RESPA, HUD, AND MORTGAGE MARKUPS: HUD AND SEVERAL COURTS' ATTEMPTS TO BROADEN RESPA TO PROHIBIT MORTGAGE MARKUPS GOES BEYOND CONGRESS'S PURPOSE

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I. INTRODUCTION

"Predatory lending" is now a household term; most people have heard stories about others who bought homes at higher-than-average rates only to lose them to foreclosure. Most lender and consumers advocacy groups alike condemn this sort of predatory lending.[1]

However, what if the mortgage lender is not necessarily preying on the most vulnerable consumers? What if the lender instead systematically marks up settlement costs to home mortgage consumers, regardless of economic standing, minority status, or level of education? Furthermore, suppose the markups are small enough to be of little significance to a single consumer and are likely never to affect a consumer's ability to purchase or make payments on a home. This scenario fits the description of a "mortgage markup,"[2] a subject that receives scant attention outside the home mortgage industry.[3]

* Associate Member, 2005–2006 *University of Cincinnati Law Review*. The author thanks Professor Thomas D. Eisele for his help throughout researching and writing this comment; Professor Bradford C. Mank for explaining the essentials of agency law; Sarah Ward Terrell for her editing expertise; and Sandy Susman, Government Affairs Director for Real Estate Services Provider's Council, for his quick response to my request for information.

1. For example, lender advocacy groups such as the Mortgage Bankers Association and Real Estate Services Provider's Council have web pages dedicated to information on predatory lending on their web sites. *See* http://www.mortgagebankers.org/IndustryResources/ResourceCenters/PredatoryLending; http://www.respro.org/index.aspx?sectionid=131. On the other side, two examples of consumer groups that provide information on predatory lending are the Center for Responsible Lending, http://www.responsiblelending.org (a consumer group solely dedicated to opposing predatory lending) and the National Consumer Law Center, http://www.consumerlaw.org/initiatives/predatory_mortgage (a group working to protect vulnerable consumers).

2. *See, e.g.*, Kruse v. Wells Fargo Home Mortgage, Inc., 383 F.3d 49, 53 (2d Cir. 2004) ("A settlement service provider 'marks up' the fee for a settlement service when the provider outsources the task of providing the service to a third-party vendor, pays the vendor a fee for the service, and then, without providing an additional service, charges homeowners seeking mortgages a higher fee for the settlement service than that which the provider paid to the third-party vendor.").

3. For example, an electronic LexisNexis search performed on November 21, 2005, of "All News Sources, English, Full Text" with no date restrictions with the search terms "RESPA and 8(b) and mortgage and mark up or markup" delivered forty articles.

While mortgage markups are not a hot topic in the mainstream media compared to the broader issue of predatory lending,[4] the issue has received ample attention lately in the form of lawsuits.[5] A mortgage markup occurs when a mortgage settlement service provider outsources a settlement service, such as a credit check, to a third party,[6] and then charges the consumer in excess of what the third party charged the service provider and pockets the difference.[7]

Mortgage markups are generally one-time charges, and, according to reported cases, they usually consist of generally modest increases.[8] Therefore, unlike predatory lending, markups are likely to have no effect on the consumer's ability to purchase and keep a home. However, in the aggregate, these markups can significantly impact the balance sheets of large corporate lenders.[9] Mortgage settlement practices for federal loans are governed by the Real Estate Settlement Procedures Act (RESPA).[10] Section 8 of RESPA addresses kickbacks and unearned fees.[11]

Recently, federal appeals courts across the country heard cases concerning mortgage markups,[12] resulting in a split among six circuits. The U.S. Courts of Appeals for the Fourth, Seventh, and Eighth Circuits

4. For example, an electronic LexisNexis search performed on November 21, 2005, of "All News Sources, English, Full Text" with no date restrictions with the search terms "predatory lend!" was interrupted because more than three thousand documents were found. When date restrictions were added to show cases in the previous two years, the same result occurred. Finally, a search that was restricted to the past year turned up 2,606 results.

5. *See Kruse*, 383 F.3d 49; Santiago v. GMAC Mortgage Group, Inc., 417 F.3d 384 (3d Cir. 2005); Boulware v. Crossland Mortgage Corp., 291 F.3d 261 (4th Cir. 2002); Krzalic v. Republic Title Co., 314 F.3d 875 (7th Cir. 2002); Haug v. Bank of Am., 317 F.3d 832 (8th Cir. 2003); *and* Sosa v. Chase Manhattan Mortgage Corp., 348 F.3d 979 (11th Cir. 2003).

6. See *Kruse*, 383 F.3d at 53.

7. *Id*.

8. For example, the plaintiff in *Krzalic* was charged $14 more by a closing agent than the closing agent was charged to provide this service. 314 F.3d at 877. In a Seventh Circuit case, the two plaintiffs were charged $8 and $14 more for recording services than their mortgage service provider paid to have the services done. *See* Echevarria v. Chi. Title & Trust Co., 256 F.3d 623, 624 (7th Cir. 2001).

9. For example, according to the June 16, 2004, edition of *PR Newswire*, Equity Group Financial, recently acquired by a larger corporation, averaged 2,500 mortgage customers per year. *Michigan-Based EGF Acquired by First Horizon Home Loans*, PR NEWSWIRE, June 16, 2004. If, in theory, the company marked up each mortgage by $50, the company would make $125,000 per year from mortgage markups. According to the LexisNexis Inactive Business Database, EGF's yearly sales ranged from $2.5 million to $5 million. Therefore, in this hypothetical situation, mortgage markups would constitute 2.5% to 5% of its total sales.

10. Real Estate Settlement Procedures Act, 12 U.S.C. § 2601–2617 (2000).

11. 12 U.S.C. § 2607.

12. *See Kruse*, 383 F.3d 49; Santiago v. GMAC Mortgage Group, Inc., 417 F.3d 384 (3d Cir. 2005); Boulware v. Crossland Mortgage Corp., 291 F.3d 261 (4th Cir. 2002); *Krzalic*, 314 F.3d 875; Haug v. Bank of Am., 317 F.3d 832 (8th Cir. 2003); *and* Sosa v. Chase Manhattan Mortgage Corp., 348 F.3d 979 (11th Cir. 2003).

held RESPA unambiguously permits mortgage markups.[13] The Second Circuit held RESPA is ambiguous as to whether mortgage markups are prohibited;[14] therefore, an interpretation by the Secretary of Housing and Urban Development (HUD) that markups are prohibited is binding.[15] Finally, the Third and Eleventh Circuits held that RESPA unambiguously provides a cause of action for consumers against lenders engaging in mortgage markups.[16] As of the date of this Comment, no case is pending before the Supreme Court to determine finally for all areas of the country if mortgage markups are permissible under RESPA.

Part II of this Comment examines the language of RESPA, the federal regulation promulgated by HUD, the regulation's policy statement, and the circuit court cases. Part III analyzes why RESPA unambiguously permits mortgage markups. Part IV of this Comment discusses the pros and cons of amending RESPA to prohibit mortgage markups as well as why the best policy would be to amend RESPA so that it prohibits a narrow category of mortgage markups. Finally, Part V concludes that RESPA clearly and unambiguously allows mortgage markups, HUD cannot administratively change the statute, and Congress should consider amending the statute to increase protection to consumers.

II. RESPA, THE HUD REGULATION & POLICY STATEMENT, & THE CIRCUIT COURT CASES

This Part conveys and explains the relevant law concerning mortgage markups. First, it explains the relevant provisions of RESPA, the statute controlling real estate settlement procedures, including its legislative history. Second, it discusses the authority RESPA gives to the HUD Secretary to implement the statute and the resulting regulation and policy statement. Third, this Part reviews the federal circuit court cases that have decided whether mortgage markups are permissible under RESPA.

13. *Boulware*, 291 F.3d at 263; *Haug*, 317 F.3d at 836; *Krzalic*, 314 F.3d at 880–81.

14. *Kruse*, 383 F.3d at 53.

15. *Id*. at 61–62. HUD is a cabinet-level agency. According to the HUD website, the agency's mission is:

> to increase homeownership, support community development and increase access to affordable housing free from discrimination. To fulfill this mission, HUD will embrace high standards of ethics, management and accountability and forge new partnerships—particularly with faith-based and community organizations—that leverage resources and improve HUD's ability to be effective on the community level.

Homes and Communities, U.S. Department of Housing & Urban Development, HUD's Mission (Oct. 3, 2003), http://www.hud.gov/library/bookshelf12/hudmission.cfm.

16. *Santiago*, 417 F.3d at 389; *Sosa*, 348 F.3d at 982–83.

A. The Real Estate Settlement Procedures Act

Congress enacted RESPA[17] late in 1974, in response to legislative findings that consumers need protection against high settlement charges and abusive practices.[18] Both the text of the Act itself and the committee reports prior to its passage are significant in discerning congressional intent.

1. The Committee Reports

The Senate and House Committee Reports contain similar information pertaining to what is now section 8 of RESPA.[19] First, the reports demonstrate that Congress did not intend for RESPA to directly regulate settlement costs.[20] Both the House and the Senate considered bills that would directly regulate the costs of real estate settlement services rather than regulating the business practices involved,[21] and both houses decided the statute would work better if it did not directly regulate prices.[22] The Senate Report listed reasons against the government fixing rates: (1) no evidence suggests that settlement charges are unreasonably high throughout the country; (2) more practical ways exist to address the problem; (3) the federal government should not impose rate regulations on all businesses supplying settlement services because of abuses in certain areas of the country; (4) implementing rate regulations would require a large bureaucracy within HUD; and (5) such federal regulations would infringe on state powers.[23]

Second, in the section entitled "Explanation of the Bill," the Senate Report says:

> Section [8][24] is intended to prohibit all kickback or referral fee arrangements whereby any payment is made or "thing of value" furnished

17. 12 U.S.C. §§ 2601–2617 (2000).

18. 12 U.S.C. § 2601.

19. S. REP. NO. 93-866 (1974), *reprinted in* 1974 U.S.C.C.A.N. 6546; H.R. REP. NO. 93-1177 (1974) (Conf. Rep.), *reprinted in* 1974 U.S.C.C.A.N. 6569. This Comment will mainly discuss the Senate Report.

20. S. REP. NO. 93-866 at 3–4, *reprinted in* 1974 U.S.C.C.A.N. at 6547–48; H.R. REP. NO. 93-1177 at 4.

21. S. REP. NO. 93-866 at 2–3, *reprinted in* 1974 U.S.C.C.A.N. at 6547–48; H.R. REP. NO. 93-1177 at 3-4.

22. *See supra* note 21.

23. S. REP. NO. 93-866 at 4-5, *reprinted in* 1974 U.S.C.C.A.N. at 6549–50.

24. In this Report, this provision was listed as section 7. *Id*. at 6. It eventually became section 8. *See* 12 U.S.C. § 8 (2000).

> for the referral of real estate settlement business. The section also prohibits a person or company that renders settlement service from giving or rebating any portion of the charge to any other person except in return for services actually performed.[25]

The report further explains that kickbacks and unearned commissions are commonly used as inducements to those who refer settlement services, and it gives examples of what practices the new statute would prohibit.[26] Though the report could not anticipate every instance in which a business practice could violate the new statute, each example listed involves two or more parties splitting a fee.[27]

2. The Current Real Estate Settlement Procedures Act

The RESPA provisions require specific disclosures to consumers; elimination of referral fees and kickbacks that increase the cost of settlement to consumers; a reduction in the amount of money consumers must keep in escrow accounts; and reform in record keeping.[28] RESPA also provides authority to the HUD secretary to prescribe and implement rules to carry out the purpose of RESPA.[29]

Sections 8(a) and (b) of RESPA address the elimination of kickbacks and overcharges. The provisions read:

> § 2607. Prohibition against kickbacks and unearned fees
> (a) Business referrals. 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.
> (b) Splitting charges. 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.[30]

25. S. REP. NO. 93-866 at 6, *reprinted in* 1974 U.S.C.C.A.N. at 6551.

26. *Id*.

27. *Id*.

28. 12 U.S.C. §§ 2601–2617.

29. *Id.* § 2617.

30. *Id.* § 2607. Sections 8(c) provides exceptions to 8(a) and (b). Section 8(d) provides penalties for violating (a) and (b). *Id*.

B. Authority of the HUD Secretary, Regulation X, and the 2001 Policy Statement

1. Authority of the HUD Secretary

By enacting RESPA, Congress expressly conveyed authority to the Secretary of HUD to make rules that implement the statute.[31] The relevant provision reads, "§ 2617. Authority of the Secretary. (a) The Secretary is authorized to prescribe such rules and regulations, to make such interpretations, and to grant such reasonable exemptions for classes of transactions, as may be necessary to achieve the purposes of this Act."[32]

2. Regulation X and Deference to Federal Regulations

Regulation X was promulgated by the HUD secretary in 1992.[33] In making this regulation, the HUD Secretary attempted to clarify the agency's position on unearned fees by including the sentence: "A charge by a person for which no or nominal services are performed or for which duplicative fees are charged is an unearned fee and violates this section."[34]

The Supreme Court has determined when agency rules, such as Regulation X, will receive judicial deference. In *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, the Court identified two questions courts must ask to determine whether to accord deference to an agency's construction of a statute that the agency administers.[35] The court must first determine if Congress has directly and unambiguously addressed the question at issue.[36] If so, the court and the agency must defer to Congress.[37] However, if the statute does not clearly address the issue, the court must determine if the agency's construction of the statute is reasonable.[38]

31. 12 U.S.C. § 2617.
32. *Id.* The remainder of the section expounds on the Secretary's authority and liabilities.
33. 24 C.F.R. § 3500.14 (2006).
34. *Id*.
35. 467 U.S. 837, 842 (1984).
36. *Id*.
37. *Id*.
38. *Id*. at 842–43.

3. HUD's 2001 Policy Statement and Deference Due to Policy Statements

The Seventh Circuit decided *Echevarria v. Chicago Title & Trust Co*. in 2001.[39] In that case, the court held mortgage markups were permissible under RESPA, concluding, "Absent a formal commitment by HUD to an opposing position, we decline to overrule our established RESPA § 8(b) case law."[40] In response to this invitation, HUD issued Policy 2001-1 to clarify the issue of unearned fees under RESPA 8(b).[41]

In its policy statement, HUD unambiguously states that fees for anything other than goods or services performed are prohibited.[42] It defined unearned fees as those where "one settlement service provider marks-up the cost of the services performed or goods provided by another settlement service provider without providing additional actual, necessary, and distinct services, goods, or facilities to justify the additional charge."[43]

The Supreme Court in *Christensen v. Harris County* addressed what deference should be given to policy statements.[44] The Court held policy statements, unlike agency rules that have gone through the notice and comment process, are entitled to respect as a persuasive authority, but "those in opinion letters—like interpretations contained in policy statements, agency manuals, and enforcement guidelines, all of which lack the force of law—do not warrant *Chevron*-style deference."[45] Therefore, the 2001 HUD policy statement is merely persuasive and does not warrant the deference described in the *Chevron* case.

39. 256 F.3d 623 (7th Cir. 2001).

40. *Id*. at 630 (citing Mercado v. Calumet Fed. Sav. & Loan Ass'n, 763 F.2d 269 (1985)).

41. 66 Fed. Reg. 53,052 (Oct. 18, 2001).

42. *Id*. at 53,058 ("This Statement of Policy reaffirms HUD's existing, long-standing interpretation of section 8(b) of RESPA. Sections 8(a) and (b) of RESPA contain distinct prohibitions. Section 8(a) prohibits the giving or acceptance of any payment pursuant to an agreement or understanding for the referral of settlement service business involving a federally related mortgage loan; it is intended to eliminate kickbacks or compensated referral arrangements among settlement service providers. Section 8(b) prohibits the giving or accepting of any portion, split, or percentage of any charge other than for goods or facilities provided or services performed; it is intended to eliminate unearned fees. Such fees are contrary to the Congressional finding when enacting RESPA that consumers need protection from unnecessarily high settlement charges.").

43. *Id* at 53,057. Also in the category of unearned fees were cases where two or more persons split a settlement fees if any part of the fee was unearned and where a single lender charges an excessive fee where no work or nominal or duplicative work is done. The Policy Statement did not limit unearned fees to only occurring in these three cases.

44. Christensen v. Harris County, 529 U.S. 576, 587 (2000).

45. *Id*.

C. Cases Holding Mortgage Markups Are Permissible

The Fourth, Seventh, and Eighth Circuits have held that mortgage markups are permissible under RESPA.[46] This subpart describes the facts and reasoning of three cases decided in these circuits.

1. Fourth Circuit: *Boulware v. Crossland Mortgage Corp.*

The plaintiff in *Boulware* alleged the defendant charged her $65 for a $15 credit report without performing any additional services.[47] She sought civil remedies under RESPA and certification of a class of all parties who received similar mortgages from the defendant in the past year.[48] The Fourth Circuit held RESPA provides no cause of action under sections 8(a) and (b).[49]

First, the court determined the plain language of the statute makes clear Congress did not intend RESPA to apply to every overcharge or to be a price control provision.[50] The language "portion, split or percentage" clearly requires a third party in order to violate section 8(b).[51] Furthermore, the statute reads, "No person shall give and no person shall accept."[52] This provision, if the court interpreted the statute as the plaintiff suggests, would make the consumer and the service provider jointly liable for its violation.[53] Therefore, the plaintiff herself would be potentially liable for violating the statute.[54] The purpose of RESPA is to protect consumers, so it is irrational to conclude Congress intended to make consumers liable in such a situation.[55]

Second, the court addressed the relationship between sections 8(a) and (b) of RESPA.[56] The plaintiff argued that to interpret the two sections as prohibiting only kickbacks would render the provisions

46. Boulware v. Crossland Mortgage Corp., 291 F.3d 261 (4th Cir. 2002); Haug v. Bank of Am., 317 F.3d 832 (8th Cir. 2003); Krzalic v. Republic Title Co., 314 F.3d 875 (7th Cir. 2002).

47. *Boulware*, 291 F.3d at 264.

48. *Id*. at 263–64.

49. *Id*. at 265 ("The plain language of § 8(b) makes clear that it does not apply to every overcharge for a real estate settlement service and that § 8(b) is not a broad price-control provision. Therefore, § 8(b) only prohibits overcharges when a 'portion' or 'percentage' of the overcharge is kicked back to or 'split' with a third party.").

50. *Id*.

51. *Id*. at 265–66.

52. *Id*.

53. *Id*. at 265.

54. *Id*.

55. *Id*. at 266.

56. *Id.*

redundant.[57] However, the court compared the two sections and determined they prohibit different actions.[58] Though both sections intend to eliminate kickbacks, section 8(a) concerns overcharges to the consumer for services that are performed, while section 8(b) addresses charges for services that are not actually performed.[59]

Third, the plaintiff argued the court should defer to HUD's interpretation of section 8(b) in Regulation X and in its 2001 policy statement prohibiting mortgage markups.[60] The court, citing *Chevron*, held no deference to HUD was due because RESPA clearly and unambiguously permits the markups alleged by the plaintiff.[61]

Finally, the court addressed congressional intent.[62] The plaintiff argued Congress intended to reach the markups she alleged the defendant charged.[63] The court denied her argument, reasoning that if Congress intended to prohibit all overcharges in settlement services, it would have written section 8(b) to include all settlement fees.[64]

2. Seventh Circuit: *Krzalic v. Republic Title Co.*

The plaintiffs in *Krzalic* alleged the defendant violated section 8(b) of RESPA by charging them $50 for recording their mortgage when it only cost the defendant $36.[65] The Seventh Circuit found no RESPA violation.[66]

The court first looked at the HUD 2001 policy statement, which clearly indicates that HUD views section 8(b) as extending beyond situations where more than one party splits an unearned fee.[67] The court acknowledged that if a federal statute is unclear and a federal agency is authorized to interpret it, then under *Chevron*, the agency's interpretation is binding.[68] However, the court determined that *Chevron* deference was not warranted under these facts because RESPA unambiguously requires a third party in order for a violation of RESPA

57. *Id*.
58. *Id*.
59. *Id*.
60. *Id*. at 266–67.
61. *Id*. at 267.
62. *Id*.
63. *Id*.
64. *Id.*
65. Krzalic v. Republic Title Co., 314 F.3d 875, 877 (7th Cir. 2002).
66. *Id*. at 879.
67. *Id*. at 877.
68. *Id*.

to occur.[69] The defendant did not share the fee in question with any other party;[70] therefore, the HUD policy statement had no effect on the plaintiff's cause of action under RESPA.[71]

Next, the court concluded the facts of the case reinforced the consequences of the statutory language.[72] The plaintiff argued section 8(b) prohibits lenders from repricing charges it incurs and passing along the extra charges to the consumer.[73] The court determined that because RESPA is not a price-control provision, the additional charges make no difference in the bottom line.[74] For example, if a lender wants the extra few dollars, it could raise the closing fee to make up the difference instead of pocketing the markup.[75] The bottom line is the same—the consumer is charged the same whether a service is marked up or the lender increases the price for a service it provides.[76]

3. Eighth Circuit: *Haug v. Bank of America*

The plaintiffs in *Haug* alleged they paid $50 for a credit report that cost the defendant $15 or less and were charged $300 and $25 respectively for an appraisal and document delivery services that cost the defendant "significantly less."[77] The Eighth Circuit reversed the lower court's denial of a 12(b)(6) motion to dismiss.[78]

First, citing *Boulware* and *Krzalic*, the court held the plain language of section 8(b) makes it an anti-kickback provision, requiring two or more parties to share a fee before there is a violation.[79] The plaintiff argued the word "and" in the phrase "no person shall give and no person

69. *Id*. at 877–79 (discussing at length administrative law and deference due to administrative agencies).

70. *Id*. at 879.

71. *Id*. at 881. The court dismisses HUD's reasons for issuing the statement. HUD issued its Policy Statement 2001 in response to the Seventh's Circuit's decision in *Echevarria v. Chicago Title & Trust Co*. However, the Seventh Circuit in this case described the process as, "One fine day the policy statement simply appeared in the Federal Register. No public process preceded it—or at least the part of it that concerns section 8(b), for the policy statement deals with other matters as well." *Krzalic*, 314 F.3d at 881.

72. *Id*. at 880–81.

73. *Id*. at 880.

74. *Id*.

75. *Id*.

76. *Id*. The court ridiculed HUD's prediction in its amicus brief that markups puts home ownership out of reach for many people, calling is "silly" and noting that a $14 increase on a $165,000 purchase would likely not force a potential buyer to continue renting. *Id*. at 881, 882.

77. Haug v. Bank of Am., 317 F.3d 832, 834–35 (8th Cir. 2003).

78. *Id*. at 834.

79. *Id*. at 836.

shall accept" means any person alone can violate RESPA by accepting or giving an unearned fee, rather than just multiple parties splitting a fee.[80] However, the court disagreed, holding that in order for a violation of section 8(b) to occur, two or more parties must split a settlement fee.[81]

Next, the court addressed *United States v. Gannon*, wherein an employee of a county recorder's office violated section 8(b) when he received and kept for himself fees in excess of the filing fees.[82] This court quoted *Gannon*'s holding that a single person can violate the statute if, in his official capacity, he receives monies in addition to those charged for services performed.[83] The court noted that subsequent cases distinguished *Gannon* by holding that since the employee accepted the money in his official capacity as a government employee, but kept the money in his personal capacity, he was virtually acting as two entities.[84]

Third, the court considered legislative history.[85] Congress considered two bills, one with price control and one without.[86] Congress enacted the bill that regulated the procedures of real estate settlement rather than the bill that regulated the actual costs.[87] This history supports section 8(b) as an anti-kickback provision rather than a prohibition on the types of overcharges alleged in this case.[88]

D. Case Holding RESPA Is Ambiguous and Deferring to the HUD Policy Statement

The plaintiffs in *Kruse v. Wells Fargo Home Mortgage, Inc.* alleged the defendants engaged in both overcharges and markups.[89] The Second Circuit distinguished overcharges from markups.[90] While mortgage markups occur when the lender outsources a service, marks up the price, and retains the windfall for itself, overcharges occur when the lender itself provides a service, rather than outsourcing, and charges the consumer more than it cost the lender to perform the service.[91] The

80. *Id*.
81. *Id*.
82. *Id*. at 836–37 (discussing United States v. Gannon, 684 F.2d 433 (7th Cir. 1981)).
83. *Id*. at 837.
84. *Id*.
85. *Id*. at 837–38.
86. *Id*. at 837.
87. *Id*. at 837–38.
88. *Id*.
89. 383 F.3d 49, 53 (2d Cir. 2004).
90. *Id*.
91. *Id*.

plaintiff alleged the defendant charged as much as twenty-five times the amount it cost the defendant to provide the service.[92] The court held RESPA permits overcharges because section 8(b) is not a price control provision and does not address what is or is not a reasonable charge.[93]

The plaintiffs also alleged the defendants retained third parties to perform tax services, flood certification, and document preparation, charging the plaintiffs substantially more for these services than what the defendants paid the third parties.[94] To determine whether mortgage markups are permissible under RESPA, the court examined the text of section 8(b) of RESPA and determined that the word "and" in the clause "[n]o person shall give and no person shall accept" could have one of two meanings: (1) a single person shall not give or accept money for services not actually performed, or (2) two people cannot split the proceeds from a charge for services not actually performed.[95] The court decided section 8(b) was not clear in its meaning and had to determine what deference, if any, it should accord to the HUD policy statement.[96] The court concluded it should defer to the policy statement regarding markups, making mortgage markups a violation of RESPA. [97] The court reached this conclusion in part because RESPA specifically authorizes the HUD Secretary to prescribe regulations to achieve RESPA's purposes, and the HUD Secretary promulgated the policy statement in exercise of that authority.[98]

E. Cases Holding RESPA Unambiguously Prohibits Mortgage Markups

The Third and Eleventh Circuits have held that RESPA's language unambiguously provides a cause of action for mortgage markups.

1. Eleventh Circuit: *Sosa v. Chase Manhattan Mortgage Corp.*

In *Sosa*, the plaintiff alleged the defendant used a third-party courier service and charged them a $50 fee, which was in excess of what the defendant paid for the service, and pocketed the difference.[99]

92. *Id*.
93. *Id.* at 57.
94. *Id*. at 53.
95. *Id*. at 57–58.
96. *Id*. at 58.
97. *Id*. at 61.
98. *Id*. at 60.
99. Sosa v. Chase Manhattan Mortgage Corp., 348 F.3d 979, 981 (11th Cir. 2003).

First, the Eleventh Circuit pointed out that the purpose of RESPA was to reduce costs to consumers for real estate settlement fees.[100] The court cited a Senate Committee Report, and stated, "Of particular interest to Congress was the payment by settlement service providers of commissions or fees in exchange for the referral of a consumer's business.[101] Congress similarly wished to eliminate fees for which no service was performed and no goods were furnished."[102]

The court next addressed the language of sections 8(a) and (b) of RESPA and explained their grammatical meaning.[103] The court determined the word "and" connects the clauses, "no person shall give" and "no person shall accept," providing a separate subject and verb.[104] Therefore, the "and" prohibits a person from either giving or accepting a portion, split, or percentage of any settlement charge regardless of whether there is another culpable party.[105] The court further pointed out the irrational results of reading the statute otherwise.[106] If one party attempted to provide a referral fee for a settlement service to a second party, and the second party refused, the first party could not be held liable for its own behavior.[107] The court also refuted the argument that a consumer could potentially be held liable as a "giver" of an unearned fee.[108] The statute only prohibits the giving of fees other than for services performed.[109] Because a consumer would only pay for an expected service, a consumer could not violate the statute.[110]

Despite holding that a single party can violate sections 8(a) and (b) of RESPA, the court held that the plaintiff failed to state a cause of action.[111] The statute specifies that a violation occurs when there are charges other than for services performed.[112] Because the defendant arranged for the third party services, the plaintiff received a benefit.[113] Therefore, the defendant provided an additional service and was not in

100. *Id*.
101. *Id*.
102. *Id*. at 981 (internal citations omitted).
103. *Id*. at 981–82.
104. *Id*. at 982.
105. *Id*.
106. *Id*. at 983.
107. *Id*.
108. *Id*.
109. *Id*.
110. *Id*.
111. *Id*. at 983–84.
112. *Id*. at 983.
113. *Id*. at 983–84.

violation of section 8(b) of RESPA.[114]

2. Third Circuit: *Santiago v. GMAC Mortgage Group, Inc.*

In the most recent decision about mortgage markups, the Third Circuit held that RESPA allows no cause of action for overcharges, but that it does provide a cause of action for mortgage markups.[115]

The plaintiff in *Santiago* alleged he was charged $85 for tax service and $20 flood certification, services the defendant outsourced to third parties, and the defendant charged him in excess of the amount the defendant paid to the third parties for these services.[116] The plaintiff also alleged he paid a $250 funding fee, a service the defendant performed, though the reasonable value was only $20.[117] The Third Circuit, like the Eleventh Circuit, held that overcharges are permissible, but markups violate RESPA.[118]

First, the court held that overcharges are permitted because RESPA is not a price control measure.[119] To hold that the overcharges alleged in this case violate RESPA would mean discerning between a reasonable and unreasonable charge for a real estate settlement service.[120] Nowhere in RESPA does the statute define an unreasonable charge.[121] Therefore, overcharges cannot be a violation of the statute.[122]

On the issue of mortgage markups, both the plaintiff and HUD argued that the "and" in section 8(b) creates two separate prohibitions: both receiving and accepting a fee other than for a service provided violates RESPA.[123] The defendant argued the statute prohibits only kickbacks.[124] The court determined both readings are plausible, but the results are the same.[125] Regardless of whether the defendant engages in kickbacks or markups, the defendant's conduct puts the parties in the same economic position—the third party still keeps the charge, the lender still gets the additional funds, and the consumer still is out the additional money.[126]

114. *Id*. at 984.
115. Santiago v. GMAC Mortgage Group, Inc., 417 F.3d 384, 385 (3d Cir. 2005).
116. *Id*. at 386.
117. *Id*.
118. *Id*. at 385.
119. *Id*. at 387.
120. *Id*.
121. *Id.*
122. *Id*.
123. *Id*. at 388.
124. *Id*.
125. *Id*.
126. *Id*. at 388–89.

Next, the court compared the context of section 8(b) to section 8(a).[127] Section 8(a) is entitled "Business referrals," and it prohibits accepting fees, kickbacks, or things of value.[128] Section 8(b) is entitled "Splitting charges," and it prohibits giving or accepting any portion, split, or percentage of charges.[129] Therefore, because "kickbacks" appears in section 8(a) and not in section 8(b), section 8(b) must provide for situations other than kickbacks.[130] These provisions allow a cause of action under RESPA.[131] Therefore, the court remanded the case to determine whether the defendant provided additional services.[132]

Finally, the court, in a footnote, determined that if it had found the text of RESPA to be ambiguous, it would have then deferred to HUD's policy statement.[133]

III. RESPA ALLOWS MORTGAGE MARKUPS

This Part argues that section 8 of RESPA clearly and unambiguously permits a lender to charge a consumer more than it is charged for a service by a third party, and to pocket the difference. The statutory language and the legislative history leave no doubt about Congress's intent, rendering moot any rule or policy statement created by HUD.

A. RESPA Requires Two or More Parties for a Violation to Occur.

The title of section 8 of RESPA is, "Prohibition against kickbacks and unearned fees."[134] While the broad title alone might suggest a prohibition against any unearned fees, a reading of the text of the statute and the titles of the subsections reveal the proper meaning of the statute. Section 8(a) of RESPA reads:

> Business referrals. 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.[135]

127. *Id*. at 389.
128. *Id*.
129. *Id*.
130. *Id*.
131. *Id*.
132. *Id*.
133. *Id*. at 389 n.4.
134. 12 U.S.C. § 2607 (2000).
135. *Id*.

This section does not mention unearned fees. Therefore, section 8(a) pertains solely to business referrals. It prohibits one settlement service provider from offering money or other valuables in return for the referral of business, regardless of whether the costs of the referral are passed on to the consumer. This provision, in light of the congressional committee reports, appears to have been passed to prevent service providers from obtaining customers solely because of a payment to another business, rather than because of competence or good customer service.[136]

In contrast, section 8(b) reaches more broadly. It reads, "(b) Splitting charges. 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."[137] This section goes beyond regulating referrals. It governs a mortgage settlement service provider that accepts or gives any part of a fee that it did not earn. Though proponents of finding that mortgage markups violate RESPA may argue this provision prohibits all overcharges, it only prohibits unearned fees that are shared between two or more parties. To expand prohibition to all unearned fees would stretch the reach of RESPA beyond its plain meaning and congressional intent.

First, the title of section 8(b) is "Splitting Charges." The word "split" is defined: "to divide into parts or portions."[138] A single party is unable to split anything with itself—this would change the meaning of the word "split." When a mortgage settlement service provider keeps an excess charge for itself, it is not splitting anything; it merely keeps the windfall. To read the statute as prohibiting a single lender from keeping this type of windfall is to expand the statute's consumer protection purpose beyond the clear meaning of the statute's language.

Second, it is irrational to hold that overcharges, like those alleged in *Kruse* and *Santiago*, are permissible under RESPA but mortgage markups are not. Nothing in the language of the statute provides this distinction. The statute addresses neither lenders that overcharge for their own services nor lenders that overcharge for services they have outsourced. It addresses only settlement service providers that split an unearned fee with another party.

Third, courts held that the "and" in the clause "[n]o person shall give

136. S. REP. NO. 93-866, at 6 (1974), *reprinted in* 1974 U.S.C.C.A.N. 6546, 6551–52; H.R. REP. NO. 93-1177 at 7-8 (1974).

137. 12 U.S.C. § 2607.

138. Merriam-Webster Online Dictionary, http://www.m-w.com/dictionary/split (last visited May 24, 2006).

and no person shall accept any portion, split, or percentage [of an unearned fee]"[139] creates two separate prohibitions. These courts erred by ignoring the irrational results of that holding. To find that a single mortgage service provider could be liable for accepting an unearned fee would automatically make the consumer the "giver" of the unearned fee. RESPA's purpose is to protect consumers. To ignore this consequence and simply say courts would not hold consumers liable is to disregard the language of the statute.

Fourth, some may argue a mortgage markup has the same effect as a kickback or referral—the consumer pays the same amount. While it might be true that the consumer is paying the same amount, prohibiting kickbacks and referrals also eliminates bribes from incompetent or devious service providers who are trying to get more business. For example, if RESPA did not exist, an attorney who performed title searches could get referrals by paying off the mortgage lender rather than by performing good work. As will be discussed later in the Comment, this particular consumer protection was of special concern to Congress. The effect of RESPA goes beyond the mere dollar amounts consumers ultimately pay for their home mortgage.

Finally, Congress did not intend RESPA to be a price regulation provision for real estate settlement services. Holding mortgage markups to be prohibited effectively would be a price control provision. As noted in the *Krzalic* decision, if a mortgage settlement provider really wanted that extra few dollars, it could simply increase the cost of another service it provides.[140] Without a more direct statute, we cannot assume Congress intended to control the prices for settlement services indirectly.

B. HUD's Regulation X and Policy Statement

RESPA authorizes the Secretary of HUD "to prescribe such rules and regulations, to make such interpretations, and to grant such reasonable exemptions for classes of transactions, as may be necessary to achieve the purposes of this Act."[141] Therefore, the creation of Regulation X was clearly within the authority of the HUD Secretary.

The section of Regulation X that addresses overcharges attempts to clarify RESPA. It adds to the provisions, "A charge by a person for which no or nominal services are performed or for which duplicative

139. 12 U.S.C. § 2607.

140. Krzalic v. Republic Title Co., 314 F.3d 880 (7th Cir. 2002).

141. 12 U.S.C. § 2617.

fees are charged is an unearned fee and violates this section."[142]

This provision, even if properly added to RESPA, still would not clearly prohibit mortgage markups. The context of the added sentence is significant. It directly follows the provision prohibiting parties from giving or accepting a split, portion, or percentage of an unearned fee, which suggests this sentence is about multiple parties rather than a single party pocketing a windfall. In addition, a service provider could argue that, simply by arranging for a third party to perform a service, it provides a valuable service for the consumer; therefore, the fee is not unearned.

However, if we assume that Regulation X's addition prohibits mortgage markups, under *Chevron*, an agency's regulation is not binding if the statute's meaning is clear and unambiguous.[143] As outlined above, RESPA clearly and unambiguously addresses only kickbacks to third parties. To conclude otherwise is to read the statute more broadly than Congress intended. Therefore, in determining if Regulation X is binding on the courts, courts need not go beyond the first step in *Chevron*. If a statute is clear and unambiguous, the court must follow the statute, and the agency's rule deserves no deference.

HUD also created its 2001 policy statement in reaction to a Seventh Circuit case holding that mortgage markups were permissible under RESPA.[144] The policy statement very clearly stated RESPA prohibits mortgage markups. Again, although HUD would like to expand the meaning of RESPA to include mortgage markups, the agency simply is overstepping its bounds. Under *Christenson*, a policy statement may be a persuasive authority, but it is not binding upon a court, especially when, as in this case, the statute unambiguously says something the policy statement does not.

Through Regulation X and its 2001 policy statement, HUD appears to be attempting to expand a statute administratively where Congress did not go as far to protect consumers as HUD wished. Though HUD's consumer protection purpose may be noble, an administrative agency simply cannot change a statute because it thinks the statute should say something else. HUD is attempting to broaden the statute's reach beyond what any interpretation can logically allow. While HUD is the

142. 24 C.F.R § 3500.14 (2006).

143. Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837, 842–43 (1984).

144. "The Court of Appeals for the Seventh Circuit rendered its conclusion in *Echevarria* 'absent a formal commitment by HUD to an opposing position . . . .' In issuing this Statement of Policy pursuant to section 19(a), HUD reiterates its position on unearned fees under section 8(b) of RESPA, which HUD regards as long standing." 66 Fed. Reg. 53,052, 53,053 (Oct. 18, 2001) (quoting Echevarria v. Chi. Title & Trust Co., 256 F.3d 623, 630 (7th Cir. 2001)).

agency possessing expertise on housing issues in our country, such expertise is irrelevant. If Congress wanted the statute to reach beyond multiple-party kickbacks, it would have written the statute to reflect that desire. HUD, like all federal agencies, is part of the executive branch and cannot create law. Furthermore, courts cannot defer to HUD simply because of its expertise on housing issues. Courts must follow the clear language of the statute that Congress created. To ignore Congress's intention concerning a law that is clearly constitutional is to infringe upon the separation of powers.[145]

C. Legislative History

When Congress passed RESPA in 1974, the government intended section 8 to prevent business referrals for profit and kickbacks.

The reports make clear that RESPA's purpose is not to regulate the prices of settlement services. The Senate Report begins by describing the first legislative attempt to control real estate settlement costs.[146] Section 701 of the Emergency Home Finance Act of 1970 allowed HUD and the Veterans' Administration (VA) to regulate the amount of settlement costs allowable in HUD and VA mortgage loans.[147] In enacting RESPA, Congress intended to repeal this provision of the Emergency Home Finance Act.[148]

The Senate and House considered other bills in addition to the bill that Congress eventually enacted, which became REPSA.[149] The rejected bills contained such proposals as authorizing direct regulation of real estate settlement costs and requiring the lender to bear certain settlement costs. Instead, Congress decided to "regulate the underlying business relationships and procedures of which the costs are a function."[150] Therefore, RESPA does not regulate the price that lenders can charge for home mortgage settlement services; it only regulates the behavior of the service providers. Clearly, without an amendment to RESPA allowing some semblance of price regulation, mortgage markups are permissible. Prohibiting a lender from charging above the actual cost of an outsourced service regulates the price of the service

145. The concept of separation of powers has been recognized since 1803 in *Marbury v. Madison*, 5 U.S. 137 (1803).

146. S. REP. NO. 93-866, at 1 (1974), *reprinted in* 1974 U.S.C.C.A.N. 6546, 6546–47.

147. *Id.*, *reprinted in* 1974 U.S.C.C.A.N. at 6546–47.

148. *Id*. at 4, *reprinted in* 1974 U.S.C.C.A.N. at 6548.

149. *Id*. at 2–4, *reprinted in* 1974 U.S.C.C.A.N. at 6547–48; H.R. REP. NO. 93-1177, at 3-4 (1974).

150. S. REP. NO. 93-866 at 3, *reprinted in* 1974 U.S.C.C.A.N. at 6548.

rather than the underlying business relationships in which a lender engages.

The congressional reports, in their explanations of what has become section 8 of RESPA, never once refer to a single party when discussing the provisions.[151] In the "Explanation" section of the Senate Report, referrals and kickbacks are specifically prohibited. As discussed in Part II, the report explains that the purposes of this provision are to prohibit business referrals where payments are exchanged for referrals, and to prohibit a company rendering a settlement service from giving any part of the fee to any other person, except for services actually performed. The report goes on to explain that competition among service providers has led them to use payments to encourage referrals, and the report gives examples of conduct prohibited under RESPA. No where in the entire explanation does the report refer to a single service provider. If Congress had intended to hold single service providers liable for retaining a fee in excess of a charge, the Committee Reports and in the statute itself would reflect that intent.

IV. SOLUTIONS FOR AMENDING RESPA

This Part explores the pros and cons of amending RESPA to prohibit mortgage markups, concludes that reasonable mortgage markups should be permitted, and suggests ways Congress could amend the statute without unduly burdening mortgage service providers.

A. Arguments for Amending RESPA to Prohibit Mortgage Markups

This subpart explores reasons for amending RESPA to clearly prohibit mortgage markups. These reasons include promoting RESPA's ultimate purpose, protecting consumers, and deferring to HUD's expertise on housing issues.

Congress enacted RESPA in response to legislative findings that "reforms in the real estate settlement process are needed to insure that consumers throughout the Nation . . . are protected from unnecessarily high settlement charges caused by certain abusive practices."[152] Mortgage markups clearly increase the cost of mortgage settlement to consumers. Therefore, if we assume the markups are unearned fees,[153]

151. *Id*. at 6, *reprinted in* 1974 U.S.C.C.A.N. at 6551–52.

152. 12 U.S.C. § 2601(a) (2000).

153. As discussed in *Sosa* and later in this Comment, markups are arguably not unearned fees but rather the cost to the consumer for the lender arranging these various services. Sosa v. Chase Manhattan Mortgage Corp., 348 F.3d 979, 983–84 (11th Cir. 2003).

then markups are unnecessary costs that serve only to increase the price of obtaining a home mortgage to consumers. Amending RESPA to clearly prohibit mortgage markups would align this section of the statute with the remainder of RESPA.

Another reason to amend RESPA is that individual consumers' interests should be protected over those of large corporations. To understand how mortgage markups can affect a company's bottom line, consider this hypothetical scenario. A large financial services company sells mortgages to 500,000 consumers in one year, the company outsources credit reports, and each consumer is charged $65 for a credit report that costs the company $10. If each consumer pays $55 more for the credit report than what it costs the company, this results in a windfall of $27.5 million to the company. While mortgage markups are, according to published cases, small-to-moderate one-time charges,[154] this additional cost generally produces a greater burden on the individual who is spending money to purchase a home than it will on the company making money off the purchase.[155] Granted, individual consumers will probably not be greatly harmed by this modest additional price; if the consumer already spends $100,000 on a new home and several thousand more for settlement services, an extra $55 will not keep him or her from the American dream of home ownership. However, why should this windfall go to a lender already flush with cash? A person who works hard and saves should not have to contribute to a large lending corporation's millions in net profits.

Amending RESPA to prohibit mortgage markups would also protect consumers who assume the markups are legitimate charges. It is hard to imagine many consumers take the time to comb through their closing statement to identify which charges are marked up and which are not. Purchasing a home is an exciting but stressful time.[156] Trying to understand the necessary steps and amassing the time and money to make the dream of owning a home a reality is a huge stress. Also, despite the disclosures required by RESPA in the Uniform Settlement Statement,[157] unsophisticated homebuyers likely will find it difficult to

154. *See supra* note 8.

155. For example, according to its 2004 Annual Review posted on its web site, in the fiscal year 2004, GMAC Financial Services posted net income of $2.9 billion in the fiscal year 2004. http://www.gmacfs.com/investment/financial_statements/pdf/GMAC_2004_YIR.pdf. In contrast, according to the US Census Bureau, the three-year-average median household income in Ohio for the years 2002–2004 was $44,160. http://www.census.gov/hhes/www/income/income04/statemhi.html.

156. This observation is not the result of a study, but an informal observation by the author based on her own and her friends' and family members' experiences with home-buying.

157. 12 U.S.C. § 2603.

understand the terms and charges represented.[158] These buyers will pay the charges and unknowingly help line the deep pockets of large financial services companies.

Another reason Congress should consider amending RESPA to prohibit mortgage markups is that HUD was created to be the federal expert on housing issues[159] and believes these markups should be prohibited.[160] Although courts cannot defer to HUD's interpretation of a statute when that interpretation conflicts with the plain language and meaning of the statute, Congress can solicit advice from experts in various fields to learn more about a subject before enacting a law.[161] As a lawmaking body with a constituency of citizens that includes mortgage consumers, Congress should defer to reasonable opinions of the federal agency formed to deal with housing issues.

B. Arguments to Permit Mortgage Markups[162]

Marking up prices in the business realm is not new or uncommon. Markups allow a business to survive. The only way a business is able to turn a profit, pay salaries, purchase additional goods to resell, and finance the overhead is to charge consumers more than its own costs for the goods or services. Applying this principle to mortgage settlement services, consider the number of services each homebuyer must obtain before being able to purchase a home. Some of these services include

158. This is an informal observation based not on published statistics but on the author's personal experience. Unsophisticated buyers can include educated people who simply have never purchased a home without the assistance of a parent or spouse.

159. HUD was created by the Department of Housing and Urban Development Act of 1965. 42 U.S.C. § 3531 states in part:

> The Congress hereby declares that the general welfare and security of the Nation and the health and living standards of our people require, as a matter of national purpose, sound development of the Nation's communities and metropolitan areas in which the vast majority of its people live and work.
>
> To carry out ["sound development of the Nation's communities and metropolitan areas"], and in recognition of the increasing importance of housing and urban development in our national life, the Congress finds that establishment of an executive department is desirable to achieve the best administration of the principal programs of the Federal Government which provide assistance for housing and for the development of the Nation's communities.

160. 66 Fed. Reg. at 53,057, 53,059.

161. For example, a February 18, 2006, LexisNexis search of the past ninety days of news stories containing the phrase "testif! before Congress" turned up stories about people testifying on such subjects as patent laws, steroid use in baseball, the Iraq war, and employment programs for veterans.

162. Brief for American Bankers Association et al. as Amici Curiae Supporting Respondents, Wells Fargo Home Mortgage, Inc., et al., (No. 03-7665). Several arguments for allowing mortgage markups in this Comment were sparked by the information in the brief.

the loan broker's work in securing the loan, a home appraisal, a credit report, the lender's inspection, the mortgage insurance application processing, the transfer of the property, a title search, document preparation, and title insurance.[163] The settlement service provider, by gathering and arranging the many services to be rendered, is itself providing a service. The average consumer would spend valuable time arranging these services, and may forget a necessary service or use a disreputable company out of ignorance of the process. The settlement service provider that arranges for everything so that a consumer simply has to sign papers certainly provides a legitimate and valuable additional service.

Another argument against amending RESPA to prohibit mortgage markups is that any amendment short of a direct price control would create a gaping loophole that renders the change moot. Unless Congress chooses to make RESPA a direct price control regulation, a mortgage settlement service provider may charge whatever it wants for services that are provided in-house rather than those services that are outsourced. Therefore, if the statute is changed to prohibit mortgage markups, settlement service providers could respond by greatly increasing the cost of other services it provides in-house. The result is the same: the settlement service provider retains the same amount for the same services, and the consumer pays the same amount. The only difference is how the money from the consumer is allocated.

A final argument for allowing markups is that mortgage settlement service providers sometimes do not know what the price of an outsourced service will be until after settlement. In such cases, providers may use "average pricing" for services.[164] Or, if a provider does not know the exact cost of a settlement service until after the closing, it may charge the consumer an average price.[165] Furthermore, settlement service providers may subscribe to services at a fixed monthly price.[166] If so, there is no way for the service provider to know the exact amount the service will cost until the end of a month when the number of transactions used and their prices can be determined. In either situation, making service providers liable for mortgage markups means the service provider must lower its estimate enough to avoid an eventual marking up of the price, which could lead to a service provider losing money. This would be especially detrimental to small businesses

163. This list was edited from the HUD web site at http://www.hud.gov/offices/hsg/sfh/res/sc3secta.cfm.

164. *See* Brief for American Bankers Association et al., s*upra* note 162, at 6–7.

165. *See id*.

166. *See id.*

that provide mortgage settlement services.

C. Reasonable Mortgage Markups Should be Permitted

Allowing unrestricted mortgage markups harms consumers. According to the HUD website, "Each year, Americans spend approximately $55 billion on closing costs they don't fully understand."[167] A part of this $55 billion is attributable to mortgage markup costs. Although it is likely a moderate or even high markup will deter few people from home ownership, unreasonable markups still have the effect of taking money from consumers to the benefit of large corporations.

However, amending RESPA to prohibit all mortgage markups would put a great burden on businesses that provide mortgage settlement services. First, because of the industry's practice of obtaining a fixed-rate plan and estimating costs unknown prior to the closing, prohibiting all mortgage markups places an unreasonable burden on mortgage service providers. Currently, RESPA provides both civil and criminal liability for its violation. Therefore, if a mortgage service provider in good faith estimates a cost for a service that ultimately costs more than its outsourced price, a statute that makes all mortgage markups illegal will impose both criminal and civil liability on that service provider.

Furthermore, as previously discussed, some sort of markup in price should be permitted. Mortgage service providers that arrange the plethora of services necessary to complete the mortgage settlement process on behalf of a consumer should be fairly compensated for their work. Arranging these services saves the consumer time and stress. The act of arranging a credit check or a home appraisal is a legitimate additional service.

Problems arise when mortgage settlement service providers take advantage of consumers by gouging them with unreasonable mortgage markups, not because they wish to be paid for their additional service of arranging the components of the loan, but to obtain an extra windfall from a naïve, stressed, and confused buyer. This is the only area in which Congress should consider restricting mortgage markups, and this is a difficult area to regulate.

167. News Release, U.S. Dep't of Hous. & Urban Dev., Jackson Unveils "Road to Reform" for American Homebuyers: HUD to Take Fresh Look as Improving the Mortgage Settlement Process (June 27, 2005), *available at* http://www.hud.gov/news/release.cfm?content=pr05-091.cfm.

D. Suggestions for Amending RESPA

First, Congress can amend RESPA to allow direct regulation of the prices mortgage settlement service providers charge for their services. This idea was proposed before Congress enacted the current bill.[168] This sort of regulation would remove all ambiguity from the process, reducing the possibility of criminal or civil liability for a good faith mistake. However, this solution would be very difficult to enact for many reasons. First, the cost of living varies greatly in different parts of the country. If Congress truly wanted to make the measure fair to all parties, it would have to consider these varying costs. Second, a provision would be needed for mortgage settlement service providers for whom fixed monthly service rates or other price estimates are necessary. It would be unfair to hold a service provider liable for RESPA violation simply because it provided a good-faith estimate that resulted in overcharging beyond a prescribed limit.

A second solution is to amend RESPA so that it forbids mortgage service providers from keeping any unearned fees. This is the position HUD advocated in its 2001 policy statement.[169] It assures that consumers will not give their mortgage provider a windfall. It also assures no ambiguity for the service providers as to what they are and are not allowed to charge for outsourced services. However, this solution would cause many problems for mortgage service providers. As mentioned earlier in this Comment, mortgage service providers often do not know what a service will cost until after the closing. Imposing civil and criminal liability on a service provider for a business decision that turns out to be a good faith mistake is too harsh a punishment. Furthermore, arranging a service through another entity is, in itself, a service by the provider and should not be considered an unearned fee.

A third solution would be to allow companies to continue freely marking up settlement costs, but require them to disclose this practice to consumers. This way, companies would not fear civil or criminal liability, settlement service providers would be compensated for arranging groups of services for their customers, and consumers could make informed decisions about whether or not to choose a particular service provider for their home mortgage. However, realistically, consumers already are overwhelmed, stressed, and confused by the process. One additional disclosure about a cost is not likely to cause many consumers to shop around for and find other mortgage service

168. S. REP. NO. 93-866, at 1 (1974), *reprinted in* 1974 U.S.C.C.A.N. 6546, 6547–48.

169. 66 Fed. Reg. 53,052, 53,057.

providers. Furthermore, those consumers with less than perfect credit generally must take whatever lender they can get and do not have the luxury to comparison shop.

A final solution is to single out actual markups—when a mortgage settlement service provider charges more for a service that it is charged by a third party—and allow a certain percentage of the markup to be added to the charge. This would allow service providers fair compensation for arranging all the services needed to complete a mortgage. Also, although the problem of businesses not knowing the cost of a settlement service prior to closing would still be present, it would be much easier for the businesses to comply. Most settlement services have fairly standard costs.[170] A settlement service provider could estimate high to ensure it is in compliance with the rules.

None of the above solutions are perfect. However, striking a balance between consumer protection and business interests is important. Therefore, Congress should carefully consider these options for amending RESPA, as well as any other reasonable solutions.

V. CONCLUSION

Section 8(b) of RESPA was intended to prohibit kickbacks and fee sharing. An examination of its plain language and the legislative history clearly demonstrates RESPA does not prohibit unearned fees not split or shared by more than one party. Although RESPA explicitly authorizes the Secretary of HUD to create rules to implement the statute, a federal agency's rules deserve no deference if the statute is unambiguous in its meaning. Sections 8(a) and (b) of RESPA are not ambiguous. The language clearly allows mortgage settlement service providers to charge markups to consumers. While consumer protection is an important goal, a flat prohibition on mortgage markups would cause an undue burden on mortgage settlement service providers. However, protecting consumer from overpaying for mortgage settlement services is important, and Congress should consider ways to limit the mortgage markup amounts service providers are allowed to charge.

170. For example, the cost to record a mortgage with a county is generally a flat fee plus a per page charge.