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# RESPA Sec. 8(a): How is an Unnecessarily High Settlement Cost Different from an Overcharge?

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In *Brasko v. Howard Bank*, 2022 WL 951771 (D. Md. Mar. 29, 2022), a district court recently certified a subclass of residential mortgage borrowers who alleged that First Mariner Bank, a predecessor of Howard Bank, violated RESPA Section 8(a)[1] through a sham co-marketing arrangement with All Star Title, Inc. According to the named plaintiffs, the bank violated RESPA Section 8(a) by agreeing to receive illegal kickbacks from the title company?laundered through third-party marketing companies?in exchange for referrals. Setting aside the details of this alleged scheme, the more interesting question on class certification was one of Article III standing: had the named plaintiffs presented evidence showing that they themselves paid unnecessarily high settlement costs due to the alleged kickback scheme?

Here, the parties? dispute centered on what seems to be a distinction without a difference: must the named plaintiffs establish particular overcharges for title-related services or may they instead ?demonstrate that they were injured by ?kickbacks or referral fees that tend to increase unnecessarily the costs of certain settlement services???[2] The bank, citing *Baehr v. Creig Northrop Team, P.C.*, 953 F.3d 244 (4th Cir.), *cert. denied*, 141 S. Ct. 373 (2020), argued that the named plaintiffs lacked Article III standing because they had failed to identify any particular title-related service for which they were overcharged.

In *Baehr*, the Fourth Circuit affirmed the dismissal of a RESPA Section 8(a) claim because the plaintiffs only alleged that they had been ?deprived of impartial and fair competition between settlement services providers.?[3] The district court in *Baehr* ?concluded that the Baehrs lacked Article III standing because they were not *overcharged* for settlement services and had not otherwise suffered a concrete injury as necessary to establish injury-in-fact.?[4] Applying *Spokeo, Inc. v. Robins*, 578 U.S. 330 (2016), the Fourth Circuit agreed with the district court that ?the deprivation of impartial and fair competition between settlement services providers?untethered from any evidence that the deprivation thereof increased settlement costs?is not a concrete injury under RESPA.?[5] Critically, throughout *Baehr*, the Fourth Circuit used the terms ?overcharge? and ?unnecessarily high settlement charges? and

?unnecessarily [increased] costs? interchangeably.

Not so in *Brasko*. In response to the bank?s overcharge arguments, the named plaintiffs insisted that they need not tie alleged kickbacks to any particular overcharge for title-related services. Instead, they pointed to evidence suggesting that the bank and the title company had agreed to an overall differential pricing scheme in which the title company would charge higher prices for providing title-related services to borrowers who had been referred by the bank (with the higher price being used to cover the title company?s share of co-marketing expenses). How or why these alleged unnecessarily high settlement costs could not be considered overcharges in service of a RESPA Section 8(a) claim was left unclear.

For the district court, however, the distinction mattered. At least at the class certification stage, the district court agreed with the named plaintiffs that they need not prove a particular overcharge for title-related services. Instead, evidence of an overall differential pricing scheme, as well as questionable charges identified on the named plaintiffs? loan documents, sufficed to demonstrate a cognizable injury in fact supporting their Article III standing.[6]

While *Brasko* leaves unresolved how an unnecessarily high settlement cost can be considered different from an overcharge in the context of RESPA Section 8(a), one thing is clear: co-marketing arrangements between settlement service providers that differentiate settlement costs based on referrals are suspect. Co-marketing arrangements must be implemented with great care to ensure that co-marketing costs are based on the fair market value of the service provided and not on referrals. Otherwise, a private plaintiff or a regulator may claim that the co-marketing arrangement is really just a disguised kickback scheme.

[1] Section 8(a) of the federal Real Estate Settlement Procedures Act (?RESPA?) provides that: ?No person shall give and no person shall accept any fee, kickback, or thing of value pursuant to any agreement or understanding, oral or otherwise, that business incident to or a 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).
[2] *Brasko v. Howard Bank*, 2022 WL 951771 at *3 (D. Md. Mar. 29, 2022) (quoting 12 U.S.C. § 2601(b)(2)).
[3] *Baehr v. Creig Northrop Team, P.C.*, 953 F.3d 244, 254 (4th Cir.), *cert. denied*, 141 S. Ct. 373 (2020).
[4] *Id.* at 251.
[5] *Id.* at 254.
[6] *Brasko*, 2022 WL 951771 at *3.

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