**UNITED STATES BANKRUPTCY COURT**
**DISTRICT OF DELAWARE**

| | | |
|---|---|---|
| *In re* | : | **Chapter 11** |
| **WASHINGTON MUTUAL, INC., et al.,[1]** | : | **Case No. 08-12229 (MFW)** |
| **Debtors.** | : | **(Jointly Administered)** |

**NOTICE OF WITHDRAWAL OF PROOF OF CLAIM NO. 2692 AND OBJECTION TO SIXTH AMENDED JOINT PLAN OF AFFILIATED DEBTORS PURSUANT TO CHAPTER 11 OF THE UNITED STATES BANKRUPTCY CODE**

NOTICE IS HEREBY GIVEN THAT, pursuant to Rule 3006 of the Federal Rules of Bankruptcy Procedure, Robert Alexander and James Reed hereby withdraw, with prejudice, the proof of claim filed against Washington Mutual, Inc. ("WMI") on or about March 30, 2009, Claim No. 2692 (the "Proof of Claim"), a copy of which is attached hereto as Exhibit "A", and withdraw their objection to the Sixth Amended Joint Plan of Affiliated Debtors Pursuant to Chapter 11 of the United States Bankruptcy Code [Dkt. No. 5548].

NOTICE IS FURTHER GIVEN THAT, as a result of the withdrawal, with prejudice, of the Proof of Claim, there is no need for WMI to reserve any amount of funds on account of a potential payment to them in connection with any claims against WMI.

[1] The Debtors in these chapter 11 cases along with the last four digits of each Debtor's federal tax identification number are: (i) Washington Mutual, Inc. (3725); and (ii) WMI Investment Corp. (5395). The Debtors' principal offices are located at 925 Fourth Avenue, Seattle, Washington 98104.

0812229110216000000000020

Dated: February 16, 2011

Edward W. Ciolko
BARROWAY TOPAZ KESSLER MELTZER & CHECK, LLP
280 King Of Prussia Road
Radnor, Pennsylvania 1087
Telephone: (610) 667-7706
Facsimile: (610) 667-7056

*Attorney for Robert Alexander and James Reed*

**Exhibit A**

#2692

B 10 (Official Form 10) (12/08)

**UNITED STATES BANKRUPTCY COURT** | **PROOF OF CLAIM**

Name of Debtor: Washington Mutual, Inc.

Case Number: 08-12229 (MFW)

NOTE: *This form should not be used to make a claim for an administrative expense arising after the commencement of the case. A request for payment of an administrative expense may be filed pursuant to 11 U.S.C. § 503.*

Name of Creditor (the person or other entity to whom the debtor owes money or property): Robert Alexander & James Reed, and the class of similarly situated borrowers who obtained mortgage loans from Washington Mutual and were required to buy private mortgage insurance.

Name and address where notices should be sent:
Barroway Topaz Kessler Meltzer & Check, LLP
Attn. Edward W. Ciolko, Esq., Donna S. Moffa, Esq., Terence S. Ziegler, Esq.
280 King of Prussia Road
Radnor, PA 19087
Telephone number:
(610) 667-7706

☐ Check this box to indicate that this claim amends a previously filed claim.

**Court Claim Number:**__________
*(If known)*

Filed on:__________

Name and address where payment should be sent (if different from above):

Telephone number:

☐ Check this box if you are aware that anyone else has filed a proof of claim relating to your claim. Attach copy of statement giving particulars.

☐ Check this box if you are the debtor or trustee in this case.

**1. Amount of Claim as of Date Case Filed:** $potentially in excess of $2.5 Billion

If all or part of your claim is secured, complete item 4 below; however, if all of your claim is unsecured, do not complete item 4.

If all or part of your claim is entitled to priority, complete item 5.

☐ Check this box if claim includes interest or other charges in addition to the principal amount of claim. Attach itemized statement of interest or charges.

**2. Basis for Claim:** See Attachment A
(See instruction #2 on reverse side.)

**3. Last four digits of any number by which creditor identifies debtor:** __________
Civ. Doc. No. 07-cv-04426 (ED Pa.); Appeal Docket - 08-8043 (3d. Cir.)

**3a. Debtor may have scheduled account as:** __________
(See instruction #3a on reverse side.)

**4. Secured Claim** (See instruction #4 on reverse side.)
Check the appropriate box if your claim is secured by a lien on property or a right of setoff and provide the requested information.

**Nature of property or right of setoff:** ☐ Real Estate ☐ Motor Vehicle ☐ Other
**Describe:**

**Value of Property:$**________ **Annual Interest Rate**___**%**

**Amount of arrearage and other charges as of time case filed included in secured claim,**

**if any: $**________ **Basis for perfection:** ________

**Amount of Secured Claim: $**________ **Amount Unsecured: $**________

**5. Amount of Claim Entitled to Priority under 11 U.S.C. §507(a). If any portion of your claim falls in one of the following categories, check the box and state the amount.**

Specify the priority of the claim.

☐ Domestic support obligations under 11 U.S.C. §507(a)(1)(A) or (a)(1)(B).

☐ Wages, salaries, or commissions (up to $10,950*) earned within 180 days before filing of the bankruptcy petition or cessation of the debtor's business, whichever is earlier – 11 U.S.C. §507 (a)(4).

☐ Contributions to an employee benefit plan – 11 U.S.C. §507 (a)(5).

☐ Up to $2,425* of deposits toward purchase, lease, or rental of property or services for personal, family, or household use – 11 U.S.C. §507 (a)(7).

☐ Taxes or penalties owed to governmental units – 11 U.S.C. §507 (a)(8).

☐ Other – Specify applicable paragraph of 11 U.S.C. §507 (a)(__).

**Amount entitled to priority:**

$________

**Amounts are subject to adjustment on 4/1/10 and every 3 years thereafter with respect to cases commenced on or after the date of adjustment.*

**6. Credits:** The amount of all payments on this claim has been credited for the purpose of making this proof of claim.

**7. Documents:** Attach redacted copies of any documents that support the claim, such as promissory notes, purchase orders, invoices, itemized statements of running accounts, contracts, judgments, mortgages, and security agreements. You may also attach a summary. Attach redacted copies of documents providing evidence of perfection of a security interest. You may also attach a summary. *(See instruction 7 and definition of "redacted" on reverse side.)*

DO NOT SEND ORIGINAL DOCUMENTS. ATTACHED DOCUMENTS MAY BE DESTROYED AFTER SCANNING. See attached Complaint (Attachment B1); Petition for Interlocutory Review (Attachment B2) and Amended Response, 2/24/2009 Stay Order (Attachment B3).
If the documents are not available, please explain:

Date: 3/27/09

**Signature:** The person filing this claim must sign it. Sign and print name and title, if any, of the creditor or other person authorized to file this claim and state address and telephone number if different from the notice address above. Attach copy of power of attorney, if any.

Edward W. Ciolko, Attorney for Claimants

FOR COURT USE ONLY
RECEIVED
MAR 30 2009
KURTZMAN CARSON CONSULTANTS

*Penalty for presenting fraudulent claim:* Fine of up to $500,000 or imprisonment for up to 5 years, or both. 18 U.S.C. §§ 152 and 3571.

☑ Date Stamped Copy Returned
☐ No self addressed stamped envelope
☐ No copy to return

0812229090330000000000328

BARROWAYTOPAZ
KESSLERMELTZERCHECK LLP
ATTORNEYS AT LAW

March 27, 2009

**VIA FEDERAL EXPRESS**

Washington Mutual Claims Processing
c/o Kurtzman Carson Consultants, LLC
2335 Alaska Ave.
El Segundo, CA 90245

**Re: Washington Mutual, Inc.**
**Case No. 08-12229 (MFW)**

Dear Claims Processor:

Enclosed please find the Proof of Claim for Robert Alexander and James Reed and the class of similarly situated borrowers who have asserted a claim against the above-debtor, Washington Mutual, Inc., for violation of the Real Estate Settlement Procedure Act, U.S.C. §2607.

Please date stamp the enclosed extra copy of the Proof of Claim form and return to me in the enclosed self-addressed, stamped envelope.

Very truly yours,

Edward W. Ciolko

Edward W. Ciolko

EWC/db
Enclosure

280 King of Prussia Road, Radnor, Pennsylvania 19087 T. 610-667-7706 F. 610-667-7056 info@btkmc.com
2125 Oak Grove Road, Suite 120, Walnut Creek, California 94598 T. 925-945-0770 F. 925-945-8792 info@btkmc.com
WWW.BTKMC.COM

# ATTACHMENT A

## ATTACHMENT A

This is a proposed class action seeking relief from the predatory practices of Defendants that violated the Real Estate Settlement Procedures Act of 1974 ("RESPA"). RESPA Section 8, 12 U.S.C. § 2607, prohibits lenders, such as Defendant Washington Mutual, from accepting kickbacks and/or unearned fees from any person providing real estate settlement services, including providers of private mortgage insurance ("PMI"). Defendants attempted to circumvent that prohibition by devising and implementing a scheme whereby their residential loan customers who needed to utilize PMI would be steered to PMI insurers pre-selected by Washington Mutual. These PMI providers would then pay a portion of the PMI premiums received from borrowers to WM Reinsurance, a wholly owned subsidiary of Washington Mutual, its "captive reinsurer," in the form of purported PMI "reinsurance" premiums.

WM Reinsurance, through these reinsurance arrangements, purportedly received these payments from the primary PMI insurers in exchange for taking on some of the PMI provider's risk that the Washington Mutual loan borrowers would default on their loans. However, WM Reinsurance assumed very little or no actual risk. As noted in the Plaintiffs' Complaint, for example, from 2000 through 2005, WM Reinsurance received approximately $295 million from leading primary mortgage insurers as its "ceded portion" or split of borrowers' mortgage PMI premiums. During that same time frame, WM Reinsurance paid out ***zero*** dollars in claims for losses/payouts covered by the purported "reinsurance" policies.

This well-disguised illegal scheme is in direct contravention of RESPA's anti-kickback prohibitions and created an enormous windfall for Defendants by enabling them to receive unearned and illegal portions of the PMI premiums paid by the unsuspecting Plaintiffs and proposed class. Plaintiffs' claims are potentially in excess of $2.5 billion.

# ATTACHMENT B1

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF PENNSYLVANIA

| | |
|---|---|
| ROBERT ALEXANDER and JAMES LEE REED, individually and on behalf of all others similarly situated,<br><br>Plaintiffs,<br><br>v.<br><br>WASHINGTON MUTUAL, INC., WASHINGTON MUTUAL BANK, WASHINGTON MUTUAL BANK fsb, and WM MORTGAGE REINSURANCE COMPANY,<br><br>Defendants. | Civil Action No. ____________<br><br>JURY TRIAL REQUESTED<br><br>Class Action |

## CLASS ACTION COMPLAINT

Plaintiffs Robert Alexander and James Lee Reed ("Plaintiffs"), on behalf of themselves and a class of all others similarly situated, allege as follows:

## INTRODUCTION

1. Washington Mutual, Inc., including certain participating subsidiaries (referred to herein collectively as "Washington Mutual" or the "Company"), a home mortgage lender, has violated the Real Estate Settlement Procedures Act of 1974 ("RESPA") by collecting illegal referral payments in the form of reinsurance premiums funneled through WM Mortgage Reinsurance Company ("WM Reinsurance"), its wholly-owned subsidiary or "captive" reinsurer.

2. This is a proposed national class action brought by Plaintiffs on behalf of themselves and a class of all other similarly situated homeowners who obtained residential mortgage loans through Washington Mutual and paid for private mortgage insurance issued by insurers with whom Washington Mutual had captive reinsurance arrangements.

3. Homeowners who buy a home with less than a 20% down payment are typically required to pay for private mortgage insurance. Private mortgage insurance protects the lender in

the event of a default by the borrower. The premium is paid by the borrower and is usually collected by the lender with the borrower's monthly payments. Borrowers typically have no opportunity to comparison-shop or select the private mortgage insurer.

4. Section 2607 of RESPA prohibits lenders from accepting kickbacks or referral fees from any person providing a real estate settlement service, including providers of private mortgage insurance. Thus, a lender cannot legally accept a referral fee from the insurer issuing the private mortgage insurance policy on the borrower's home.

5. Defendants have attempted to circumvent RESPA's prohibition against accepting kickbacks and unearned fees by arranging for the private mortgage insurer to pay an excessive portion of the private mortgage insurance premiums of borrowers—referred by Washington Mutual—to WM Reinsurance in the form of purported reinsurance premiums.

6. While these payments to Washington Mutual's affiliated reinsurer were purportedly for "reinsurance" services, WM Reinsurance received these payments while assuming very little or no actual risk. Since 1999, Washington Mutual's affiliated reinsurer has received over **$295 million** from leading primary mortgage insurers as it's "split" of borrowers' mortgage insurance premiums--$77 million in 2005 alone. In stark contrast, its actual insurance losses as reflected in the total amount of claims paid with respect to such premiums were **zero.** In other words, the millions of dollars collected through the captive reinsurance arrangements far exceeded the value of any services rendered.

7. This scheme constitutes disguised, unlawful referral fees in violation of RESPA's prohibition against kickbacks, as well as a violation of RESPA's ban on accepting a percentage of settlement-service fees other than for services actually performed.

## JURISDICTION AND VENUE

8. This Court has subject matter jurisdiction over this action pursuant to 28 U.S.C. §§ 1331 and 1367 and 12 U.S.C. § 2614.

9. Venue is proper in this district under 28 U.S.C. § 1391(b) and 12 U.S.C. § 2614 because the real property involved in Plaintiffs' mortgage loan transactions is located in this district and a substantial part of the events giving rise to the claims occurred in this district.

## PARTIES

**Plaintiffs**

10. Plaintiff Robert Alexander resides in Westminster, Maryland. Plaintiff Alexander obtained a residential mortgage loan from Washington Mutual in December of 2005 for the purchase of a home, with a down payment of less than 20%, and was required to pay for private mortgage insurance. Plaintiff Alexander paid for private mortgage insurance from an insurer with whom Washington Mutual had a captive reinsurance arrangement.

11. Plaintiff James Lee Reed resides in Dover, Pennsylvania. Plaintiff Reed obtained a residential mortgage loan from Washington Mutual in April of 2007 for the purchase of a home, with a down payment of less than 20%, and was required to pay for private mortgage insurance. Plaintiff Bennet paid for private mortgage insurance from an insurer with whom Washington Mutual had a captive reinsurance arrangement.

**Defendants**

12. Defendant Washington Mutual, Inc. is a Washington corporation, with its corporate headquarters located at 1201 Third Avenue, Seattle, Washington. Washington Mutual does business in all 50 states. Washington Mutual, the parent company of Washington Mutual Bank fsb and WM Mortgage Reinsurance Company ("WM Reinsurance"), is a proper party to this action, as it was and is a recipient of the unlawful kickbacks and unearned fees described herein. Upon information and belief, WM Reinsurance funnels reinsurance premiums to Washington Mutual. Under RESPA Section 8(b), 12 U.S.C. 2607(b), it is unlawful for *any* person to accept any portion of an unearned fee. Section 8(d) of RESPA, 12 U.S.C. § 2607(d), provides that a violator is jointly and severally liable for 3 times the amount paid for the settlement service.

13. Defendants Washington Mutual Bank and Washington Mutual Bank, fsb are federally-charted savings associations, headquartered in Seattle, Washington. Defendant Washington Mutual does business as "Washington Mutual Bank," "Washington Mutual Bank, FA" and "Long Beach Mortgage."

14. Defendant WM Reinsurance is a Hawaii corporation. Upon information and belief, WM Reinsurance is headquartered in Seattle Washington and reinsures loans originated by Washington Mutual in all fifty states.

## FACTUAL ALLEGATIONS

### A. Washington Mutual's Operations

15. Washington Mutual, Inc., a savings and loan holding company, operates through two banking subsidiaries—Washington Mutual Bank and Washington Mutual Bank fsb—as well as numerous nonbank subsidiaries, among which is WM Reinsurance.

16. Through its subsidiaries, Washington Mutual, Inc. provides financial services to consumers and businesses, including retail banking, credit cards, home loans, commercial banking and other services.

17. As of December 31, 2006, Washington Mutual, Inc. reported assets of approximately $346 billion. Through its subsidiaries, Washington Mutual, Inc. operates nearly 2700 consumer and small business banking stores nationwide and has approximately 50,000 employees.

18. Washington Mutual originates and services home mortgage loans as part of the home loans segment of Washington Mutual, Inc. Washington Mutual is also one of the nation's largest subprime mortgage lenders, originating subprime loans under the name "Long Beach Mortgage."

19. WM Reinsurance provides purported reinsurance coverage to primary mortgage insurers with respect to mortgage loans in Washington Mutual's mortgage servicing portfolio that are covered by private mortgage insurance.

**B. <u>Private Mortgage Insurance Industry</u>**

20. In order to lessen risk of default, lenders typically prefer to finance no more than eighty percent of the value of a home, with the remaining twenty percent being paid as a down payment by the borrower. In the event of a default, the lender is then more likely to completely recover its investment.

21. Many potential homebuyers cannot afford to pay 20% of the purchase price as a down payment on a home. Private mortgage insurance allows the lender to make loans in excess of 80% of the home's value by providing a guarantee from a dependable third party -- the private mortgage insurer -- to protect the lender in the event of a default by the borrower.

22. Private mortgage insurers are typically unaffiliated third-party companies who agree to cover the first twenty to thirty percent of the amount of the potential claim, including unpaid principal, interest and certain expenses.

23. The amount of private mortgage insurance coverage required varies according to the perceived risk of default. The lower the percentage of the borrower's down payment, the more mortgage insurance required. For example, more private mortgage insurance is required with a five percent down payment than with a fifteen percent down payment. Additionally, more private mortgage insurance may be required for adjustable-rate mortgages than for fixed-rate mortgages.

24. While the lender is the beneficiary of the private mortgage insurance, the borrower pays the premiums, usually through an addition to the borrower's monthly mortgage payment.

25. Borrowers generally have no opportunity to comparison-shop for private mortgage insurance. The private mortgage insurer is selected by the lender. The terms and conditions of the insurance policy, as well as the cost of the policy, is determined by the lender and the private mortgage insurer rather than negotiated between the borrower and the private mortgage insurer.

26. The private mortgage insurance industry began with the founding of Mortgage Guaranty Insurance Corp. ("MGIC") in 1957 and is dominated by MGIC and other companies, including, without limitation: PMI Mortgage Insurance Company, Genworth Mortgage Insurance Corporation, Radian Guaranty Inc., United Guaranty Residential Insurance Company, Triad Guaranty Insurance Company and Republic Mortgage Insurance. The industry is represented by a trade association known as Mortgage Insurance Companies of America ("MICA").

27. According to MICA, new private mortgage insurance contracts for its member firms have consistently exceeded $200 billion per year since 1998. MICA firms issued over 1.5 million new certificates of mortgage insurance in 2005, representing over $225 billion in new insurance written.

28. Private mortgage insurance is limited to the conventional home loan market. Mortgage loans directly insured by the federal government via mortgage guaranty programs, such as those maintained by the Federal Housing Administration and the Veterans Administration, maintain their own form of mortgage default insurance.

**C. RESPA Prohibits Kickbacks for Referrals and Fee-Splitting Related To Private Mortgage Insurance Policies**

29. RESPA is the primary federal law regulating residential mortgage settlement services. The United States Department of Housing and Urban Development ("HUD") is charged with interpreting RESPA. HUD has promulgated the implementing rules for RESPA. *See* Regulation X, 24 C.F.R. § 3500.

30. RESPA was enacted, in part, to curb the problem of kickbacks between real estate agents, lenders and other real estate settlement service providers. "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).

31. A key component of RESPA is its dual prohibition of referral fees and fee-splitting between persons involved in real estate settlement services.

32. In 12 U.S.C. 2607(a) RESPA provides:

> 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.

33. In 12 U.S.C. 2607(b) RESPA provides:

> 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.

34. Regulation X further explains, "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." 24 C.F.R. § 3500.14(c).

35. The term "thing of value" is broadly defined in RESPA and further described in Regulation X as including:

> without limitation, monies, things, discounts, salaries, commissions, fees, duplicate payments of a charge, stock, dividends, distributions of partnership profits, franchise royalties, credits representing monies that may be paid at a future date, the opportunity to participate in a money-making program, retained or increased earnings, increased equity in a parent or subsidiary entity...The term payment is used as synonymous with the giving or receiving any "thing of value" and does not require transfer of money.

24. C.F.R. § 3500.14(d).

36. Private mortgage insurance business referred to private mortgage insurers by a lender constitutes "business incident to or a part of a real estate settlement service" within the meaning of RESPA, 12 U.S.C. § 2607(a). The term "settlement service" is liberally defined in RESPA and Regulation X and includes the "provision of services involving mortgage insurance." 24 C.F.R. § 3500.2(b).

37. Under RESPA, therefore, Washington Mutual and its affiliates are prohibited

from accepting referral fees from a private mortgage insurer or from splitting private mortgage insurance premiums with the insurer other than for services actually performed by the captive reinsurer.

38. The damages recoverable for violating §8 of RESPA are set forth at 12 U.S.C. § 2607 (d) (2) which provides:

> Any person or persons who violate the prohibitions or limitations of this section shall be jointly and severally 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.

Thus, a borrower has a private right of action for recovery of three times the total charges for settlement services and need not allege an overcharge to have standing. *See eg. Kahrer v. Ameriquest Mortgage*, 418 F. Supp. 2d 748, 756 (W.D. Pa 2005).

**D. Mortgage Reinsurance Industry**

39. Private mortgage insurers may enter into contracts with reinsurers, whereby the reinsurer typically agrees to assume a portion of the private mortgage insurer's risk with respect to a given pool of loans. In return, the private mortgage insurer pays to the reinsurer a portion of the premiums it receives from borrowers with respect to the loans involved.

40. Mortgage reinsurance arrangements can generally take two forms: (a) "quota share" and (b) "excess loss."

41. In a quota share reinsurance arrangement, the reinsurer agrees to assume a fixed percentage of all the private mortgage insurer's insured losses. Thus, if the private mortgage insurer experiences losses, the reinsurer is certain to experience losses in the percentage agreed upon in the reinsurance coverage.

42. In an excess loss reinsurance arrangement, however, the reinsurer is liable only for claims, or a percentage thereof, above a particular ceiling. Unlike the quota share arrangement, the excess loss method does not necessarily result in any loss being shifted to the reinsurer.

43. The likelihood of the reinsurer experiencing any losses under this arrangement depends not only on the amount of losses by the private mortgage insurance, but also on whether the reinsurance agreement between the reinsurer and the private mortgage insurer sets the excess loss level at an amount where the reinsurer bears actual risk of loss.

**E. Captive Mortgage Reinsurance Arrangements and HUD's Concern About RESPA Anti-kickback Violations Under Such Arrangements**

44. Lenders produce customers for private mortgage insurers. Certain lenders, seeking to capitalize on the billions of dollars their borrowers pay to these insurers in premiums each year, have established their own affiliated or "captive" reinsurers. These captive reinsurers provide reinsurance primarily or exclusively for loans the lender originates that require the borrower to pay for private mortgage insurance.

45. Under "captive reinsurance arrangements," the lender refers its borrowers to a private mortgage insurer who agrees to reinsure with the lender's captive reinsurer. These arrangements require the private mortgage insurer to cede a percentage of the borrowers' premiums to the lender's captive reinsurer.

46. Captive mortgage reinsurance arrangements raise obvious RESPA kickback problems. Private mortgage insurers are dependent on the lender to obtain business, while the lender is collaborating with the insurer to obtain a share of the borrower's premium revenue through its captive reinsurer. The insurer stimulates its business by providing a lucrative stream of revenue for the lender via the lender's captive reinsurer.

47. Simply put, as opposed to receiving direct payments for referring its customers to a certain private mortgage insurer, an unscrupulous lender can use a captive reinsurance arrangement to funnel such unlawful kickbacks to itself or an affiliate.

48. Concerned that these transactions would be designed to disguise a funneling of referral fees back to the lender who arranged for the private mortgage insurer to obtain the business, HUD issued a letter dated August 6, 1997 ("HUD letter") addressing the problem of captive reinsurers and RESPA's anti-kickback violations.

49. The HUD letter concluded that captive reinsurance arrangements were permissible under RESPA only "if the payments to the affiliated reinsurer: (1) are for reinsurance services 'actually furnished or for services performed' and (2) are bona fide compensation that does not exceed the value of such services" (emphasis in original).

50. The HUD letter focuses the RESPA anti-kickback analysis on whether the arrangement between the lender's captive reinsurer and the private mortgage insurer represents "a real transfer of risk." HUD warned that "The reinsurance transaction cannot be a sham under which premium payments... are given to the reinsurer even though there is no reasonable expectation that the reinsurer will ever have to pay claims."

51. The HUD letter states "This requirement for a real transfer of risk would clearly be satisfied by a quota share arrangement, under which the reinsurer is bound to participate pro rata in every claim" (emphasis in original).

52. In contrast, HUD states that excess loss reinsurance contracts can escape characterization as a referral fee or fee-split only:

> ...if the band of the reinsurer's potential exposure is such that a reasonable business justification would motivate a decision to reinsure that band. Unless there is a real transfer of risk, no real reinsurance services are actually being provided. In either case, the premiums paid...must be commensurate with the risk.

53. Notably, state insurance commissioners and federal regulators have investigated and condemned similar captive reinsurance arrangements in the title insurance industry as sham transactions designed to funnel unlawful kickbacks for business referrals. As a result, a number of title insurance providers have abandoned such arrangements altogether.

54. The National Association of Insurance Commissioners ("NAIC") also has addressed the accounting treatment of premiums ceded to captive mortgage reinsurers. Under the annual statement requirements of the NAIC, private mortgage insurers should not treat as authorized reinsurance amounts ceded to lender-captive reinsurers where adequate risk is not transferred. Rather, such amounts should be accounted for under the less beneficial deposit accounting guidelines and identified as though unauthorized accounting was being utilized.

55. In connection with the billions of dollars in home loans originated by Washington Mutual, many of its borrowers pay for private mortgage insurance.

56. Pursuant to "captive reinsurance arrangements," Washington Mutual refers borrowers to private mortgage insurers, who agree to reinsure with WM Reinsurance. These insurers include at least: PMI Mortgage Insurance Company, Genworth Mortgage Insurance Corporation, Mortgage Guaranty Insurance Company, Radian Guaranty Inc., United Guaranty Residential Insurance Company, Triad Guaranty Insurance Company and Republic Mortgage Insurance.

57. Washington Mutual has a strong financial interest in steering business to private mortgage insurers who, in turn, agree to reinsure with WM Reinsurance on terms that will produce significant kickbacks.

58. WM Reinsurance enters into reinsurance agreements solely with respect to loans originated by Washington Mutual and its affiliates. Thus, borrowers from Washington Mutual are forced to pay, indirectly, for reinsurance premiums forwarded to WM Reinsurance.

59. Under Washington Mutual's captive reinsurance arrangements, the primary insurer pays WM Reinsurance a percentage of the premiums paid by borrowers on a particular pool of loans; in return, WM Reinsurance purportedly agrees to assume a portion of the insurer's risk with respect to the loans involved.

60. Unbeknownst to borrowers, little or no risk is actually transferred from the primary insurer to WM Reinsurance in exchange for the insurer payments to WM Reinsurance. The actual risk, if any, transferred to WM Reinsurance under its secret "reinsurance" agreements is not commensurate with the premiums it extracts from the private mortgage insurer.

61. Upon information and belief, WM Reinsurance received hundreds of millions of dollars in "reinsurance" premiums since 2000.

62. For example, from 2000 through 2005, Washington Mutual, through its captive reinsurer, collected from private mortgage insurers approximately $295,458,000 as its "share" of

borrower's private mortgage insurance premiums. In contrast, its "share" of paid insured losses was zero:

| YEAR | PREMIUMS RECEIVED BY REINSURER | LOSSES PAID BY REINSURER |
|---|---|---|
| 2005 | $77,879,000 | $0 |
| 2004 | $73,691,000 | $0 |
| 2003 | $50,163,000 | $0 |
| 2002 | $73,691,000 | $0 |
| 2001 | $14,217,000 | $0 |
| 2000 | $5,817,000 | $0 |
| TOTAL: | **$295,458,000** | **$0** |

63. The numbers speak for themselves. Upon information and belief, this trend of collecting premiums that far exceed the value any risk actually transferred has continued through the present.

64. As HUD noted during its recent testimony by Assistant Secretary for Regulatory Affairs and Manufactured Housing Gary M. Cunningham before the United States Congress (referring to analogous captive reinsurance arrangements in the title insurance industry):

> [W]hen there is a history of little or no claims being paid, or the premium payments to the captive reinsurer far exceed the risk borne by the reinsurer, there is strong evidence that there is an arrangement constructed for the purpose of payment of referral fees or other things of value in violation of Section 8 of RESPA.

65. The millions of dollars collected by Washington Mutual through its captive reinsurer have clearly not been commensurate to its actual risk exposure. Washington Mutual has received millions of dollars in payments, while bearing little or no risk of loss.

66. In reality, Washington Mutual's captive reinsurance arrangements were and are sham transactions for collecting illegal kickbacks in return for referring private mortgage insurance business to certain insurers.

67. The money Washington Mutual collected through its captive reinsurer far exceeded the value of the services, if any, it performed. There was no real transfer of risk or, at least, not a commensurate transfer of risk. The amounts paid were simply disguised kickbacks to Washington Mutual for the referral of borrowers to private mortgage insurers.

68. These arrangements keep premiums for private mortgage insurance artificially inflated because a percentage of borrowers' premiums are not actually being paid to cover actual risk, but are simply funding illegal kickbacks to lenders. In other words, because the money collected by a lender through its captive reinsurer comes from borrowers' mortgage insurance premiums, borrowers are essentially required to pay for *both* actual private mortgage insurance coverage *and* private mortgage insurers' unlawful kickbacks to lenders.

69. Amounts paid to lenders as unlawful kickbacks have become a part of the cost of doing business for private mortgage insurers. As a result, private mortgage insurance premiums incorporate the payment of such kickbacks -- to the detriment of consumers.

## CLASS ACTION ALLEGATIONS

70. Plaintiffs bring this action pursuant to Federal Rules of Civil Procedure 23(a) and 23(b)(1), (b)(2) and/or (b)(3) on behalf of a general class consisting of all persons who obtained federally-related residential mortgage loans through Washington Mutual and/or its subsidiaries and, in connection therewith, purchased private mortgage insurance and whose residential mortgage loans were included within Washington Mutual's captive mortgage reinsurance arrangements (the "Class").

71. The Class excludes Defendants and any entity in which Defendants have a controlling interest, and their officers, directors, legal representatives, successors and assigns.

72. The Class is so numerous that joinder of all members is impracticable.

73. A class action is superior to all other available methods for the fair and efficient adjudication of this controversy.

74. Plaintiffs' claims are typical of the claims of the Class.

75. There are questions of law and fact common to the Class, including but not limited to:

a. Whether Defendants' captive reinsurance arrangements involved sufficient transfer of risk;

b. Whether payments to Washington Mutual's captive reinsurer were *bona fide* compensation and solely for services actually performed;

c. Whether payments to Washington Mutual's captive reinsurer exceeded the value of any services actually performed;

d. Whether Defendants captive reinsurance arrangements constituted unlawful kickbacks from private mortgage insurers;

e. Whether Defendants accepted a portion, split or percentage of borrowers' private mortgage insurance premiums other than for services actually performed; and

f. Whether Defendants are liable to Plaintiffs and the Class for statutory damages pursuant to RESPA § 2607(d)(2).

76. These and other questions of law and/or fact are common to the Class and predominate over any questions affecting only individual Class members.

77. Plaintiffs will fairly and adequately represent and protect the interests of the members of the Class. Plaintiffs have no claims antagonistic to those of the Class. Plaintiffs have retained counsel competent and experienced in complex nationwide class action litigation. Plaintiffs' counsel will fairly, adequately and vigorously protect the interests of the Class.

78. Class action status is warranted under Rule 23(b)(1)(A) because the prosecution of separate actions by or against individual members of the class would create a risk of inconsistent or varying adjudications with respect to individual members of the class, which would establish incompatible standards of conduct for Defendants.

79. Class action status is also warranted under Rule 23(b)(1)(B) because the prosecution of separate actions by or against individual members of the class would create a risk

of adjudications with respect to individual members of the class which would, as a practical matter, be dispositive of the interests of the other members not parties to the adjudications or substantially impair or impede their ability to protect their interests.

80. Class action status is also warranted under Rule 23(b)(2) because Defendants have acted or refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole.

81. Class action status is also warranted under Rule 23(b)(3) because questions of law or fact common to the members of the class predominate over any questions affecting only individual members, and a class action is superior to other available methods for the fair and efficient adjudication of this controversy.

## CLAIMS FOR RELIEF

## COUNT I

### Violation of RESPA, 12 U.S.C. § 2607

82. Plaintiffs hereby incorporate by reference the preceding paragraphs as if they were fully set forth herein.

83. Throughout the Class Period, Defendants provided "settlement services" in respect of "federally-related mortgage loans," as such terms are defined by RESPA §§ 2602(1) and (3).

84. The amounts received by Defendants through Washington Mutual's captive reinsurance arrangements constituted "things of value" within the meaning of RESPA § 2602(2).

85. Plaintiffs and the Class obtained federally-related residential mortgage loans through Washington Mutual and paid millions of dollars for private mortgage insurance premiums in connection with their real estate closings. Defendants arranged for an unlawfully excessive split of borrowers' premiums to be paid to WM Reinsurance.

86. The millions of dollars in premiums accepted from private mortgage insurers: (a) were not for services actually furnished or performed; and/or (b) exceeded the value of such services.

87. The millions of dollars accepted by Washington Mutual through its captive reinsurance arrangements constituted fees, kickbacks or things of value pursuant to agreements with private mortgage insurers that business incident to real estate settlement services involving federally-related mortgage loans would be referred to such insurers. Such practice violated RESPA, 12 U.S.C. 2607(a). WM Reinsurance—Washington Mutual's subsidiary—participated in the scheme and served as the direct conduit by which the kickbacks were funneled. WM Reinsurance agreed to provide purported "reinsurance" services involving mortgage insurance paid by Plaintiffs and the Class.

88. In connection with transactions involving federally-related mortgage loans, Washington Mutual accepted a portion, split or percentage of charges received by private mortgage insurers for the rendering of real estate settlement services other than for services actually performed, in violation of RESPA, 12 U.S.C. 2607(b). The money paid by private mortgage insurers to Washington Mutual and accepted by Washington Mutual through its captive reinsurer was a portion, split or percentage of the private mortgage insurance premiums paid by Washington Mutual's customers. WM Reinsurance—Washington Mutual's subsidiary—participated in the scheme and served as the direct party to which the split was paid. WM Reinsurance agreed to provide purported "reinsurance" services involving mortgage insurance paid by Plaintiffs and the Class.

89. Plaintiffs and the Class were harmed by Defendants' unlawful kickback scheme.

90. First, Plaintiffs and the Class were overcharged for mortgage insurance. Under Washington Mutual's scheme, the mortgage insurance premiums paid by Plaintiffs and the Class necessarily and wrongly included payments for both: (a) actual mortgage insurance services; and (b) payments unlawfully kicked back to Washington Mutual's captive reinsurer that far exceeded the value of any services performed and, were, in fact, illegal referral fees. Plaintiff does not

challenge private mortgage insurers' rates, but rather the use of the premiums to fund kickbacks and referral fees.

91. Second, regardless of whether Plaintiffs and the Class were overcharged for private mortgage insurance, and regardless of the reasonableness or unreasonableness of the rates Plaintiffs paid for private mortgage insurance under RESPA, Plaintiffs and the Class were entitled to purchase settlement services from providers that did not participate in unlawful kickback schemes and are entitled to recover from Washington Mutual statutory damages in an amount equal to three times the amount they paid for private mortgage insurance.

92. Defendants therefore violated RESPA, 12 U.S.C. 2607. Pursuant to RESPA, 12 U.S.C. 2607(d), Defendants are liable to Plaintiffs and the Class in an amount equal to three times the amounts they have paid or will have paid for private mortgage insurance as of the date of judgment.

93. Pursuant to 12 U.S.C. 2607(d), Plaintiffs also seek attorneys' fees and costs of suit.

**TOLLING OF STATUTE OF LIMITATIONS**

94. Applicable statutes of limitation may be tolled based upon principles of equitable tolling, fraudulent concealment and/or the discovery rule. Equitable tolling is available under RESPA and should apply to the circumstances of this case. Plaintiffs and putative Class members could not, despite the exercise of due diligence, have discovered the underlying basis for their claims. No information was provided to Plaintiffs or putative class members at closing of their loans that would not lead them to suspect that Defendants were using private mortgage insurance premiums as a means of collecting kickbacks and referral fees. Further, Defendants knowingly and actively concealed the basis for the Plaintiffs' claims by engaging in a scheme that was, by its very nature and purposeful design, self-concealing. For these reasons, any delay by the members of the putative Class whose claims accrued outside of the applicable statute of limitations was excusable.

95. Due to the undisclosed and self-concealing nature of Washington Mutual's scheme to collect illegal kickbacks from private mortgage insurers, the putative Class members whose claims would have otherwise accrued outside of the applicable statute of limitations did not possess sufficient information or possess the requisite expertise in order to enable them to discover the true nature of Defendants' captive reinsurance arrangements.

96. This complex action is dissimilar to a case where, for example, an attentive borrower may determine—from a careful examination of the HUD-1 settlement statement—that he was overcharged for a settlement service or that too much money is being paid from the proceeds to the lender, real estate agent, title insurer or other settlement service provider. Rather, conduct described herein occurs behind closed doors, pursuant to secret agreements with a trail impossible for the average homeowner to follow.

97. Plaintiffs were able to discover the underlying basis for the claims alleged herein only with the assistance of counsel. Plaintiffs and the putative Class members had no basis upon which to investigate the validity of the undisclosed payments to WM Reinsurance for purported reinsurance. Putative Class members' delay was excusable because they did not discover, and reasonably could not have discovered Defendants' conduct as alleged herein absent specialized knowledge and/or assistance of counsel.

98. Further, Washington Mutual engaged in affirmative acts to conceal the facts and circumstances giving rise to the claims asserted herein. Washington Mutual affirmatively represented to Plaintiffs and the Class that any amounts it received from its captive reinsurance arrangements were for services actually performed. Pursuant to RESPA § 2604(c) and the accompanying regulations set forth in 24 C.F.R. 3500.7, if Washington Mutual required the use of a particular provider of settlement service, it was obligated to describe the nature and details of the relationship between Washington Mutual and such provider. It failed to do so.

99. The putative Class members did not possess sufficient information to even put them on notice of the true nature of Washington Mutual's captive reinsurance arrangements. The average borrower is not an insurance expert and could not investigate and evaluate transfer

of risk of loss between insurance companies. Many borrowers are unfamiliar with the concept of reinsurance. Simply being told that Washington Mutual may enter into reinsurance relationships is absolutely insufficient to put the average borrower on notice that anything improper or actionable may have occurred with respect to that reinsurance or that his rights under RESPA may be violated. Washington Mutual intentionally designed any disclosure that it provided in such a manner to conceal from the putative class members information sufficient to put them notice of the underlying basis for their claims. Thus, the putative class members were not put on notice of Washington Mutual's wrongdoing. *See Boudin v. Residential Essentials, LLC*, No. 07-0018, 2007 WL 2023466 at * 5 (S.D. Ala. 2007). For instance, Washington Mutual did not disclose to borrowers that WM Reinsurance was not actually assuming any risk of loss. Thus, Washington Mutual concealed information that could have put the putative Class members on notice that there was inadequate assumption of risk by WM Reinsurance.

100. The putative class members exercised due diligence by fully participating in their loan transactions and reviewing relevant loan documents. Because of Defendants' actions and because of the nature of the reinsurance scheme, Plaintiffs and the absent putative Class members were not put on notice of Defendants' wrongdoing despite exercising due diligence. *Boudin*, 2007 WL 2023466 at * 5.

101. Washington Mutual provided misleading information to Plaintiffs and the Class, thus affirmatively acting to conceal its unlawful kickback scheme. By funneling kickbacks through WM Reinsurance and representing that such payments were for services actually performed, rather than referral fees, Washington Mutual acted to conceal and prevent Plaintiff from discovering the underlying basis for this action. Any delay by the absent putative Class members is excusable and, accordingly, Plaintiffs and the Class contend that it would be inequitable for the Court to apply the one-year limitation period set forth in RESPA § 16, 12 U.S.C. § 2614, in a way that would preclude the claim of any Class member.

## PRAYER FOR RELIEF

WHEREFORE, Plaintiffs requests that this Court enter a judgment against Defendants and in favor of Plaintiffs and the Class and award the following relief:

A. This action be certified as a class action pursuant to Rule 23 of the Federal Rules of Civil Procedure, declaring Plaintiffs as representatives of the Class and Plaintiffs' counsel as counsel for the Class;

B. The conduct alleged herein be declared, adjudged and decreed to be unlawful;

C. Plaintiffs and the Class be awarded statutory damages pursuant to RESPA § 8(d)(2), 12 U.S.C. § 2607(d)(2);

D. An order granting Plaintiffs and the Class costs of suit, including reasonable attorneys' fees and expenses; and

E. An order granting Plaintiffs and the Class such other, further and different relief as the nature of the case may require or as may be determined to be just, equitable and proper by this Court.

## DEMAND FOR JURY TRIAL

Plaintiffs hereby demands a trial by jury as to all claims in this action.

Dated: October 22, 2007

Respectfully submitted,
SCHIFFRIN BARROWAY TOPAZ & KESSLER, LLP

JHM 6596
Joseph H. Meltzer, Esq.
Edward W. Ciolko, Esq.
Mark K. Gyandoh, Esq.
Joseph A. Weeden, Esq.
280 King of Prussia Road
Radnor, PA 19087
Telephone: (610) 667-7706
Facsimile: (610) 667-7056

-and-

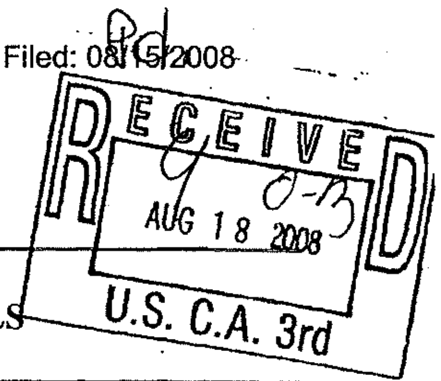
Alan R. Plutzik, Of Counsel
Robert M. Bramson, Of Counsel
2125 Oak Grove Blvd., Suite 120
Walnut Creek, CA 94598
Telephone: (925) 945-0770
Facsimile: (925) 945-8792

TRAVIS & CALHOUN, P.C.
Eric G. Calhoun, Esq.
Richard J. Pradarits Jr.
1000 Providence Towers East
5001 Spring Valley Road
Dallas, Texas 75244
Telephone: (972) 934-4100
Facsimile: (972) 934-4101

BERKE, BERKE & BERKE
Andrew L. Berke, Esq.
420 Frazier Avenue
Chattanooga, TN 37402
Telephone: (423) 266-5171
Facsimile: (423) 265-5307

**ATTORNEYS FOR PLAINTIFF**

# ATTACHMENT B2




No. 08-8043

**IN THE**
**UNITED STATES COURT OF APPEALS**
**FOR THE THIRD CIRCUIT**

ROBERT ALEXANDER and JAMES LEE REED, individually and on behalf of all others similarly situated

Plaintiffs,

v.

WASHINGTON MUTUAL, INC., WASHINGTON MUTUAL BANK, WASHINGTON MUTUAL BANK fsb and WM REINSURANCE MORTGAGE REINSURANCE COMPANY

Defendants.

---

On Petition For Permission to Appeal Under 28 U.S.C. § 1292(b) from the United States District Court for the Eastern District of Pennsylvania
Civil Action No. 2:07-CV-4426

---

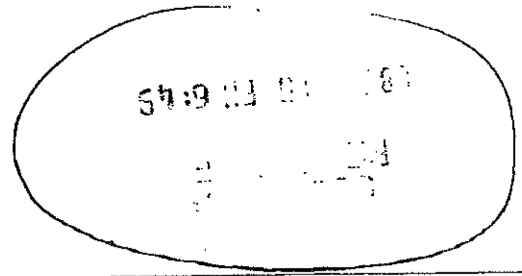
# PETITION FOR PERMISSION TO APPEAL

---

Martin C. Bryce, Jr.
BALLARD SPAHR ANDREWS & INGERSOLL, LLP
51st Floor
1735 Market Street
Philadelphia, PA 19103-7599
(215) 665-8500 (T)
(215) 864-8999 (F)

*Of Counsel:*
Thomas M. Hefferon
David L. Permut
GOODWIN PROCTER LLP
901 New York Avenue, NW
Washington, DC 20001
(202) 346-4000 (T)
(202) 346-4444 (F)

Dated: August 15, 2008



# TABLE OF CONTENTS


**CORPORATE DISCLOSURE STATEMENT** ..... iii

**TABLE OF AUTHORITIES** ..... v

**PETITION FOR PERMISSION TO APPEAL** ..... 1

**I. Introduction/Summary of Argument** ..... 1

**II. Statement of Facts/Case Procedural History** ..... 2

**III. Statement of Issue** ..... 6

**IV. Reasons The Appeal Should Be Allowed** ..... 6

**A. The District Court's Order Involves A Controlling Question Of Law On Which There Are Substantial Grounds for Difference of Opinion.** ..... 9

**1. RESPA's Findings And Purpose Are Consistent With A Congressional Intent to Eliminate Overcharges** ..... 12

**2. RESPA Explicitly Exempts Certain Referral Arrangements From the Purview of the Statute.** ..... 14

**3. Section 8(d) Limits Private Enforcement of RESPA to An Action For Damages.** ..... 17

**B. An Immediate Appeal Will Materially Advance The Ultimate Termination Of the Litigation.** ..... 18

**V. Conclusion and Statement of Relief Sought** ..... 19

## CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1, Petitioners Washington Mutual, Inc., Washington Mutual Bank, Washington Mutual Bank FSB and WM Reinsurance Mortgage Reinsurance Company state that:

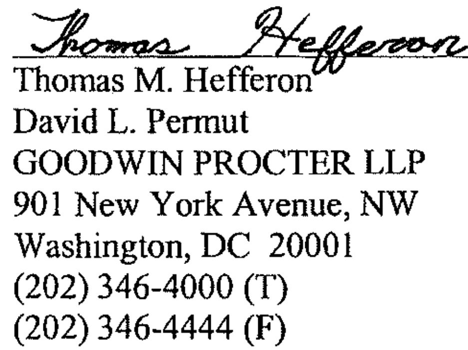
1. Washington Mutual Bank is a wholly-owned subsidiary of Washington Mutual, Inc.

2. Washington Mutual, Inc., is a publicly-owned corporation. The undersigned is not presently aware that any publicly traded entity owns 10% or more of Washington Mutual, Inc.'s publicly traded stock.

Pursuant to Local Rule 26.1-1(a), Petitioners state that there are no publicly owned corporations, not named in this Petition, with which Petitioners are affiliated.

Pursuant to Local Rule 26.1-1(b), Petitioners state that there are no publicly owned companies, not named in this Petition, who have a financial interest in the outcome of this appeal.

Martin C. Bryce, Jr.
BALLARD SPAHR ANDREWS &
INGERSOLL, LLP
51st Floor
1735 Market Street
Philadelphia, PA 19103-7599
(215) 665-8500 (T)
(215) 864-8999 (F)



Thomas M. Hefferon
David L. Permut
GOODWIN PROCTER LLP
901 New York Avenue, NW
Washington, DC 20001
(202) 346-4000 (T)
(202) 346-4444 (F)

Dated: August 15, 2008

# TABLE OF AUTHORITIES

**CASES:** **Page**

*Alexander v. Washington Mut., Inc.*, No. 07-4426, 2008 WL 2600323 (E.D. Pa. June 30, 2008) .......... 8

*BMW of N. Am. v. Gore*, 517 U.S. 559 (1996) .......... 7

*Boulware v. Crossland Mortgage Corp.*, 291 F.3d 261 (4th Cir. 2002) .......... 9

*Capell v. Pulte Mortgage L.L.C.*, No. 07-1901, 2007 WL 3342389 (E.D. Pa. Nov. 7, 2007) .......... 8

*Carter v. Welles-Bower Realty, Inc.*, 493 F. Supp. 2d 921 (N.D. Ohio 2007) .......... 8, 10, 13, 14

*Edwards v. First American Corp.*, 517 F. Supp. 2d 1199 (C.D. Cal. 2007) .......... 8

*Glover v. Standard Fed. Bank*, 283 F.3d 953 (8th Cir. 2002) .......... 8

*Heimmermann v. First Union Mortgage Corp.*, 305 F.3d 1257 (11th Cir. 2002) .......... 8

*Kahrer v. Ameriquest Mortgage Co.*, 418 F. Supp. 2d 748 (W.D. Pa. 2006) .......... *passim*

*Katz v. Carte Blanche Corp.*, 496 F.2d 747 (3d Cir. 1974) .......... 6, 9, 10

*Koken v. Viad Corp.*, No. 03-5975, 2004 WL 1240672 (E.D. Pa. May 11, 2004) .......... 9

*Kruse v. Wells Fargo Home Mortgage, Inc.*, 383 F.3d 49 (2d Cir. 2004) .......... 9

*Krzalic v. Republic Title Co.*, 314 F.3d 875 (7th Cir. 2002) .......... 8

*Max Daetwyler Corp. v. Meyer*, 575 F. Supp. 280 (E.D. Pa. 1983) .......... 19

*Milbert v. Bison Labs., Inc.*, 260 F.2d 431 (3d Cir. 1958) ........ 6

*Miller v. Nissan Motor Acceptance Corp.*, No. 99-4953,
2000 WL 1599244 (E.D. Pa. Oct. 27, 2000) ........ 11

*Moore v. Radian Group, Inc.*, 233 F. Supp. 2d 819 (E.D. Tex. 2002),
*aff'd*, 69 Fed. App'x 659 (5th Cir. 2003) ........ 8, 10, 11

*Morales v. Attorneys' Title Ins. Fund, Inc.*, 983 F. Supp. 1418
(S.D. Fla. 1997) ........ 4, 10, 11

*Mullinax v. Radian Guar., Inc.*, 311 F. Supp. 2d 474
(M.D.N.C. 2004) ........ 8, 10

*Orson, Inc. v. Miramax Film Corp.*, 867 F. Supp. 319 (E.D. Pa. 1994) ........ 18

*Philip Morris USA v. Williams*, 549 U.S. 346 (2007) ........ 7

*Robinson v. Fountainhead Title Group Corp.*, 447 F. Supp. 2d 478
(D. Md. 2006) ........ 8, 10

*Rosado v. Ford Motor Co.*, 337 F.3d 291 (3d Cir. 2003) ........ 19

*Santiago v. GMAC Mortgage*, 417 F.3d 384 (3d Cir. 2005) ........ 8

*Schuetz v. Banc One Mortgage Corp.*, 292 F.3d 1004 (9th Cir. 2002) ........ 8

*Sosa v. Chase Manhattan Mortgage Corp.*, 348 F.3d 979
(11th Cir. 2003) ........ 9

*State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408 (2003) ........ 7

*Stevens v. Citigroup, Inc.*, No. 00-3815, 2000 WL 1848593
(E.D. Pa. Dec. 15, 2000) ........ 8

*Stevens v. Union Planters Corp.*, No. 00-1695, 2000 WL 33128256
(E.D. Pa. Aug. 22, 2000) ........ 8

**STATUTES:**

Real Estate Settlement Procedures Act:

§ 2, 12 U.S.C. § 2601 ... 12, 13
§ 2(a), 12 U.S.C. § 2601(a) ... 13
§ 2(b)(2), 12 U.S.C. § 2601(b)(2) ... 13
§ 8, 12 U.S.C. § 2607 ... *passim*
§ 8(a), 12 U.S.C. § 2607(a) ... 8, 14, 17
§ 8(b), 12 U.S.C. § 2607(b) ... 8, 14, 17
§ 8(c), 12 U.S.C. § 2607(c) ... 3, 12, 15, 16
§ 8(c)(2), 12 U.S.C. § 2607(c)(2) ... 15
§ 8(c)(3), 12 U.S.C. § 2607(c)(3) ... 15
§ 8(c)(4), 12 U.S.C. § 2607(c)(4) ... 15
§ 8(c)(5), 12 U.S.C. § 2607(c)(5) ... 15
§ 8(d), 12 U.S.C. § 2607(d) ... 17, 18
§ 8(d)(1), 12 U.S.C. § 2607(d)(1) ... 17
§ 8(d)(2), 12 U.S.C. § 2607(d)(2) ... 12, 16, 17, 18
§ 8(d)(4), 12 U.S.C. § 2607(d)(4) ... 17

28 U.S.C. § 1292(b) ... *passim*

Domestic Housing and International Recovery and Financial Stability Act, Pub. L. No. 98-181, 97 Stat. 1153 (1983) ... 16

**RULES & REGULATIONS:**

24 C.F.R. § 3500.15 ... 15

Fed. R. App. P. 5(a)(3) ... 5

Fed. R. Civ. P. 12(b)(6) ... 3

64 Fed. Reg. 10,080 (Mar. 1, 1999) ... 7

**OTHER AUTHORITIES:**

16 C. Wright, A. Miller & E. Cooper, Federal Practice and Procedure: Jurisdiction (2d ed. 1996) ........................................................................ 6

# PETITION FOR PERMISSION TO APPEAL

## I. Introduction/Summary of Argument

Defendants bring this Petition for Permission to Appeal the United States District Court for the Eastern District of Pennsylvania's June 30, 2008 Order ("June 30 Order") holding that Plaintiffs have Article III standing to bring a claim for damages under § 8 of the Real Estate Settlement Procedures Act ("RESPA") 12 U.S.C. § 2607. Section 8 of RESPA prohibits kickbacks, referral fees and fee splitting in connection with the provision of real estate settlement services for home mortgage loans. Plaintiffs here challenge private mortgage insurance premiums paid in connection with their loans on the ground that their mortgage insurance provider paid allegedly excessive premiums to reinsure their loans with a captive affiliate of their lender. It was undisputed below that the rate that Plaintiffs allege that they paid for mortgage insurance was a rate filed with the Pennsylvania Department of Insurance and thus the only legal rate that could be charged.

The District Court found that Plaintiffs could pursue their claim for damages under § 8 of RESPA even though they could not allege that they were overcharged for mortgage insurance. In the face of a clear split of authority on the standing issue, however, the District Court issued an August 4, 2008 Order ("August 4 Order") that certified the question of standing for interlocutory appeal under 28 U.S.C. § 1292(b).

Defendants contend, and the District Court below found, that the requirements for an immediate appeal pursuant to 28 U.S.C. § 1292(b) have been satisfied because: (1) standing is a controlling issue of law; (2) the multi-district and intra-district split in authority regarding the scope of RESPA standing demonstrates that there is substantial ground for differences of opinion on this issue; and (3) resolution of the standing issue will materially advance this lawsuit and may result in the early termination of this complex litigation.

## II. Statement of Facts/Case Procedural History

In October 2007, Plaintiffs filed this putative nationwide class action lawsuit alleging that Defendants violated Section 8 of RESPA in connection with the mortgage insurance placed on their loans. They asserted that their private mortgage insurance is subject to captive reinsurance arrangements with WM Reinsurance Mortgage Reinsurance Company ("WM Reinsurance"), an affiliate of Washington Mutual, Inc. ("Washington Mutual"). *See* Complaint ("Compl.") ¶¶ 10-14. According to Plaintiffs, the portion of the mortgage insurance premiums ceded to WM Reinsurance was not commensurate with the risk that WM Reinsurance assumes. *Id.* ¶¶ 60-61. Plaintiffs contended that these allegedly excessive reinsurance premiums were disguised kickbacks paid to Washington Mutual in exchange for the referral of its primary mortgage business. As Plaintiffs acknowledged below, however, the rates that were charged for the primary

mortgage insurance on their loans were rates filed with the Pennsylvania Department of Insurance and, therefore, the only legal rates that could have been charged in the Commonwealth of Pennsylvania. *See* Mem. in Opp. to Defs.' Mot. to Dismiss Class Action Compl. at 15 (Jan. 28, 2008) (Dockt. No. 16). Accordingly, Plaintiffs do not and cannot allege that they were overcharged for mortgage insurance.

On December 21, 2007, Defendants filed a motion to dismiss the Class Action Complaint pursuant to Federal Rule of Civil Procedure 12(b)(6). *See* Mem. of Law in Support of Mot. to Dismiss Pls.' Class Action Compl. (Dec. 21, 2007) ("Mot. to Dismiss") (Dockt. No. 10). That Motion asserted four grounds for dismissal. *Id.* at 2. First, Defendants argued that Plaintiffs' claims are barred by the filed rate doctrine. *Id.* at 3-6. Second, because filed rates are deemed *per se* reasonable, Defendants asserted that the mortgage insurance premiums fall under the safe harbor provided by § 8(c) of RESPA for payments reasonably related to the value of goods and services provided. 12 U.S.C. § 2607(c). *Id.* at 6-8. Third, and germane to this appeal, Defendants contended that because Plaintiffs cannot establish an injury in fact from the imposition of *per se* reasonable rates, they have no standing to assert their RESPA claims. *Id.* at 9-13. Finally, Defendants argued that Plaintiffs' claims should be dismissed pursuant to the *Burford* abstention doctrine. *Id.* 14-16.

The District Court denied Defendants' motion to dismiss, but acknowledged that there is "conflict in the case law and the cases cited by both parties" concerning the standing requirements of § 8 of RESPA. June 30 Order at 12 (attached hereto as Exhibit I, Appendix Tab A). In its June 30 Order, the Court recognized two lines of cases setting forth the requirements for standing to bring a § 8 claim – one following *Morales v. Attorneys' Title Ins. Fund, Inc.*, 983 F. Supp. 1418 (S.D. Fla. 1997), holds that plaintiffs have no standing to bring a RESPA claim unless they can allege that they were overcharged for the settlement services involved in the alleged violation, and one following *Kahrer v. Ameriquest Mortgage Co.*, 418 F. Supp. 2d 748 (W.D. Pa. 2006), holds that plaintiffs need not allege that they were overcharged to pursue a Section 8 claim. *Id.*

Defendants then filed a "Motion For Reconsideration Or, In the Alternative, Request For 28 U.S.C. § 1292(b) Certification." Defendants urged the Court to reconsider its June 30 Order because § 8, when read as a whole, is clearly intended to provide a limited private remedy for damages to injured consumers. RESPA has a separate public enforcement scheme, and there is no indication in the statute or its legislative history that Congress intended to supplement that scheme by permitting uninjured consumers to serve as private attorney generals. *See* Motion for Reconsideration at 8-9. In the alternative, Defendants requested that, given the split of authority on the standing issue, the Court amend its June 30 Order to

certify the issue for immediate interlocutory appeal pursuant to 28 U.S.C. § 1292(b). *Id.* at 2-3.

The Court declined to reconsider its prior ruling, but did certify the "question of plaintiffs' standing for immediate interlocutory appeal." August 4 Order at 8 (attached hereto as Exhibit II, Appendix Tab B).[1] In certifying this question, the Court examined each of the requirements of 28 U.S.C. § 1292(b). The Court found, first, that standing is a controlling question of law because any "judgment would be reversible on final appeal if this determination is erroneous and a different resolution of the issue would eliminate the need for trial." *Id.* at 5. Second, it found that the "conflicting authority provides substantial grounds for difference of opinion regarding whether plaintiffs must allege a settlement service overcharge to maintain a RESPA claim." *Id.* at 7. Finally, it found that "immediate interlocutory appeal of the standing question will materially advance the ultimate termination of the litigation." *Id.* at 7. In conclusion, the Court found "that practical and legal considerations sufficiently warrant certification of the question of plaintiffs' standing for immediate interlocutory appeal." *Id.* at 8. Accordingly, the Court certified its June 30 Order for review by the Court of Appeals pursuant to 28 U.S.C. § 1292(b) and issued a stay pending the outcome of any appeal.

---

[1] The August 4 Order was entered in August 5, 2008, accordingly this Petition is filed within ten (10) days of entry of the Order. Fed. R. App. P. 5(a)(3).

## III. Statement of Issue

According to the District Court's August 4 Order, "the question presented is whether a settlement service overcharge is an element of a private cause of action under [Section 8 of] RESPA." August 4 Order at 6.

## IV. Reasons The Appeal Should Be Allowed

An interlocutory appeal is appropriate under 28 U.S.C. § 1292(b) when an order "not otherwise appealable" (1) "involves a controlling question of law" (2) "as to which there is substantial ground for difference of opinion," and (3) "an immediate appeal from the order may materially advance the ultimate termination of the litigation." *See also Katz v. Carte Blanche Corp.*, 496 F.2d 747 (3d Cir. 1974). Moreover, a district court's order on standing, at the outset of what promises to be protracted, expensive litigation, is especially well suited for interlocutory review. *See Milbert v. Bison Labs., Inc.*, 260 F.2d 431, 433 (3d Cir. 1958) (en banc) (Maris, J., who was one of two federal judges who testified before Congress on § 1292(b)) (tracing the legislative history of § 1292(b) and observing its application is especially appropriate in "cases where a long trial would be necessary for the determination of liability or damages upon a decision overruling a defense going to the right to maintain the action"); 16 C. Wright, A. Miller & E. Cooper, Federal Practice and Procedure: Jurisdiction § 3929, at 365–67, & § 3931, at 453 n.28 (2d ed. 1996).

This Petition should be granted and an immediate appeal allowed because the District Court correctly concluded that there are substantial grounds for difference of opinion on the standing question, and immediate appellate review would materially advance the ultimate termination of this litigation. The District Court's June 30 Order on standing widens an already significant division of authority within the Eastern District of Pennsylvania, this Circuit, and among other district courts nationwide. This split in authority is both stark and significant. Section 8 of RESPA is one of the most frequently litigated statutes in consumer class actions. Department of Housing and Urban Development RESPA Statement of Policy, 1999-1, 64 Fed. Reg. 10,080, 10,083 (Mar. 1, 1999) (noting that in excess of 150 § 8 class actions had been filed in the years prior to the Policy Statement's issuance). Because the statute provides for the trebling of statutory damages, RESPA liability can be significant, particularly if borrowers who have suffered no actual injury have standing to pursue private actions. Indeed, on its face, Plaintiffs' Class Action Complaint seeks hundreds of millions of dollars in damages on behalf of the putative class. As a result, this appeal implicates not only RESPA, but due process concerns that have been consistently raised by the U.S. Supreme Court in recent years. *Philip Morris USA v. Williams*, 549 U.S. 346 (2007); *State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408 (2003); *BMW of N. Am. v. Gore*, 517 U.S. 559 (1996).

The resolution of the proper scope of RESPA standing also would provide lower courts in this Circuit and elsewhere important guidance. Courts are nearly evenly split regarding whether a borrower must allege an overcharge to have standing under Section 8. Compare *Carter v. Welles-Bower Realty, Inc.*, 493 F. Supp. 2d 921 (N.D. Ohio 2007); *Mullinax v. Radian Guar., Inc.*, 311 F. Supp. 2d 474 (M.D.N.C. 2004); *Moore v. Radian Group, Inc.*, 233 F. Supp. 2d 819 (E.D. Tex. 2002), *aff'd*, 69 Fed. App'x 659 (5th Cir. 2003); *Stevens v. Citigroup, Inc.*, No. 00-3815, 2000 WL 1848593 (E.D. Pa. Dec. 15, 2000); *Stevens v. Union Planters Corp.*, No. 00-1695, 2000 WL 33128256 (E.D. Pa. Aug. 22, 2000) (all holding an overcharge is a necessary element of a § 8 claim); with *Alexander v. Washington Mut., Inc.*, No. 07-4426, 2008 WL 2600323 (E.D. Pa. June 30, 2008); *Capell v. Pulte Mortgage L.L.C.*, No. 07-1901, 2007 WL 3342389, at *1 (E.D. Pa. Nov. 7, 2007); *Edwards v. First Am. Corp.*, 517 F. Supp. 2d 1199, 1202 (C.D. Cal. 2007); *Kahrer*, 418 F. Supp. 2d 748; *Robinson v. Fountainhead Title Group Corp.*, 447 F. Supp. 2d 478 (D. Md. 2006) (all holding that no overcharge need be alleged). And although Circuit Courts recently have provided considerable guidance regarding the elements of a §§ 8(a) and 8(b) claims,[2] there has been no

---

[2] *See, e.g.*, *Heimmermann v. First Union Mortgage Corp.*, 305 F.3d 1257 (11th Cir. 2002); *Schuetz v. Banc One Mortgage Corp.*, 292 F.3d 1004 (9th Cir. 2002); *Glover v. Standard Fed. Bank*, 283 F.3d 953 (8th Cir. 2002); *Krzalic v. Republic Title Co.*, 314 F.3d 875 (7th Cir. 2002) (interpreting § 8(a)); and *Santiago v. GMAC Mortgage Group, Inc.*, 417 F.3d 384, 387 (3d Cir. 2005);

appellate guidance regarding § 8 standing. The need for such guidance is real and immediate. Defendants are aware of at least three other putative nationwide class actions currently pending in the Eastern District of Pennsylvania that raise substantially the same RESPA claims against other mortgage lenders and their captive reinsurance affiliates. *Alston v. Countrywide Financial Corporation, et al.*, No. C07-3508 (E.D. Pa.); *Moore v. GMAC LLC, et al.*, No. C07-4296 (E.D. Pa.); *Liguori v. Wells Fargo & Co., et al.*, No. C08-00479 (E.D. Pa.).

### A. The District Court's Order Involves A Controlling Question Of Law On Which There Are Substantial Grounds for Difference of Opinion.

The District Court correctly found that the issue of whether Plaintiffs have standing to pursue their RESPA claims is a controlling issue of law. August 4 Order at 5. As the District Court noted, its determination on standing "would be reversible on appeal if [it] is erroneous and a different resolution of the issue would eliminate the need for trial." *Id.; see also Koken v. Viad Corp.*, 2004 WL 1240672, at *1 (E.D. Pa. May 11, 2004) ("When determining whether an issue presents a controlling question of law, the emphasis is on whether a different resolution of the issue would eliminate the need for trial."). Accordingly, the District Court

---

*Kruse v. Wells Fargo Home Mortgage, Inc.*, 383 F.3d 49 (2d Cir. 2004); *Sosa v. Chase Manhattan Mortgage Corp.*, 348 F.3d 979 (11th Cir. 2003); *Boulware v. Crossland Mortgage Corp.*, 291 F.3d 261 (4th Cir. 2002) (interpreting § 8(b)).

correctly determined that the potentially case-dispositive issue of standing is a "controlling issue of law." *Id.* (citing *Katz*, 496 F.2d at 755).

There is also little doubt that the standing of private parties to sue for violations of § 8 of RESPA is an issue on which there are substantial grounds for difference of opinion. As the District Court acknowledged, there is currently a split in authority among district courts regarding the scope of § 8 of RESPA. August 4 Order at 3; June 30 Order at 128. One line of cases, embodied by *Morales v. Attorneys' Title Ins. Fund, Inc.*, 983 F. Supp. 1418 (S.D. Fla. 1997), *Carter v. Welles-Bowen Realty, Inc.*, 493 F. Supp. 2d 921 (N.D. Ohio 2007), *Mullinax v. Radian Guar., Inc.*, 311 F. Supp. 2d 474 (M.D.N.C. 2004), and *Moore v. Radian Group, Inc.*, 233 F. Supp. 2d 819 (E.D. Tex. 2002), has held that Plaintiffs do not have standing to assert a claim under § 8 of RESPA unless they can allege that they were overcharged for the settlement service at issue. Another line of cases, embodied by the order below, *Kahrer v. Ameriquest Mortgage Co.*, 418 F. Supp. 2d 748 (W.D. Pa. 2006), and *Robinson v. Fountainhead Title Group Corp.*, 447 F. Supp. 2d 478 (D. Md. 2006), has held that Section 8 of RESPA confers standing on consumers to challenge referral arrangements whether or not they resulted in an overcharge for a settlement service.

Appellate guidance as to these issues would be especially welcome because, although the two lines of cases come to diametrically opposite conclusions, they

share the same flawed approach. Both lines of cases myopically focus their standing analyses on the damages provisions of § 8, rather than the statute as a whole. They focus nearly exclusively on 1983 Amendments to § 8, and the debate over whether those amendments changed the statutory damages calculus from three times the overcharge paid for a settlement service to three times the charge. The *Morales* line of cases concludes that the measure of damages under § 8 remains unchanged, while the *Kahrer* line of cases holds that the statutory measure of damages was changed to three times the charge for the settlement service. Yet, even if RESPA was amended to provide statutory damages that are not measured by an overcharge, it does not follow that Congress thereby intended to fundamentally alter the statute to expand standing to Plaintiffs who were not injured. *See Miller v. Nissan Motor Acceptance Corp.*, 2000 WL 1599244, at *23 n.64 (E.D. Pa. Oct. 27, 2000), *reversed in part on other grounds*, ("a statute's damages provision cannot overcome Article III standing requirements"); *see also Moore*, 233 F. Supp. 2d at 822-23 (rejecting "any reading of RESPA that 'presumed injury' for purposes of conferring Article III standing" where plaintiffs fail to allege an actual injury).

Standing is not determined by the damages awarded by a statute, but by Congressional intent, which requires an analysis of the statute as a whole. And when RESPA and § 8 are read as a whole, it is clear that interpretation of the 1983

Amendments as changing the standing requirements for § 8 claims is flawed for at least three reasons.

***First***, there is no need to divine Congressional intent from the language of RESPA's 1983 Amendments. RESPA contains an explicit "Congressional findings and purpose" section, which states that the practices that Congress sought to prohibit were practices that unnecessarily increase settlement charges. ***Second***, RESPA, by its plain terms, does not provide a right to settlements that are free from the taint of referral agreements. Side-by-side with the prohibition of referral fees and fee splits, Congress created a series of exemptions in § 8(c) for certain referral arrangements and for classes of payments that, in Congress' judgment, do not unnecessarily increase the cost of settlement. ***Third*** and finally, the structure of § 8's remedial provisions demonstrates that, in enacting § 8(d)(2), Congress created a limited private right of action to seek damages for overcharges. Seen in this light, an analysis of § 8 standing based solely on RESPA's damages provision and the 1983 Amendments thereto is incomplete and has led to results that are inconsistent with RESPA's purpose and plain language.

#### 1. RESPA's Findings And Purpose Are Consistent With A Congressional Intent to Eliminate Overcharges

The best indication of Congress' intent in enacting RESPA can be found in the statute's "Congressional findings and purpose," which are located in § 2 of the statute. 12 U.S.C. § 2601. Both focus on the elimination of certain practices, such

as fee splits, kickbacks, and referral fees, ***that cause unnecessarily high charges for settlement services***. According to Congress' findings:

> Congress finds that significant 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*** that have developed in some areas of the country.

12 U.S.C. § 2601(a) (emphasis supplied). Congress' statement of its purpose likewise focuses on unnecessarily high settlement service costs:

> It is the purpose of this chapter to effect certain changes in the settlement process for residential real estate that will result ... (2) in ***the elimination of kickbacks and referral fees that tend to increase unnecessarily the costs of certain settlement services.***

12 U.S.C. § 2601(b)(2) (emphasis supplied).

Significantly, the *Kahrer* line of cases starts from the baseline assumption that, consistent with Congress' avowed purpose, § 8 originally only afforded a private remedy to consumers that were overcharged for a settlement service. Yet, there is no indication in the 1983 Amendments that Congress intended to fundamentally alter RESPA's original purpose or its standing requirements. Indeed, the 1983 Amendments left § 2 of the statute unaltered. The 1983 Amendments merely changed the statutory damages language for § 8 from the amount of the transferred "thing of value" paid for the referral to the "charge" for the service itself. As the *Carter* court cogently explained, that change became

necessary when the formerly separate damages provisions for §§ 8(a) and 8(b) were consolidated because the fee splitting provisions of § 8(b) did not reference the transfer of a "thing of value" between settlement service providers. *Carter*, 493 F. Supp. 2d at 927. There is no indication that Congress intended to do anything more.

### 2. RESPA Explicitly Exempts Certain Referral Arrangements From the Purview of the Statute.

The structure of § 8 of RESPA also is consistent with the statute's avowed Congressional findings and purpose aimed at eliminating certain practices that unnecessarily increase settlement costs. Section 8 starts with two broadly worded prohibitions:

> (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.

These broad prohibitions are then tempered by § 8(c), which contains five separate exemptions that "[n]othing in this section shall be construed as prohibiting," including the safe harbor for "the payments to any person of a bona fide salary or compensation or other payment for goods or facilities actually furnished or for services actually performed." 12 U.S.C. § 2607(c)(2). Other exemptions include explicit referral arrangements that would otherwise be prohibited by the statute including: "payment pursuant to cooperative broker and referral arrangements or agreements between real estate agents and brokers," 12 U.S.C. § 2607(c)(3); "affiliated business arrangements" whereby a party refers a consumer to an affiliated settlement service company and thereby profits from the referral,[3] 12 U.S.C. § 2607(c)(4); and "such other payments or classes of payments or other transfers as are specified in regulations prescribed by the Secretary" of Housing and Urban Development ("HUD"), 12 U.S.C. § 2607(c)(5). These provisions – which specifically exempt certain referral arrangements and provide for the Secretary of HUD to authorize other exemptions – are fundamentally at odds with the notion that Congress intended to provide consumers with the right to a settlement free of all referral fees or fee splitting arrangements. Rather, they express a Congressional intent to exempt certain types of payments or referral

[3] Such referral arrangements are permitted provided that certain disclosures are made to consumers and, in most instances, the consumer is provided with the option to use another settlement service provider. 12 U.S.C. § 2607(c)(4); 24 C.F.R. § 3500.15.

arrangements – such as bona fide compensation for goods, facilities and services – that, in Congress' judgment, do not unnecessarily increase the cost of settlement services and therefore are beyond the reach of Section 8.

Ironically, the exemption for certain affiliated business arrangements was enacted by the same 1983 amendments that changed § 8's damages provision. *See* Domestic Housing and International Recovery and Financial Stability Act, Pub. L. No. 98-181, 97 Stat. 1153, 1231 (1983) (codified as amended in 12 U.S.C. § 2607(c)) (adding a new clause (4) and redesignating pre-existing clause (4) as clause (5)). The cases holding that the 1983 Amendments were intended to alter § 8 standing fail to address this fact or explain how Congress conceivably could have amended § 8(d)(2) to create a broad justiciable right to participate in settlements free from the taint of referral arrangements at the same time that it exempted whole classes of such arrangements from the purview of the statute.

RESPA's explicit authorization for certain referral arrangements and the authorization for the Secretary of HUD to exempt other such payments flatly contradicts the notion that Congress ever intended to create an unfettered right to settlements free from referral arrangements. To the contrary, § 8(c) identifies certain types of payments or referral arrangements that, in Congress' judgment, do not unnecessarily increase the cost of settlement services and therefore do not

violate §§ 8(a) or 8(b). Congress did not give potential plaintiffs the right to challenge ***any*** settlement charge, regardless of its reasonableness.

### 3. Section 8(d) Limits Private Enforcement of RESPA to An Action For Damages.

An exclusive focus on the 1983 Amendments to § 8(d)(2) also ignores other provisions of § 8(d) that are inconsistent with the provision of standing to uninjured plaintiffs. If § 8(d) is the "focal point of the standing analysis," *see* June 4 Order at 9, then all of § 8(d) should be evaluated to determine whether Congress intended to alter RESPA's reach so significantly. An analysis of § 8(d), read as a whole, however, demonstrates that Congress intended to create a private cause of action for damages, not a privately enforceable right to settlements free from referral arrangements.

Section 8 of RESPA places primary enforcement authority in HUD, state attorneys general and state insurance commissioners. *See* 12 U.S.C. § 2607(d)(4). In fact, RESPA has criminal consequences. Violations of § 8 can be punished by fines of not more than $10,000 and imprisonment for not more than one year. 12 U.S.C. § 2607(d)(1). Consistent with its public enforcement scheme, § 8(d)(4) places express limits on private standing to seek noncompensatory relief. It provides that HUD, state attorneys general, and state insurance commissioners have the exclusive authority to seek injunctive relief for § 8 violations. 12 U.S.C. § 2607(d)(4). These provisions of § 8(d) demonstrate that Congress designed § 8

to be enforced primarily by public entities and defy any notion that Congress intended to rely on private attorneys general to enforce § 8 or to provide unfettered standing to bring private causes of action.

Congress did supplement public enforcement of § 8 with a private right of action in § 8(d)(2) for what the statute labels as "*treble damages*." 12 U.S.C. § 2607(d) (emphasis supplied). Congress did not provide a private right of action to all parties who participated in the settlement, however, the private right of action is limited to persons "charged for the settlement service involved in the violation." 12 U.S.C. § 2607(d)(2). That limitation is consistent with a Congressional intent to limit standing to consumers who were actually injured by a RESPA violation.

### B. An Immediate Appeal Will Materially Advance The Ultimate Termination Of the Litigation.

Finally, without question, the District Court correctly concluded that an immediate appeal of the June 30 Order will "materially advance the ultimate termination of the litigation." 28 U.S.C. § 1292(b). Factors for determining whether an interlocutory appeal would meet this requirement include whether the appeal "would (1) eliminate the need for trial, (2) eliminate complex issues so as to simplify the trial, or (3) eliminate issues to make discovery easier and less costly." *Orson, Inc. v. Miramax Film Corp.*, 867 F. Supp. 319, 322 (E.D. Pa. 1994) (citing *Zygmuntowicz v. Hospitality Invs., Inc.*, 828 F. Supp. 346, 346 (E.D. Pa. 1993)). Immediate appeal to interpret the elements of standing to assert a RESPA claim

could eliminate the need for a trial entirely because if an overcharge must be pled, the Plaintiffs here lack standing to bring this lawsuit. *See Rosado v. Ford Motor Co.*, 337 F.3d 291 (3d Cir. 2003) (examining the issue of standing in an appeal pursuant to 28 U.S.C. § 1292(b)). If this Court reverses the June 30 Order, its decision will be dispositive of the case and no further proceedings will be necessary.

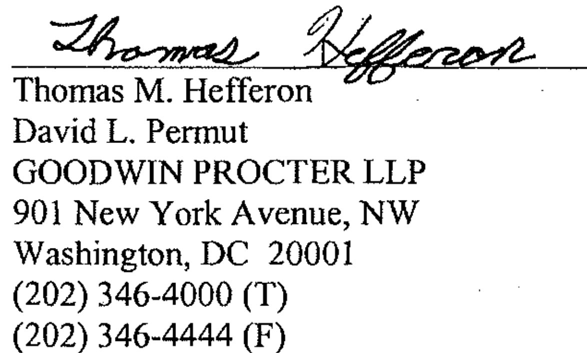
Moreover, an appellate ruling could also save the court and the parties significant additional time for discovery and a merits trial, and would provide useful guidance for pending and future litigants. *See Max Daetwyler Corp. v. Meyer*, 575 F. Supp. 280, 282 (E.D. Pa. 1983) (finding that immediate appeal would materially advance the ultimate determination of the case "not only because the Court of Appeals would presumably direct dismissal of the suit if it disagreed with my analysis," but also "because a significant amount of time, funds, and effort will necessarily be expended by the parties and the court if this matter proceeds to resolution of the substantive merits of plaintiff's complaint").

## V. Conclusion and Statement of Relief Sought

For these reasons, Defendants petition this Court for permission to immediately appeal the District Court's June 30 Order finding that Plaintiffs have standing to pursue their claims under Section 8 of RESPA.

Respectfully submitted,

Martin C. Bryce, Jr.
BALLARD SPAHR ANDREWS & INGERSOLL, LLP
51st Floor
1735 Market Street
Philadelphia, PA 19103-7599
(215) 665-8500 (T)
(215) 864-8999 (F)



Thomas M. Hefferon
David L. Permut
GOODWIN PROCTER LLP
901 New York Avenue, NW
Washington, DC 20001
(202) 346-4000 (T)
(202) 346-4444 (F)

Dated: August 15, 2008

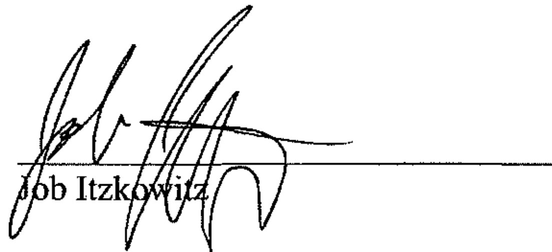
## CERTIFICATE OF SERVICE

I hereby certify that on this 15th day of August, 2008, I caused the foregoing to be served **via U.S. mail, postage prepaid** upon:

Joseph H. Meltzer, Esq.
Edward W. Ciolko, Esq.
James A. Maro, Jr.
Joseph A. Weeden
Mark K. Gyandoh
280 King of Prussia Road
Radnor, PA 19087
Telephone: (610) 667-7706
Facsimile: (610) 667-7056

Alan R. Plutzik, Of Counsel
Robert M. Bramson, Of Counsel
2125 Oak Grove Blvd., Suite 120
Walnut Creek, CA 94598
Telephone: (925) 945-0770
Facsimile: (925) 945-8792

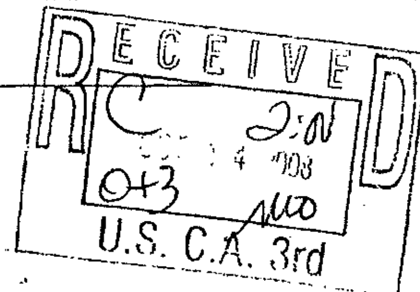
Eric G. Calhoun, Esq.
Richard J. Pradarits, Jr.
Travis & Calhoun, P.C.
1000 Providence Towers East
5001 Spring Valley Road
Dallas, TX 75244
Telephone: (972) 934-4100
Facsimile: (972) 934-4101



Job Itzkowitz

LIBW/1685393.4

IN THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT




| | | |
|---|---|---|
| ROBERT ALEXANDER, et. al. | : | NO. 08-8043 |
| v. | : | |
| WASHINGTON MUTUAL, INC., et. al. | : | |

**MOTION OF PLAINTIFFS/ANSWERING PARTIES ROBERT ALEXANDER and JAMES REED FOR LEAVE TO WITHDRAW THEIR MOTION FOR LEAVE TO FILE ANSWER OUT OF TIME; TO WITHDRAW THEIR "RESPONSE TO PETITION FOR PERMISSION TO APPEAL"; AND TO NOTICE SUPPORT FOR THE PENDING PETITION FOR PERMISSION TO APPEAL**

Plaintiffs/Answering Parties Robert Alexander and James Reed, by and through their counsel, hereby request that they be permitted to withdraw their Motion for Leave to file an Answer to Defendants' Petition For Permission to Appeal out of time (filed September 3, 2008); to withdraw their answer, titled "Response to Petition for Permission to Appeal," (filed out of time with the Clerk for the Third Circuit Court of Appeals on September 2, 2008); and to notice, by way of this Motion, their support for the pending Petition for Permission to Appeal. In support of this request Plaintiffs/Answering Parties aver as follows:

1. Pursuant to an August 4, 2008 Order of the District Court and FED. R. APP. P. 5(a)(3), Petitioners Washington Mutual, Inc., Washington Mutual Bank, Washington Mutual Bank fsb and WM Reinsurance Mortgage Company filed a

Petition to Appeal Under 28 U.S.C. § 1292(b) from the United States District Court for the Eastern District of Pennsylvania ("Petition") on August 15, 2008.

2. On September 2, 2008, Plaintiffs/Answering Parties filed an answer, titled "Response to Petition for Permission to Appeal," opposing the petition.

3. On September 3, 2008, upon determining that the September 2, 2008 answer had been erroneously filed one day late, Plaintiffs/Answering Parties filed a Motion for Leave to File Answer Out of Time, requesting that the September 2, 2008 answer opposing the Petition for Permission to Appeal be accepted for consideration in connection with the Petition for Permission to Appeal.

4. A primary basis for the Plaintiffs'/Answering Parties' opposition to the Petition for Permission to Appeal, as set forth in the September 2, 2008 filing which they now seek to withdraw, was the lack of conflicting decisions within the Eastern District of Pennsylvania regarding the RESPA standing issue resolved by the District Court in this case and certified by the District Court for review.

5. On October 1, 2008, the Honorable James T. Giles granted a Motion to Dismiss in *Alston, et al. v. Countrywide Financial Corporation, et al.*, No. 07-03508, (Exhibit A hereto), in which he reached a conclusion contrary to that reached by the Honorable Thomas N. O'Neill, Jr., in this case, on the issue certified for review by the District Court. As a result, the primary basis for Plaintiffs/Answering Parties' opposition to the Petition for Permission to Appeal,

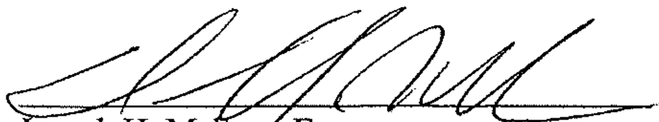
*i.e.* the lack of conflicting decisions within this Circuit, can no longer be asserted in good faith. Accordingly, Plaintiffs/Answering Parties seek leave to withdraw their response in opposition to the petition filed September 2, 2008.

6. Further, given that there are now conflicting decisions within the Eastern District of Pennsylvania, reflecting a substantial ground for difference of opinion about the question certified by the District Court for review, Plaintiffs/Answering Parties wish to place on file, by way of this motion, notice that they support the Petition for Permission to Appeal to the extent, and only to the extent, that they now believe the case presents an issue that is appropriate for interlocutory review under the criteria established by 28 U.S.C. §1292(b).

**WHEREFORE,** Plaintiffs/Answering Parties Robert Alexander and James Reed respectfully request that this Honorable Court grant their Motion for Leave to withdraw their Motion for Leave to file an Answer to Defendants' Petition For Permission to Appeal out of time (filed September 3, 2008); to withdraw their answer, titled "Response to Petition for Permission to Appeal," (filed on September 2, 2008); and to notice, by way of this motion, their support for the pending Petition for Permission to Appeal.

DATED: October 14, 2008

**SCHIFFRIN BARROWAY TOPAZ & KESSLER, LLP**



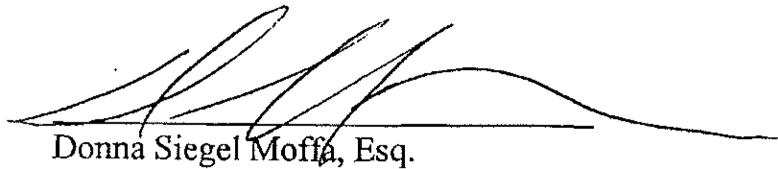
Joseph H. Meltzer, Esq.
Edward W. Ciolko, Esq.
Donna Siegel Moffa, Esq.
Casandra Murphy, Esq.
Terence Ziegler, Esq.
280 King of Prussia Road
Radnor, PA 19087
Telephone: (610) 667-7706
Facsimile: (610) 667-7056

## CERTIFICATE OF SERVICE

I hereby certify that on this 14th day of October, 2008, I caused the foregoing to be served via **Facsimile and U.S. Mail, postage prepaid,** upon:

Martin C. Bryce, Jr., Esq.
1735 Market Street, 51st Floor
Philadelphia, PA 19103

Thomas M. Hefferon, Esq.
David L. Permut, Esq.
901 New York Avenue, NW
Washington, DC 20001



Donna Siegel Moffa, Esq.

# EXHIBIT A

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

| | | |
|---|---|---|
| MARY ALSTON, KEVIN COLLIER, and BRAD AUGUNAS, | : | CIVIL ACTION |
| Plaintiffs, | : | NO. 07-3508 |
| v. | : | |
| COUNTRYWIDE FINANCIAL CORPORATION, COUNTRYWIDE HOME LOANS, INC., and BALBOA REINSURANCE COMPANY, | : | |
| Defendants. | : | |

## MEMORANDUM

Giles, J. September 29, 2008

Before the court is Defendants' Motion to Dismiss Plaintiffs' First Amended Class Action Complaint (Doc. No. 8),[1] Plaintiff's Response in Opposition (Doc. No. 14), and Defendants' Reply (Doc. No. 15). Plaintiffs bring this prospective class action suit on behalf of themselves and all others similarly situated, alleging violations of the Real Estate Settlement Procedures Act of 1974 ("RESPA"). For the reasons that follow, Defendants' Motion to Dismiss is granted.

## INTRODUCTION

Plaintiffs Mary Alston, Kevin Collier, and Brad Augunas claim that Defendants

[1] All docket numbers refer to this court's docket unless marked "C.D. Cal." for the docket in the Central District of California.

Countrywide Financial Corporation and Countrywide Home Loans, Inc. (collectively "Countrywide") and Balboa Reinsurance Company ("Balboa") violated Section 8 of RESPA, 12 U.S.C. § 2607, in connection with the mortgage insurance placed on their loans. They allege that their private mortgage insurance policies are subject to captive reinsurance arrangements with Balboa, an affiliate and subsidiary of Countrywide. (1st Am. Compl. ¶¶ 10-14, 89.) They allege that, pursuant to the captive reinsurance arrangements, the primary insurer cedes a percentage of the mortgage insurance premiums paid by borrowers to Balboa in exchange for assuming a portion of the primary insurer's risk, but that the risk assumed by Balboa is not commensurate with the premiums that it receives. (Id. ¶¶ 60-61.) According to Plaintiffs, these allegedly excessive reinsurance premiums are disguised kickbacks paid to Countrywide through the captive reinsurance arrangements in exchange for the referral of its primary mortgage business. (Id. ¶¶ 66-67.) Plaintiffs allege that the millions of dollars in premiums accepted by Balboa were not for services actually furnished or performed or exceeded the value of any such services. (Id. ¶ 87.) As a result of the alleged kickbacks, Plaintiffs assert that their monthly mortgage insurance premiums were artificially inflated. (Id. ¶ 68, 91.) They further claim that, even if they were not overcharged for mortgage insurance, they were entitled under RESPA to purchase settlement services from providers that did not participate in unlawful kickback schemes and thus are entitled to statutory damages. (Id. ¶¶ 92-93.)

## FACTS

The court recites the facts in the light most favorable to Plaintiffs. Each of the three named plaintiffs resides in Pennsylvania and obtained a residential mortgage loan from Countrywide. (1st Am. Compl. ¶¶ 10-11, 14.) Ms. Alston obtained her loan in April 2005, Mr.

Collier obtained his loan in February 2006, and Mr. Augunas obtained his loan in June 2006. (Id.) Each plaintiff obtained a loan with a down payment of less than 20% and was required to pay for private mortgage insurance from Balboa, Countrywide's captive reinsurer. (Id. ¶¶ 10-11, 14, 17.) Under Countrywide's captive reinsurance arrangements, the primary insurer pays Balboa a percentage of the premiums paid by borrowers on a particular pool of loans, and, in return, Balboa agrees to assume a portion of the insurer's risk with respect to the loans involved. (Id. ¶ 60.) Since 1999, Balboa has collected over $892 million of reinsurance premiums and has paid zero losses. (Id. ¶ 61.)

## PROCEDURAL HISTORY

Plaintiffs filed their original Complaint in this matter on December 22, 2006, in the Central District of California (Case No. 06-cv-8174). (C.D. Cal. Doc. No. 1). On April 3, 2007, Plaintiffs filed their First Amended Class Action Complaint (C.D. Cal. Doc. No. 17). On May 3, 2007, Defendants' filed a Motion to Dismiss the Claims of the Pennsylvania Plaintiffs, (C.D. Cal. Doc. No. 31) and a Motion to Dismiss the Claims of the California Plaintiffs, (C.D. Cal. Doc. No. 31). Plaintiffs filed a Response and Defendants filed a Reply to the Motion to Dismiss the Pennsylvania Plaintiffs. (C.D. Cal. Doc. Nos. 45 & 54.) On August 9, 2008, Plaintiff voluntarily dismissed the California Plaintiffs. (C.D. Cal. Doc. No. 51.)

On August 13, 2007, the remaining claims in the matter were transferred to this court. (C.D. Cal. Doc. No. 53. See also Doc. No. 1.) This court ordered revised briefing on the motion to dismiss. (Doc. No. 7.) On November 9, 2007, Defendants filed their Motion to Dismiss Plaintiffs' First Amended Class Action Complaint (Doc. No. 8). On December 7, 2007, Plaintiffs filed a Response in Opposition, (Doc. No. 14), and on December 14, 2007, Defendants

filed a Reply brief, (Doc. No. 15). Oral argument was held on February 29, 2008.

On February 15, 2008, the court entered as an Order the parties' stipulation to stay the deadline for filing of a motion for class certification pending the resolution of Defendants' motion to dismiss. (Doc. No. 37.)

On February 28, 2008, Plaintiffs filed a Notice of Supplemental Authority. (Doc. No. 28.) In that notice, Plaintiffs argue that DeVito v. Aetna, Inc., 536 F. Supp. 2d 523 (D.N.J. 2008), supports their position that the Burford abstention doctrine should not apply to Plaintiffs' claims.

On July 2, 2008, Plaintiffs filed a Second Notice of Supplemental Authority. (Doc. No. 31.) In that second notice, Plaintiffs argue that Alexander v. Washington Mut., Inc., No. 07-4426, 2008 WL 2600323 (E.D. Pa., June 30, 2008), supports their claims. On July 18, 2008, Defendants filed a Reply to Plaintiffs' [Second] Notice of Supplemental Authority (Doc. No. 32). In that Reply, Defendants rebutted Plaintiff's characterization of Alexander. On August 7, 2008, Plaintiffs filed a Motion to Strike Defendants' Reply to Plaintiffs' Notice of Supplemental Authority or, in the Alternative, to Permit a Brief Response Thereto (Doc. No. 37). Plaintiffs' Motion to Strike is denied.

**STANDARD OF REVIEW**

In deciding a motion to dismiss pursuant to Rule 12(b)(6), courts must "'accept all factual allegations as true, construe the complaint in the light most favorable to the plaintiff, and determine whether, under any reasonable reading of the complaint, the plaintiff may be entitled to relief.'" Phillips v. County of Allegheny, 515 F.3d 224, 233 (3d Cir. 2008) (quoting Pinker v. Roche Holdings Ltd., 292 F.3d 361, 374 n. 7 (3d Cir. 2002)) (stating that this statement of the

Rule 12(b)(6) standard remains acceptable following the U.S. Supreme Court's decision in Bell Atlantic Corp. v. Twombly, 127 S.Ct. 1955 (2007); see id. at 231 (stating that Twombly does not undermine the principle that the court must accept all of plaintiff's allegations as true and draw all reasonable inferences therefrom). To withstand a motion to dismiss under Rule 12(b)(6), "'[f]actual allegations must be enough to raise a right to relief above the speculative level." Id. at 234 (quoting Twombly, 127 S.Ct. at 1965). Thus, "'stating . . . a claim requires a complaint with enough factual matter (taken as true) to suggest' the required element." Id. (quoting Twombly, 127 S.Ct. at 1965); see Wilkerson v. New Media Tech. Charter Sch., Inc., 522 F.3d 315, 321 (3d Cir. 2008) (following Phillips). This standard "simply calls for enough facts to raise a reasonable expectation that discovery will reveal evidence of the necessary element." Phillips, 515 F.3d at 234 (quoting Twombly, 127 S.Ct. at 1965) (quotations omitted).

## DISCUSSION

Plaintiff's First Amended Complaint contains one count: violation of 12 U.S.C. § 2607. In that count, Plaintiffs claim that Defendants have violated RESPA's anti-kickback provision, 12 U.S.C. § 2607(a), and RESPA's prohibition of fee splitting for settlement charges other than for services actually rendered, 12 U.S.C. § 2607(b).

In their Motion to Dismiss, Defendants argue that (1) Plaintiffs' claims should be dismissed pursuant to the Burford abstention doctrine; (2) Plaintiffs' claims are barred by the filed rate doctrine; and (3) Plaintiff Mary Alston's claims are barred by the statute of limitations.

### I. RESPA, Generally

Congress passed the Real Estate Settlement Procedures Act, 12 U.S.C. § 2601 et seq., to inform home buyers about the costs and nature of the settlement process and to protect home

buyers from unnecessarily high settlement charges caused by certain abusive practices. 12 U.S.C. § 2601(a). Congress intended that RESPA would result, inter alia, "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).

Section 2607 of RESPA provides, in relevant part,

> (a) Business referrals
>
> No person[2] 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[3] 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.

12 U.S.C. § 2607. The statute also provides for statutory damages:

> (1) Any person or persons who violate the provisions of this section shall be fined not more than $10,000 or imprisoned for not more than one year, or both.

---

[2] Under RESPA, the term "person" includes individuals, corporations, associations, partnerships, and trusts. 12 U.S.C. § 2602(5).

[3] Under RESPA, "the term 'settlement services' includes any service provided in connection with a real estate settlement including, but not limited to, the following: title searches, title examinations, the provision of title certificates, title insurance, services rendered by an attorney, the preparation of documents, property surveys, the rendering of credit reports or appraisals, pest and fungus inspections, services rendered by a real estate agent or broker, the origination of a federally related mortgage loan (including, but not limited to, the taking of loan applications, loan processing, and the underwriting and funding of loans), and the handling of the processing, and closing or settlement." 12 U.S.C. § 2602(3).

> (2) Any person or persons who violate the prohibitions or limitations of this section shall be jointly and severally 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.

12 U.S.C. § 2607(d). The Secretary of Housing and Urban Development and certain state officials are statutorily enabled to enjoin violations of RESPA. 12 U.S.C. § 2607(d)(4). RESPA also provides a private cause of action. 12 U.S.C. § 2607(d)(5).[4]

## II. Burford Abstention

Defendants argue that Plaintiffs' claims should be dismissed pursuant to the Burford abstention doctrine. See Burford v. Sun Oil Co., 319 U.S. 315 (1943). "In Burford, the Supreme Court stated that a federal court should refuse to exercise its jurisdiction in a manner that would interfere with a state's efforts to regulate an area of law in which state interests predominate and in which adequate and timely state review of the regulatory scheme is available." Chiropractic America v. Lavecchia, 180 F.3d 99, 104 (3d Cir. 1999) (citing Burford, 319 U.S. at 332-334). See also Heritage Farms, Inc. v. Solebury Twp., 671 F.2d 743, 746 (3d Cir. 1982) ("Burford abstention is appropriate where a difficult question of state law is presented which involves important state policies or administrative concerns.") According to the Supreme Court,

> Where timely and adequate state-court review is available, a federal court sitting in equity must decline to interfere with the proceedings or orders of state administrative agencies: (1) when there are "difficult questions of state law bearing on policy problems of substantial public import whose importance transcends the result in the case then at bar"; or (2) where the "exercise of

---

[4] 12 U.S.C. § 2607(d)(5) provides that "[i]n any private action brought pursuant to this subsection, the court may award to the prevailing party the court costs of the action together with reasonable attorneys fees."

> federal review of the question in a case and in similar cases would be disruptive of state efforts to establish a coherent policy with respect to a matter of substantial public concern."

New Orleans Pub. Serv., Inc. v. Council of the City of New Orleans, 491 U.S. 350, 361 (1989) (emphasis added) (quoting Colorado River Water Conservation Dist. v. United States, 424 U.S. 800, 814 (1976)). The third circuit has acknowledges that Burford abstention is only appropriate in cases seeking equitable relief. See Keeley v. Loomis Fargo & Co., 183 F.3d 257, 273 n. 13 (3d Cir. 1999) (holding that Burford abstention is inappropriate in a claim for damages, not equitable relief). See also id. (declining to invoke Burford abstention in a case where a state regulation that affects all members of a class generally, and stating that because "[c]ases implicating Burford abstention involve state orders against an individual party that a federal-court plaintiff seeks to enjoin.") Here, Plaintiffs seek monetary damages in addition to equitable relief. Therefore, Burford abstention is inappropriate.

## III. The Filed Rate Doctrine and Standing

Under the filed rate doctrine, where regulated companies are required by federal or state law to file proposed rates or charges with a governing regulatory agency any rate approved by that agency "is per se reasonable and unassailable in judicial proceedings brought by ratepayers." Wegoland Ltd. v. NYNEX Corp., 27 F.3d 17, 18 (2d Cir. 1994). See also AT&T v. Cent. Off. Tel., Inc., 524 U.S. 214, 226 (1998); AT&T Corp. v. JMC Telecom, LLC, 470 F.3d 525, 532 (3d Cir. 2006). "There is no fraud exception to the filed rate doctrine." AT&T Corp. v. JMC Telecom, LLC, 470 F.3d at 535.

In Pennsylvania, mortgage insurance rates must be filed with the Commonwealth's Department of Insurance. 40 Pa. Stat. § 710-5(a). Regulation by the Commonwealth is intended

forward. They seek declaratory relief and statutory damages for Defendants' alleged violations of RESPA. Plaintiffs' argue that their claims of RESPA violations by Defendants must be considered independently from their allegation that they have paid an artificially inflated rate. In other words, Plaintiffs contend that they have standing to sue for a RESPA violation even if Defendants' alleged kickback arrangement had not increased their mortgage insurance rates. (See Pls.' Opp'n to Defs.' Mot. to Dismiss at 9.) There is considerable disagreement among federal district courts that have addressed this very issue. Compare Mullinax v. Radian Guar., Inc., 311 F. Supp. 2d 474 (M.D.N.C. 2004) (dismissing for lack of standing a RESPA claim without a contestable overcharge), and Moore v. Radian Group, Inc., 233 F. Supp. 2d 819 (E.D. Tex. 2002) (same holding) with Kahrer v. Ameriquest Mort. Co., 418 F. Supp. 2d 748, 756 (W.D. Pa. 2006) ("RESPA gives consumers the right, enforceable by a private right of action for statutory damages, to purchase settlement services from companies that have not participated in a kickback scheme.") and Alexander v. Washington Mut., Inc., No. 07-4426, 2008 WL 2600323 (E.D. Pa., June 30, 2008) (finding that plaintiffs have standing to bring a RESPA claim where they have paid a filed rate). Taking as true Plaintiffs' allegation that Countrywide and Balboa engaged in an illegal mortgage insurance kickback or fee-splitting scheme in violation of RESPA, and taking as true Plaintiff's allegations that they borrowed money from Countrywide and were required to pay mortgage insurance, Plaintiffs have pled a violation of RESPA. The question for this court is whether a claim of such a violation, not having resulted in an inflated rate paid by Plaintiffs, can be brought by private individuals. The court finds it cannot.

As one court has observed, "The damages provision of Section 2607(d)(2) is the focal point of the standing analysis." Carter v. Welles-Bowen Realty, Inc., 493 F. Supp. 2d 921, 924

(N.D. Ohio 2007). According to the damages provision,

> [a]ny person or persons who violate the prohibitions or limitations of this section shall be jointly and severally 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..

12 U.S.C. 2607(d)(2). Clearly, the statute entitles persons who paid for any settlement service in violation of RESPA to receive damages equal to three times the amount of any charge paid for settlement services in violation of the statute. However, the purpose of RESPA is to protect individuals "from unnecessarily high settlement charges." 12 U.S.C. § 2601; Carter, 493 F. Supp. 2d at 927. Here, where Plaintiffs have not been overcharged because of any illegal kickback or fee splitting, the court does not construe RESPA's damages provision as authorizing Plaintiffs to sue for damages. Cf. Carter, 492 F. Supp. 2d. at 924-27 (discussing the legislative history of RESPA and concluding that plaintiffs do not satisfy the injury-in-fact requirement for Article III standing where they have not been overcharged for settlement services); Mullinax v. Radian Guar., Inc., 311 F. Supp. 2d 474, 483 (M.D.N.C. 2004) ("absent an overcharge that is contestable by the plaintiff, a plaintiff does not have standing to sue under RESPA").

## CONCLUSION

Having found that Plaintiffs do not have standing to invoke this court's jurisdiction, Plaintiffs' First Amended Complaint is dismissed without prejudice for lack of jurisdiction. An appropriate Order follows.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

| | | |
|---|---|---|
| MARY ALSTON, KEVIN COLLIER, and BRAD AUGUNAS, | : | CIVIL ACTION |
| Plaintiffs, | : | NO. 07-3508 |
| v. | : | |
| COUNTRYWIDE FINANCIAL CORPORATION, COUNTRYWIDE HOME LOANS, INC., and BALBOA REINSURANCE COMPANY, | : | |
| Defendants. | : | |

**ORDER**

AND NOW, this 29th day of September, 2008, it is hereby ORDERED as follows:

1. Defendants' Motion to Dismiss the Claims of the Pennsylvania Plaintiffs, (C.D. Cal. Doc. No. 31) is DENIED AS MOOT.
2. Plaintiffs' Motion to Strike Defendants' Reply to Plaintiffs' Notice of Supplemental Authority or, in the Alternative, to Permit a Brief Response Thereto (E.D. Pa. Doc. No. 37) is DENIED.
3. Defendants' Motion to Dismiss Plaintiffs' First Amended Class Action Complaint (E.D. Pa. Doc. No. 8) is GRANTED.
4. The above captioned matter is DISMISSED without prejudice for lack of jurisdiction.

BY THE COURT:

S/ James T. Giles
J.

# ATTACHMENT B3

**UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT**

August 27, 2008
BCO-139

**No.** 08-8043

ROBERT ALEXANDER; JAMES LEE REED,
Individually and on behalf of all others similarly
situated

v.

WASHINGTON MUTUAL, INC; WASHINGTON
MUTUAL BANK; WASHINGTON MUTUAL BANK, FSB;
WM MTG REINSURANCE CO,
Petitioners
(E.D. of P.A. Civil No. 2-07-cv-04426)

**Present:** MCKEE, RENDELL, and SMITH, CIRCUIT JUDGES.

1. Petition for Permission to Appeal Under U.S.C. Section 1292(b) filed by Petitioners, Washington Mutual, Inc., et al.

2. Motion by Petitioners, FDIC, for Stay Pending Exhaustion of the Mandatory Administrative Claims Process

**Response deadline 8/29/08**

/s/ Chanel R. Gaines
Chanel R. Gaines 267-299-4955
Case Manager

**ORDER**

In light of a suggestion of bankruptcy advising that Washington Mutual, Inc., had filed a voluntary petition for relief under Chapter 11 of the Bankruptcy Code, an order was entered on January 15, 2009 staying the above-captioned appeal as to Washington Mutual, Inc. The following day, on January 16, 2009, the Federal Deposit Insurance Corporation, which has been substituted for Washington Mutual Bank, Inc., filed a motion to stay this appeal pending exhaustion of the mandatory administrative claims process. This motion has not been opposed by any party to the appeal. It is hereby ORDERED that the unopposed motion for a stay of this appeal pending exhaustion of the mandatory administrative claims process is GRANTED until the FDIC either renders a determination on the administrative claim of the respondents/plaintiffs, or the expiration of the 180-day period allotted for making such a determination

on June 29, 2009, whichever occurs first. The FDIC shall notify the Clerk of Court within seven days of either its determination of the administrative claim by respondents/plaintiffs, or the expiration of the 180-day period.

Inasmuch as this appeal is stayed in its entirety at this time in order to allow other administrative proceedings to advance, it is hereby ordered that the petition for permission to appeal under 28 U.S.C. § 1292(b) is DEFERRED. The parties shall advise the Clerk within fifteen days of either the FDIC's resolution of the administrative claim or the expiration of the 180-day period on June 29, 2009, whichever occurs first, as to whether there is any basis for entertaining the initial petition for permission to appeal under 28 U.S.C. § 1292(b), or the petition for permission to appeal as amended in light of subsequent proceedings. If any party requests consideration of the initial petition, or an amended petition, this matter shall be referred to a motions panel at that time.

**By the Court,**

**/s/ D. Brooks Smith**
**Circuit Judge**

**Dated: February 24, 2009**
**CRG/cc: Robert M. Bramson, Esq.**
**Eric G. Calhoun, Esq.**
**Edward W. Ciolko, Esq.**
**Mark K. Gyandoh, Esq.**
**James A. Maro, Esq.**
**Joseph H. Meltzer, Esq.**
**Casandra A. Murphy, Esq.**
**Alan R. Plutzik, Esq.**
**Richard J. Pradarits, Jr., Esq.**
**Joseph A. Weeden, Esq.**
**Martin C. Bryce, Jr., Esq.**
**Thomas M. Hefferon, Esq.**
**James W. McGarry, Esq.**
**David L. Permut, Esq.**