American Bar Association
www.supremecourtpreview.org

No. 10-708

IN THE
Supreme Court of the United States

THE FIRST AMERICAN CORPORATION AND
FIRST AMERICAN TITLE INSURANCE COMPANY,
Petitioners,
v.

DENISE EDWARDS,
Respondent.

On Writ of Certiorari to the United States
Court of Appeals for the Ninth Circuit

BRIEF OF THE AMERICAN BANKERS ASSOCIATION, AMERICAN ESCROW ASSOCIATION, COMMUNITY MORTGAGE BANKING PROJECT, CONSUMER BANKERS ASSOCIATION, CONSUMER MORTGAGE COALITION, THE FINANCIAL SERVICES ROUNDTABLE, HOUSING POLICY COUNCIL, MORTGAGE BANKERS ASSOCIATION, AND NATIONAL ASSOCIATION OF REALTORS® AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

THOMAS M. HEFFERON
Counsel of Record
WILLIAM F. SHEEHAN
DAVID L. PERMUT
GOODWIN | PROCTER LLP
901 New York Avenue, N.W.
Washington, D.C. 20001
(202) 346-4000
Counsel for *Amici Curiae*

August 29, 2011

TABLE OF CONTENTS

INTEREST OF THE *AMICI CURIAE* 1

SUMMARY OF ARGUMENT.................................... 4

ARGUMENT 7

I. RESPA Grants A Private Cause Of Action Only When A Kickback Increases The Cost Of A Settlement Service, Not Whenever There Is An Exclusive Referral Agreement Or An Allegedly Impartial Referral 7

  A. RESPA's Goal Is To Bar Kickbacks That Increase Costs.. 7

  B. RESPA Does Not Create A Cause of Action For An Exclusive Referral Agreement Or The Denial Of An Impartial Referral........... 10

  C. The Court Of Appeals Misconstrued Section 2607(d)(2) 16

CONCLUSION 20

TABLE OF AUTHORITIES

CASES: **PAGE**

Ashwander v. TVA,
297 U.S. 288 (1936) 5

Camreta v. Greene,
131 S. Ct. 2020 (2011) 4

Capell v. Pulte Mtge. L.L.C., No. 07-1901,
2007 U.S. Dist. LEXIS 82570
(E.D. Pa. Nov. 7, 2007) 10

Carter v. Welles-Bowen Realty, Inc.,
553 F.3d 979 (6th Cir. 2009) 10, 11, 15, 17

Carter v. Welles-Bowen Realty, Inc.,
719 F. Supp. 2d 846 (N.D. Ohio 2010) 14

Citizens United v. FEC,
130 S. Ct. 876 (2010) 5

Commodity Futures Trading Comm'n v.
Schor, 478 U.S. 833 (1986) 5

Finley v. United States, 490 U.S. 545 (1989) 18

Haug v. Bank of America,
317 F.3d 832 (8th Cir. 2003) 8

Kahrer v. Ameriquest Mtge. Co.,
418 F. Supp. 2d 748 (W.D. Pa. 2006) 17

Kruse v. Wells Fargo Home Mortg., Inc.
383 F.3d 49 (2d. Cir. 2004) 8

Robinson v. Fountainhead Title Group Corp.,
447 F. Supp. 2d 478 (D. Md. 2006) 17

Santiago v. GMAC Mortg. Group, Inc.,
417 F.3d 384 (3d. Cir. 2005) 8

Snow v. First Am. Title Ins. Co.,
332 F.3d 356 Cir. 2003 19

Stern v. Marshall,
131 S. Ct. 2594 (2011) 5

STATUTES:

Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No.11-203, § 1098(7)(B), 124 Stat 1376 19

Fair Credit Reporting Act,
15 U.S.C. § 1681n(a) & (b) 18

Fair Debt Collection Practices Act
15 U.S.C. § 1692k(a) 18

Real Estate Settlement Procedures Act of 1974, 12 U.S.C. §§ 2601-2617

12 U.S.C. § 2601(b)(2) 6, 7, 9, 18
12 U.S.C. § 2605 19
12 U.S.C. § 2607 .... 8, 12 19
12 U.S.C. § 2607(a) 8, 11, 17
12 U.S.C. § 2607(b) 17
12 U.S.C. § 2607(c) 11
12 U.S.C. § 2607(c)(1)(b) 14
12 U.S.C. § 2607(c)(2) 8, 11
12 U.S.C. § 2607(c)(3) 11
12 U.S.C. § 2607(c)(4) 12, 13
12 U.S.C. § 2607(c)(5) 13
12 U.S.C. § 2607(d) 6
12 U.S.C. § 2607(d)(2) .... *passim*
12 U.S.C. § 2607(d)(4) 7, 19
12 U.S.C. § 2614 19
12 U.S.C. § 2617 19

Real Estate Settlement Procedures Act of 1974, Pub. L. No. 93-533, § 8(d)(2), 88 Stat. 1724, 1728 (1974) 17

Truth in Lending Act of 1968, 15 U.S.C. § 1640(a) 18

CONSTITUTION:

U.S. Const. Art. III 4, 6

RULES AND REGULATIONS:

24 C.F.R. § 3500, App. B. 9

24 C.F.R. § 3500.14 8

24 C.F.R. § 3500.14(g)(2).....................................8, 11

HUD's Regulatory Impact Analysis accompanying its June 7, 1996 final RESPA regulation governing affiliated business arrangements......................................14

Statement of Policy 1996-2 Regarding Sham Controlled Business Arrangements, 61 Fed. Reg. 29,258 (June 7, 1996) 13

Statement of Policy 1996-4: Title Insurance Practices in Florida, 61 Fed. Reg. 49,397 *et seq*. (Sept. 19, 1996)..15

LEGISLATIVE HISTORY:

H.R. Rep. No. 97-532 (1982)..............................11, 15

H.R. Rep. No. 98-123 (1983)....................................18

INTEREST OF THE *AMICI CURIAE*[1]

Amici represent the full spectrum of participants in the residential mortgage industry who are subject to RESPA, from mortgage companies to mortgage brokers, commercial banks, thrifts, title insurers and agents, homeowners insurance providers, real estate agents, settlement agents, and settlement service providers of all kinds. Although many of these companies are small and hence local, many others operate regionally and/or nationally. *Amici* and their members have a strong interest in the construction and application of the laws governing the mortgage lending industry.

The American Bankers Association ("ABA") is the principal national trade association of the banking industry in the United States. Its members are banks of all sizes and types, including national and state chartered banks; community, regional, and money center banks and holding companies; savings banks and associations; and trust companies. Member banks of the ABA are located in each of the 50 states and the District of Columbia, and collectively they account for approximately 90% of the domestic assets of the banking industry in the United States.

---

[1] The parties have consented the filing of this brief in letters on file with the Clerk. No counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than the *amici curiae*, their members, or their counsel made such a contribution.

The American Escrow Association is a national association of real estate settlement agents. It acts on behalf of professionals conducting all types of settlement practices throughout the United States. Its goals are to further the knowledge and professionalism of settlement agents and to educate and advise decision makers at the national level on issues of consequence to the settlement industry as a whole.

The Consumer Bankers Association ("CBA") is the only national financial trade group focused exclusively on retail banking and personal financial services — banking services geared toward consumers and small businesses. As the recognized voice on retail banking issues, CBA provides leadership, education, research, and federal representation for its members. CBA members include most of the nation's largest bank holding companies, as well as regional and super-community banks that collectively hold two-thirds of the total assets of depository institutions.

The Community Mortgage Banking Project is a public policy organization representing the interests of independent mortgage bankers. The Project supports legislative and regulatory reform of the mortgage market that promote consumer access, borrower and investor transparency, local competition and choice, and a value added mortgage chain.

The Consumer Mortgage Coalition is an industry trade group representing national residential mortgage lenders, servicers, and service providers. Its members participate in every stage of the home financing process, from providing loan

information and taking loan applications to processing and funding loans, to purchasing loans from brokers and other lenders, and to pooling loans for sale on the secondary market as mortgaged backed securities. The Coalition acts to pursue reform of the mortgage origination process, to assure that consumers are properly informed when making credit choices, and to reduce abusive lending practices. It participates in almost every aspect of federal legislative activity and regulatory rulemaking relating to the mortgage industry.

The Financial Services Roundtable represents 100 of the largest integrated financial services companies providing banking, insurance, and investment products and services to the American consumer. Roundtable member companies account directly for $92.7 trillion in managed assets, $1.2 trillion in revenue, and 2.3 million jobs. The Roundtable's Housing Policy Council is made up of thirty-two companies that are among the nation's leaders in mortgage finance. Member companies originate seventy-five percent of the mortgages for American home buyers and provide mortgage insurance and servicing to the majority of American home owners.

The Mortgage Bankers Association (MBA) is a national association representing the real estate finance industry. It has over 2,200 members comprised of real estate finance companies, mortgage companies, mortgage brokers, commercial banks, thrifts, life insurance companies, and others in the mortgage lending field. MBA seeks to ensure the continued strength of the nation's residential and commercial real estate markets, to expand

homeownership, and to extend access to affordable housing to all Americans. It promotes fair and ethical lending practices and fosters professional excellence among real estate finance employees through a wide range of educational programs and publications.

The National Association of Realtors® is the country's largest membership organization for residential and commercial real estate agents. It provides ongoing research and education programs for its members' professional development, advocates for laws and policies that support the right to own, use, and transfer real property, and develops and promotes standards for efficient, effective, and ethical real estate business practices.

SUMMARY OF ARGUMENT

1. *Amici* are aware that the Court granted certiorari only on the second question presented in the Petition – whether a purchaser of real estate settlement services has Article III standing to sue under the Real Estate Settlement Protection Act ("RESPA") in the absence of any claim that the alleged violation of the Act affected the price, quality, or other characteristics of the settlement services provided. *Amici* endorse Petitioners' argument that Respondent lacks constitutional standing because she has failed to allege any actual injury.

Amici are also aware of the Court's settled practice of declining to reach a constitutional issue if a case may decided on nonconstitutional grounds. *See, e.g. Camreta v. Greene*, 131 S. Ct. 2020, 2031 (2011) ("[The] 'longstanding principle of judicial restraint requires that courts avoid reaching

constitutional questions in advance of the necessity of deciding them.'") (quoting *Lyng* v. *Northwest Indian Cemetery Protective Ass'n*, 485 U.S. 439, 445 (1988)); *Ashwander* v. *TVA*, 297 U.S. 288, 346-347 (1936) (Brandeis, J., concurring) ("The Court will not * * * decide questions of a constitutional nature unless absolutely necessary to a decision of the case.") (citations and internal quotation marks omitted)); *Citizens United v. FEC*, 130 S. Ct. 876, 918 (2010) (Roberts, C.J., concurring) ("Because the stakes are so high, our standard practice is to refrain from addressing constitutional questions except when necessary to rule on particular claims before us. [Citing *Ashwander*.] This policy underlies both our willingness to construe ambiguous statutes to avoid constitutional problems and our practice never to formulate a rule of constitutional law broader than is required by the precise facts to which it is to be applied.") (inner quotation and citations omitted). *See also, e.g., Stern v. Marshall,* 131 S. Ct. 2594, 2605 (2011) ("[W]e will, where possible, construe federal statutes so as 'to avoid serious doubt of their constitutionality.") (quoting *Commodity Futures Trading Comm'n* v. *Schor*, 478 U.S. 833, 841, (1986)). "Where such 'serious doubts' arise, a court should determine whether a construction of the statute is 'fairly possible' by which the constitutional question can be avoided." *Schor,* 478 U.S. at 841 (citing *Crowell* v. *Benson*, 285 U.S. 22 (1932)). Indeed, "'this Court will often strain to construe legislation so as to save it against constitutional attack,'" although it "'will not carry this to the point of perverting the purpose of a statute' or judicially rewriting it.'" *Id.* (quoting *Aptheker* v. *Secretary of State*, 378 U.S. 500, 515 (1964)).

Amici believe that, *without* straining, the Court can construe RESPA to avoid Article III standing issues. Accordingly, in the event that the Court, or one or more of its members, may in the end wish to resolve this case on statutory rather than constitutional grounds, *Amici* show in this brief that RESPA itself denies standing to a purchaser of real estate settlement services who has no claim that the alleged violation caused him or her actual harm.

2. The decision below was wrongly decided because the court of appeals appears to have believed that RESPA bars exclusive referral agreements. Instead RESPA bars only referral agreements based on kickbacks or the giving of another "thing of value," the presence of which will "increase unnecessarily the costs" of the settlement service being provided. 12 U.S.C. § 2601(b)(2). Because RESPA actually permits exclusive referral agreements, the courts that have ruled that RESPA confers on consumers a right to "impartial" referrals are incorrect. The Act confers only a right to referrals untainted by kickbacks that unnecessarily increase settlement costs, and therefore creates a private cause of action only when the price of the referred service is increased because of the kickback – that is, when the plaintiff actually suffers economic injury.

The court of appeals reached the wrong result in this case not only because it failed to appreciate the role of the kickback in the statutory scheme but also because it relied instead on, and misconstrued, the language of RESPA's damages provision, § 2607(d), as amended in 1983. The 1983 amendment did not change RESPA's precisely focused purpose of

protecting consumers from kickbacks that tend to "increase unnecessarily the costs" of settlement services (§ 2601(b)(2)), and did not create a new private RESPA cause of action for non-financial harm. While federal and state regulators are expressly empowered by the Act to seek injunctive relief against alleged violations thought to be anticompetitive (*see* § 2607(d)(4)), private plaintiffs have no enforcement role to play in cases where the conduct complained of causes them no actual injury.

ARGUMENT

I. RESPA Grants A Private Cause Of Action Only When A Kickback Increases The Cost Of A Settlement Service, Not Whenever There Is An Exclusive Referral Agreement Or The Denial of An Impartial Referral

A. RESPA's Goal Is To Bar Kickbacks That Increase Costs.

Congress passed RESPA to save consumers money: "It is the purpose of this chapter to effect certain changes in the settlement process for residential real estate that will result * * * in the elimination of kickbacks or referral fees that tend to increase unnecessarily the costs of certain settlement services." 12 U.S.C. § 2601(b)(2).

Kickbacks obviously do "tend to increase unnecessarily the costs" to consumers because the service provider who pays a kickback in exchange for the referral often treats the kickback as a cost of

doing business, which it passes on to the consumer in the form of unnecessarily higher fees.

The statute refers to "fees" and "things of value" as well as kickbacks. It says that no person shall give "any fee, kickback, or thing of value pursuant to any agreement * * * that * * * a real estate settlement service * * * shall be referred to any person." § 2607(a). But the "fee" or "thing of value" must be in the nature of a kickback to create a private cause of action; *i.e.,* it must increase the service provider's cost of doing business and lead to unnecessarily higher fees to the consumer. Indeed, § 2607(c)(2) exempts "the payment * * * of a bona fide salary or compensation or other payment for goods or facilities actually furnished or for services actually performed." A "reasonable relationship" test is used to determine whether a payment is bona fide: "[i]f the payment of a thing of value bears no reasonable relationship to the market value of the goods or services provided, then the excess is not for services or goods." 24 C.F.R. § 3500.14. That is, the "excess" portion of the payment could represent a kickback that unnecessarily increased settlement costs.[2]

---

[2] The Department of Housing and Urban Development has stated that the failure of the payment of a thing of value to pass the reasonable relationship test "may be used as evidence of a violation of Section [2607] and may serve as a basis of a RESPA investigation." 24 C.F.R. § 3500.14(g)(2). Nevertheless, "[h]igh prices standing alone are not proof of a RESPA violation." *Id.* Courts have consistently held that § 2607 of RESPA is not a price control provision. *E.g., Santiago v. GMAC Mortg. Group, Inc.,* 417 F.3d 384 (3d. Cir. 2005); *Kruse v. Wells Fargo Home Mortg., Inc.* 383 F.3d 49 (2d. Cir. 2004); *Haug v. Bank of America,* 317 F.3d 832 (8th Cir. 2003).

Plaintiff recognizes that she must allege a kickback to recover: she says that First American overpaid for its 17 percent interest in Tower City. Pet. App. 51a-52a. Her theory is that First American in effect paid an advance kickback. Thus, instead of saying to Tower City, "I'll give you $10 for every consumer you refer to me," First American is alleged to have said something like, "Here's $100 in exchange for ten future referrals." *See id.*

The Department of Housing and Urban Development ("HUD") has also recognized the need to show a cost-increasing kickback as a predicate to establishing a violation. Its regulations cite, as an example of a RESPA violation, the situation in which A gives settlement services at a discounted rate to B, a builder, in return for B's agreement to refer home purchasers to A. 24 C.F.R. 3500, App. B. The necessary implication is that A will make up the discount by increasing its charge to home purchasers – and that, if A charged full price to B, there would be no violation even if as part of the transaction B had agreed to make the referrals.

In short, for RESPA to be violated, A must give B something undeserved, in the nature of a kickback, for in that instance A will ordinarily look to recover what it gave to B and will tend to do so through higher fees to its customers – *i.e.,* through an overcharge. That's what Congress meant to protect against: settlement service costs that are "unnecessarily increase[d]" by the presence of kickbacks. § 2601(b)(2).

B. RESPA Does Not Create A Cause Of Action For An Exclusive Referral Agreement Or The Denial Of An Impartial Referral.

Although a kickback would be expected in most cases ultimately to increase the price to the consumer, some settlement service fees are government-regulated (prohibiting the provider from raising the price) and in other instances a provider may choose not to increase the price to the consumer. In these cases the courts have considered alleged kickbacks that result in no harm, with different results.

Some courts that construe RESPA to provide a private right of action for a kickback scheme that results in no harm to the consumer hold that RESPA protects not only against referrals that unnecessarily increase costs because of kickbacks, but also against referrals that, because of the presence of a kickback – even one that does not increase costs – are not "impartial." *See Carter v. Welles-Bowen Realty, Inc.,* 553 F.3d 979, 987 (6th Cir. 2009) (cited and relied on by the court below, Pet. App. 7a); *Capell v. Pulte Mtge. L.L.C.,* No. 07-1901, 2007 U.S. Dist. LEXIS 82570, at *5 (E.D. Pa. Nov. 7, 2007).

The court of appeals in this case never clearly identified what it considered to be the RESPA violation at issue, but it appears to have agreed with the *Carter* line of cases in accepting Respondent's claim "that her title insurance was referred to First American pursuant to an exclusive agency agreement, which * * * was illegal under RESPA." Pet. App. 3a.

To support the proposition that RESPA creates a right to impartial referrals, *Carter* and cases like it point to a House Report accompanying the 1983 RESPA amendments. *Carter*, 553 F.3d at 987; *see also* Pet. App. 6a. The Report voiced a concern about "affiliated business arrangements," under which referrals might be made without the explicit payment of kickbacks or similar fees, and lamented that the advice of the referrer in such an arrangement "may lose its impartiality" and reduce the "healthy competition generated by independent settlement service providers." H.R. Rep. No. 97-532, at 52 (1982). From that Report these courts erroneously infer that RESPA itself creates a private cause of action "for harm to consumers beyond an increase in the cost of settlement services"; *i.e.,* that § 2607(a) "allows individuals to police the marketplace in order to ensure impartiality of referrals and competition between settlement service providers." *Carter,* 553 F.3d at 987, 988 (quoting *Capell,* 2007 U.S. Dist. LEXIS 82570, at *1).

The inference is erroneous because in fact Congress did not ban referrals that are not "impartial." On the contrary, the exemptions to liability provided in § 2607(c) show that partial referrals are permitted. We have already seen that § 2607(c)(2) exempts "any payment * * * for goods or facilities actually furnished or for services actually performed," and that HUD interprets that section to exempt payments that are reasonably related to the value of goods, facilities or services furnished – regardless of whether the referral of a settlement service is "impartial." 24 C.F.R. § 3500.14(g)(2). In addition, § 2607(c)(3) expressly exempts "payment pursuant to cooperative broker and *referral*

arrangements or agreements between real estate agents and brokers." (Emphasis added.) And § 2607(c)(4) exempts affiliated business arrangements – which may include exclusive referral agreements – provided only that (i) the consumer is not required to use any particular settlement service provider; (ii) the referrer advises the consumer of the existence of the affiliated business arrangement and provides a timely estimate of the service fees to be charged; and (iii) the company in the arrangement holding an interest in the other company receives nothing more than a return on its ownership interest – *i.e.,* no kickbacks to unnecessarily increase costs. *See* § 2607(c)(4).

Moreover, notwithstanding the qualifications for the § 2607(c)(4) exemption just listed, that section explicitly permits a lender to require the use of an "attorney, credit reporting agency, or real estate appraiser chosen by the lender to represent the lender's interest" in the transaction. Hence that provision permits an exclusive referral arrangement that the consumer is actually required to accept.

Section 2607(c)(4) was enacted as part of the same 1983 Amendments that, according to the court below, created a broadly enforceable right to impartial referrals. But Congress' sanction of referrals to affiliated businesses through an exemption to the anti-kickback and fee splitting provisions of § 2607 contradicts the notion that the 1983 Amendments were intended to create a private cause of action

targeted at impartial referrals *per se,* regardless of consumer harm.[3]

Further, HUD has issued a policy statement that expressly recognizes that exclusive referrals are permissible under RESPA. Statement of Policy 1996-2 Regarding Sham Controlled Business Arrangements, 61 Fed. Reg. 29,258 *et. seq*. (June 7, 1996). HUD explained that lawful controlled business arrangements under § 2607(c)(4) consist of "a referrer of settlement service business (such as a real estate broker or real estate agent) and a recipient of referrals of business (such as a mortgage banker, mortgage broker, title agent or title company)." *Id.* at 29,259. HUD also recognized that these arrangements "may reduce costs to businesses and consumers." Thus:

> Businesses may benefit from lower marketing costs and the ability to share information on the home purchase or refinancing among settlement service providers. In the long run, any cost savings should be passed on to consumers in most cases. Consumers may benefit

---

[3] Section 2607(c)(5) also provides HUD with the authority to exempt "other payments or * * * transfers" after consultation with various officials. Contrary to the position HUD has taken in this case, HUD has used this authority to propose allowing partial referrals and even the required use of certain settlement service providers. *See, e.g.*, Real Estate Settlement Procedures Act; Simplifying and Improving the Process of Obtaining Mortgages to Reduce Settlement Costs to Consumers, 67 Fed. Reg. 49,134 (July 29, 2002) (proposing that lenders be permitted to package settlement services).

> additionally from reduced shopping time and related hassles.[4]

In determining whether the entity receiving referrals is "merely a sham arrangement used as a conduit for referral fee payments, [the Policy statement] balances a number of factors in determining whether a violation exists." *Id.* p. 29262. It enumerates ten factors, which "will be considered together." *Id.* No one is "determinative"; rather, HUD will consider all the factors "and will weigh them in light of the specific facts." *Id.* The last of the ten factors is the existence of an exclusive referral agreement. *Id.* Example #4 following the list approves an arrangement involving an exclusive agreement. *Id.* p. 29264: "[U]pon review there appears to be nothing impermissible about these [exclusive] referrals of title business from the title agency to the title insurance company."[5]

Similarly, § 2607(c)(1)(b) of the statute expressly permits the payment of a fee "by a title company to its duly appointed agent for services actually performed in the issuance of a policy of title insurance," and HUD has recognized that title

---

[4] HUD's Regulatory Impact Analysis accompanying its June 7, 1996 final RESPA regulation governing affiliated business arrangements.

[5] *Amici* do not endorse the 1996 Policy Statement, which was promulgated without providing notice and an opportunity for comment, goes beyond the reach of the statute, and was recently held unconstitutionally vague in *Carter v. Welles-Bowen Realty, Inc.,* 719 F. Supp. 2d 846 (N.D. Ohio 2010). But the statement does demonstrate that, in HUD's view, exclusive referrals are permissible.

insurance agents may make what are essentially exclusive referrals to title insurance companies so long as the agent performs certain defined "core title services" for the company. *See* Statement of Policy 1996-4: Title Insurance Practices in Florida, 61 Fed. Reg. 49,397 *et seq.* (Sept. 19, 1996).

Respondent herself acknowledged in the court of appeals that exclusive referral agreements are permitted by RESPA.[6] Under these agreements, service provider referrals are not "impartial" and the "healthy competition generated by independent settlement service providers" (H.R. Rep. No. 97-532, *supra*) is reduced – all as expressly permitted by RESPA.

Accordingly, the court of appeals in this case erred in believing that RESPA does not permit exclusive referral agreements (and by implication grants a cause of action for referrals that are not impartial). It is true that RESPA gives an enforceable right to consumers to receive referral services "untainted" or "[un]sullied by kickbacks," *Carter,* 553 F.3d at 989, but only kickbacks that unnecessarily increase the costs of the settlement services.

That conclusion finds even more support in RESPA's limitation of its private civil remedy to "the person or persons charged for the settlement service involved in the violation." 12 U.S.C. 2607(d)(2). In many real estate transactions the seller or the lender

---

[6] Reply Brief of Appellant-Petitioner, filed Apr. 20, 2009, at 2009 U.S. 9th Cir. Briefs LEXIS 735, at *3 ("title companies may have exclusive relationships with title insurers" under RESPA).

may agree to assume some or all of the closing costs. If, for example, the appraisal in such a case was paid by the seller or lender but was tainted by a kickback, the borrower would have no remedy under § 2607(d)(2), showing that Congress meant to provide a remedy only to someone actually injured by an unnecessarily increased cost.

C. The Court Of Appeals Misconstrued Section 2607(d)(2).

Section 2607(d)(2) provides that "persons who violate the prohibitions or limitations of this section shall be * * * liable to the person or persons charged for the settlement service involved in the violation in an amount equal to three times the amount of any charge paid for such settlement service." The court of appeals eschewed any analysis of what actually causes a RESPA violation. Instead, focusing only on this damages provision, it concluded that, because it does not mention an "overcharge" but instead refers to "any charge," RESPA creates a cause of action for three times the settlement service fee "[w]henever a violation * * * occurs." Pet. App. 5a. As shown above, however, no private right of action exists unless the cost of the settlement service at issue was unnecessarily increased by the giving of a kickback, fee, or thing of value in exchange for the referral. Congress was concerned about whether a referral "unnecessarily increased the cost of settlement services," not whether it was impartial.

The court of appeals in this case and in *Carter* thought that the 1983 amendment to § 2607(d)(2) demonstrated Congress' intent to create a RESPA

cause of action for non-financial harm. *See* Pet. App. 5a-6a; *Carter,* 553 F.3d at 987.[7] Before 1983, § 2607(d)(2) provided that a violator would be liable for "an amount equal to three times the value or amount of the fee or thing of value" whereas after the amendment the violator is liable for "an amount equal to three times the amount of any charge paid for such settlement service." The court below found it significant that Congress had "eliminated the 'thing of value' phrasing in the damages provision, replacing it with 'any charge paid,'" as if to say that Congress must have intended to expand the recovery of damages to cases in which no financial harm could be shown. Pet. App. 6a.

That analysis fails to appreciate that the earlier version of § 2607(d)(2) had two subsections, one establishing damages for a violation of § 2607(a) (kickbacks) and the other for a violation of § 2607(b) (fee splitting). *See* Real Estate Settlement Procedures Act of 1974, Pub. L. No. 93-533, § 8(d)(2), 88 Stat. 1724, 1728 (1974). Section 2607(b) does not mention a "thing of value." Thus, when Congress in 1983 consolidated the two provisions of § 2607(d)(2) into one measure of damages for violations of both subsections (a) and (b), it necessarily removed the phrase "thing of value." Inferring a substantive change to expand the scope of recovery to cases where no financial harm may be shown contravenes

---

[7] The court below and the *Carter* court repeated and perhaps were influenced by the similar error of the District Courts in *Kahrer v. Ameriquest Mtge. Co.*, 418 F. Supp. 2d 748 (W.D. Pa. 2006), *Robinson v. Fountainhead Title Group Corp.,* 447 F. Supp. 2d 478 (D. Md. 2006), and the other decisions cited in *Carter* at 553 F.3d at 983 n.2.

this Court's caution that "'it will not be inferred that Congress, in revising and consolidating the laws, intended to change their effect unless such intention is clearly expressed.'" *Finley v. United States,* 490 U.S. 545, 554 (1989) (quoting *Anderson v. Pacific Coast S.S. Co.,* 225 U.S. 187, 199 (1912)).

Nothing in RESPA's language or legislative history suggests that Congress intended, in amending the damages provision of § 2607(d)(2), to expand RESPA's reach to provide a cause of action for the denial of an impartial referral. In particular, the 1983 amendment did not change RESPA's precisely stated purpose of protecting consumers from kickbacks that "increase unnecessarily the costs" of settlement services. § 2601(b)(2).[8] Thus, even if Congress intended in the 1983 amendment to expand recoverable damages from three times the amount of the overcharge to three times the amount of the entire service charge, that does not mean that Congress meant also to create a cause of action in cases where no overcharge is alleged or provable.[9]

---

[8] In amending RESPA in 1983, Congress did not intend to "change current law which prohibits the payment of unearned fees, kickbacks, or other things of value in return for referrals of settlement service business.'" H.R. Rep. No. 98-123 at 76 (1983).

[9] A contrary construction of RESPA could lead to ruinous liability of a settlement service provider who committed a technical violation of the statute, a result that would be inconsistent with other federal consumer laws that even for nontechnical violations impose a cap on exposure. *See* 15 U.S.C. 1640(a) (Truth in Lending Act), 15 U.S.C. 1681n(a) & (b) (Fair Credit Reporting Act), 15 U.S.C. 1692k(a) (Fair Debt Collection Practices Act).

That conclusion is reinforced by a consideration of the Act's enforcement mechanisms as a whole. The primary enforcers of § 2607 are public: the Bureau of Consumer Financial Protection as well as State Attorneys General and State Insurance Commissioners have investigative and enforcement duties conferred by § 2617 (Bureau investigatory powers) and § 2607(d)(4) ("The Bureau, the Secretary [of the Treasury], or the attorney general or the insurance commissioner of any State may bring an action to enjoin violations of this section.").[10] Those public officials are the only ones on whom the statute confers the power to seek injunctive relief, and they have a three-year period in which to sue for a violations, as compared to the one year granted a private plaintiff.[11] These provisions reinforce the conclusion that the Act does not give a bounty to private plaintiffs for seeking to preserve fair competition in cases where the conduct complained of inflicts no discernable harm.

In sum, the court below misconstrued § 2607(d)(2) and misunderstood RESPA. If Congress had meant

---

[10] *See* § 1098(7)(B) of the Dodd-Frank Wall Street Reform and Consumer Protection Act. 124 Stat. at 2104.

[11] *See Snow v. First Am. Title Ins. Co.***,** 332 F.3d 356, 359 5th Cir. 2003 ("Section 2614 actually contains three separate statutes of limitations. The Secretary of Housing and Urban Development, state attorneys general, and state insurance commissioners may sue within three years of any violation of RESPA**.** 12 U.S.C. § 2614. Private plaintiffs, too, have a three-year limitations period for suits alleging a violation of § 2605 [dealing with escrow accounts]. *Id.* Only for private plaintiffs suing under §§ 2607 and 2608 did Congress impose a one-year limitations period. *Id.*").

to give consumers the right to "impartial" referrals, it would have banned all exclusive referral agreements. Instead it explicitly permits them. Hence the reasonable conclusion is that Congress meant to create a private cause of action under RESPA only for referrals causing an increase in price to the consumer – an overcharge – because of the accompanying kickback. When an alleged kickback does *not* cause an increase in price – as all agree is the case here – the consumer has no injury and no cause of action under RESPA.

CONCLUSION

The judgment of the Court of Appeals should be reversed.

Respectfully submitted,

THOMAS M. HEFFERON
Counsel of Record
WILLIAM F. SHEEHAN
DAVID L. PERMUT
GOODWIN | PROCTER LLP
901 New York Avenue, N.W.
Washington, D.C. 20001
(202) 346-4000

Counsel for *Amici Curiae*

August 29, 2011