settlement documents in transactions closed by Tower City Title Agency, Inc. as an entity that had performed *bona fide* and substantial title or closing services when it is alleged that the LLC performed little or no work in connection with the transaction.

c. Additionally, the fees attributable to the LLC were in addition to the customary and usual fee that Tower City Title Agency, Inc. charged for the transaction.

The lawsuit was filed under the federal Real Estate Settlement Procedures Act of 1974, as amended, 12 U.S.C. § 2601 et



seq. (12 U.S.C. 2602(7)), the Ohio Consumer Sales Practices Act, Ohio Revised Code §§ 1341 *et seq.* and common law torts of civil conspiracy and negligent

misrepresentation.

The size of the Shahan's class is not known until discovery is done, but it could be several thousand recent home buyers who have used mortgage brokers or loan officers that are affiliated with Tower City Title Agency, LLC and/or its affiliates. The lawsuit requests damages which would be tripled under the law, punitive damages and attorney fees.

## Unique RESPA Section 8 Class Action Filed Against RE/MAX in California

(Source: [www.respanews.com](http://www.respanews.com), August 23, 2005)

A class-action suit has been filed against a California RE/MAX branch and United Title Co. alleging illegal kickbacks, fraud and unfair competition. The lawsuit, filed in May in the U.S. District Court in the Southern District of California, alleges that United Title and the RE/MAX branch violated the anti-kickback provisions of RESPA.

Alleged kickbacks in the real estate title insurance arena have taken center stage this year, sparked by a Colorado inquiry into title insurance practices. John Garamendi, California's insurance regulator, [announced in July](#) that three major title insurers would pay more than \$37 million to settle charges of kickbacks to lenders, builders and Realtors.

The lawsuit is a class action suit on behalf of everyone who sold or purchased a home in California using RE/MAX as their agent or broker "and were induced by RE/MAX to use the services of United Title," according to the complaint. The plaintiffs are asking for damages of up to three times the fees they paid and also seek an injunction barring all defendants from giving or getting kickbacks and

failing to disclose they are in affiliated business arrangements.

The six plaintiffs named in the legal papers are San Diego residents Felix and Linda Rodriguez, Laura Willis, Rosario and Susan Villareal and Ruth Warren.

The six say when they bought San Diego homes using RE/MAX sales agents, their agents recommended United Title for either title or escrow services or both.

The lawsuit alleges that United Title paid a "bonus" to RE/MAX for referrals in violation of RESPA. RESPA states, "No person shall give and no person shall accept any fee, kickback, or thing of value pursuant to any agreement or understanding—that business incident to or a part of a real estate settlement service—shall be referred to another person." Also, the complaint alleges that United Title and RE/MAX violated RESPA's disclosure provisions.

The plaintiffs are asking for damages of up to three times the fees they paid and also seek an injunction barring all defendants from giving or getting kickbacks and failing to disclose they are in affiliated business arrangements.

"They (the six) either were not told there was a business relationship between RE/MAX and United, or the disclosure was not sufficient," said Kevin Young, one of the attorneys for the plaintiffs.

This suit, [Rodriguez v. United Title](#), is unusual because past anti-kickback lawsuits, as well as enforcement actions have centered on title agencies. This is because it is illegal under RESPA for title insurers to offer kickbacks, but not for real estate brokerages or other

professionals to accept them, industry sources said. "The broker (RE/MAX) is included for unfair business practices under California's business and professions code," said Kevin Young, attorney for the six plaintiffs.

In May, in a more typical example, an Illinois man [filed a class-action lawsuit](#) against First

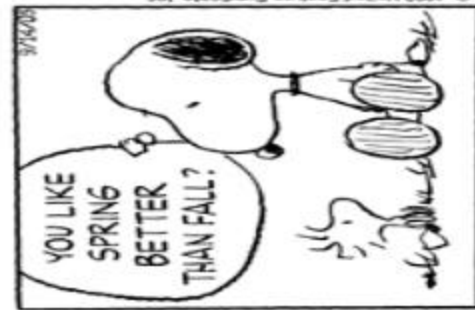
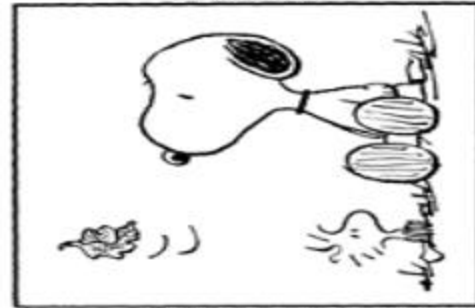
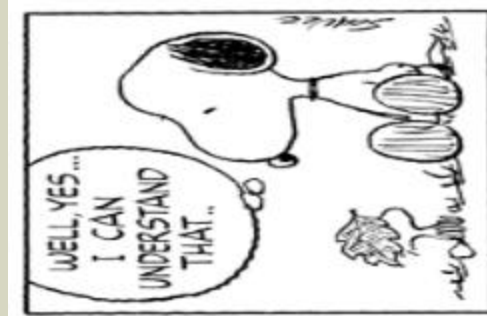


## September 2005

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## Unique RESPA Section 8 Class Action Filed Against RE/MAX in California (continued from page 3).

American Title Insurance Co. alleging the company misrepresented closing charges, according to media reports.

In July, three major title insurers settled with John Garamendi, California's insurance regulator, in a probe of their practices. The companies were accused of paying \$25.4 million in illegal kickbacks to various lenders, builders and Realtors in exchange for the referral of title insurance business. The title insurers settled

without admitting wrongdoing.

Garamendi, who is also co-chair of the Title Insurance Working Group within the National Association of Insurance Commissioners, has worked with Colorado and Washington state insurance regulators to probe a series of alleged phony reinsurance contracts between title companies and subsidiaries of real estate agents, developers and lenders.