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Subprime Litigation Adds to Real Estate Woes

By Jeff Nielsen

According to recent research from Navigant Consulting, subprime mortgage and related civil litigation filed in U.S. federal courts during 2007 and the first quarter of 2008 is on pace to eclipse the landslide of lawsuits seen in the wake of the U.S. savings and loan crisis of the early 1990s.[1] While differences exist, that earlier credit crunch was likewise fueled by loosened underwriting standards and falling real estate values. It ultimately required a taxpayer bailout of approximately $160 billion, and saddled the Resolution Trust Corporation, the government entity charged with overseeing the clean-up, with 559 lawsuits during its less than six-year existence. Some estimate the cost of the current maelstrom will top $1 trillion, and it now appears likely the U.S. Treasury will pick up at least some portion of that tab. Moreover, by the end of June 2008, roughly just 18 months since the early tremors of this current credit crisis first emerged, subprime-related litigation will take the ignominious prize as the new high water mark in terms of litigation spillover from a major financial crisis. And we may still just be getting started.

As the deterioration in the credit markets gained speed during the second half of 2007, so did the pace of subprime-related litigation. The number of such cases filed in federal courts nearly doubled during the second half of 2007, from 97 during the first six months to 181 during the latter half of the year. It turned out that was just a warm-up. One hundred and seventy new cases were filed in federal courts during the first three months of 2008, an 85 percent increase over the previous busiest quarter. Moreover, the pace of filings throughout the quarter was unrelenting. The three months comprising the March 2008 quarter now stand as the first, second and fourth highest monthly totals yet observed. August 2007, previously the most active month, fell to third.

[1] Nielsen, Jeff, with Scott Paczosa and William Schoeffler, "Subprime Mortgage and Related Litigation: 2007 – Looking Back at What's Ahead," Navigant Consulting (February 2008); Nielsen, Jeff, with Scott Paczosa and William Schoeffler, "Subprime Mortgage and Related Litigation: First Quarter 2008 Update – Reaching New Heights," Navigant Consulting (April 2008). The information presented in this article is based on the results of these studies, which can be accessed at http://www.abanet.org/litigation/sponsors/navigant.html.

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The Navigant study found that virtually every participant in the subprime collapse is being sued. Fortune 1000 companies were named in more than 50 percent of the 448 cases filed through March 2008. Defendants include mortgage brokers, lenders, appraisers, title companies, homebuilders, servicers, issuers, underwriting firms, bond insurers, money managers, public accounting firms and company directors and officers, among others. The cases filed to date include borrower class actions (45 percent), securities cases (23 percent), as well as commercial contract disputes, bankruptcy, employment and other cases. Geographically, around half of all cases filed are in California and New York courts.

As noted above, it is still early in the litigation process. As of March 2008, only 15 percent of the 2007 cases had received a

ruling on a motion to dismiss (such motions had been filed in less than half the cases). For the 191 class actions filed, only four were class certified. A long road lies ahead, and these suits are likely to be a fixture for years to come.

When will the litigation peak? Perhaps when the market hits bottom. That is, you will likely know it only *after* you see it.

Jeff Nielsen is a Managing Director in the Washington, D.C. office of Navigant Consulting, Inc. where he leads the firm's Financial Services Disputes & Investigations service line. For more than 15 years, Mr. Nielsen has advised companies, boards and their counsel on the financial, economic, accounting and data management aspects of commercial disputes and regulatory investigations, specifically matters involving the financial services industry and real estate. Mr. Nielsen has been retained on more than 50 banking engagements and is currently leading a number of the firm's major subprime-related engagements. He is a frequent speaker on mortgage-related issues and has been quoted, or has had his work cited, in American Banker, National Mortgage News, The National Law Journal, The Wall Street Journal, The New York Times, and Financial Times, among other publications.

Message from the Co-Chairs

Rob Remington and John Morris

Rob

John

The Real Estate Litigation Committee has had a busy 2008. The Committee, among other things, sponsored the program: *The Subprime Meltdown – Enforcement and Litigation Challenges* at the Section of Litigation Annual Meeting in Washington, D.C. The esteemed program panel chaired by Andrew Sandler included Reid Muoio, Assistant Director of the Enforcement Division of the SEC, Thomas Miller, Iowa Attorney General, and Teresa Bryce, General Counsel, Radian Group, Inc. Attendance at the program was excellent and the largest in the history of the Committee.

In addition, the Committee had a very successful Business Breakfast at the Annual Meeting. At the breakfast, Committee plans for the 2008/2009 year were discussed, including plans for achieving increased membership through improvements to the web site, new programs, newsletter improvements, and improvements to the subcommittee structure and population.

The Committee hosts subcommittee calls the last Wednesday of every month to discuss ongoing projects and future plans. All interested Committee members and prospective members are welcome to participate. If you would like to be included on the invitation list for the calls, please e-mail Rob Remington at rrr@hahnlaw.com.

For the remainder of 2008 and through 2009, the Committee intends to continue its focus on the subprime crisis. Each of our upcoming Newsletters will include timely articles and updates on the legal issues arising out of the crisis. In addition, the Committee web site will contain legal updates and case summaries on subprime issues, and the Committee intends to pursue additional programs on this topic at next year's Section Annual Conference, which will be held in Atlanta on April 29 to May 1, 2009.

Finally, the Committee is planning to host a Business Breakfast at the ABA Annual Meeting to be held in New York City August 7 – 10. If you are planning to attend the Annual Meeting, please stop by the breakfast.

Rob Remington and John Morris

Recent Developments in Closing Protection Letter Case Law

By David E. Austin

Closing Protection Letters (CPLs) may be common to title insurance attorneys, but not all real estate litigators have a reason or opportunity to deal with them in their regular practice. With the recent increase in loan fraud litigation, CPLs are becoming an important topic for any real estate litigator. In this article, I will summarize how CPLs work, and discuss two recent developments in closing protection letter litigation – one case that found that contributory negligence by the lender was not a defense to liability under a CPL, and one case that found that a lender will be limited to recovery pursuant to the terms of a CPL.

What is a CPL?

A title insurer uses a CPL to promise a lender that their closing agent is trustworthy. Although CPLs may confer ancillary benefits on purchasers, CPLs are written by title insurers to encourage lenders to use that particular insurer's agents to close their real estate transactions.[1]

CPLs protect lenders under certain limited circumstances. For example, a CPL will allow a lender to be reimbursed by the title insurer if an agent misappropriates funds advanced by the lender to pay off an existing loan at closing, or if the agent fails to comply with the lender's closing instructions related to the title of the subject property.

Although CPLs offer protection to lenders, they do not replace closing agents' errors and omissions insurance, and do not supplant existing claims that lenders may have against their closing agents when their closer is acting as the lender's, rather than the insurer's agent. Closing protection letters also do not invalidate or replace the protections afforded by a loan policy of title insurance. Instead, they supplement the coverage provided by the loan policy and act as an additional incentive for the lender to use that title insurer's agent at closing.

Similarly, CPLs are not considered insurance policies because no separate premium is collected for the letter, although the argument has been advanced that the use of the title insurer's agent serves as consideration for the CPL. Most courts recognize that the CPL is a separate contract that provides its own remedies for lenders.

Standardized CPLs have been promulgated by the American Land Title Association (ALTA), although some states have developed their own versions. The most recent ALTA CPL forms, adopted in October 2007, incorporate additional conditions and exclusions from their predecessors, and include more affirmative coverage. These new forms also elaborate on the relationship between issuer and agent or approved attorney, disclaim liability for acts and knowledge of other third parties, and include an arbitration provision.

In recent months, claims involving CPLs are becoming more common as part of the national increase in loan fraud litigation. Accordingly, the law surrounding CPLs continues to develop as more claims are made, and lawsuits are filed over those claims. Two recent decisions by Georgia and Florida courts have already made significant changes to CPL case law, finding that (1) a lender's contributory negligence is not a defense to a CPL claim and (2) tort damages are not recoverable under a CPL.

Contributory Negligence

The Georgia Court of Appeals recently addressed whether a lender's contributory negligence is a defense to a title insurer's liability under a CPL. The closing in *Lawyers Title Insurance Corp. v. New Freedom Mortgage Corp.*, 645 S.E. 2nd 536 (Ga. App. 2007) was a sham transaction involving a straw purchaser and an inflated property appraisal. The lender, New Freedom, argued that the insurer's closing agent disregarded the lender's written closing instructions and acted fraudulently in handling the lender's funds and documents. Accordingly, New Freedom argued that it was entitled to recover its damages for the closing agent's fraud.

The *New Freedom* court held that the lender's contributory negligence was not a defense to the title insurer's alleged liability under the CPL. The court interpreted the phrase "arise out of" in the closing protection letter to require full indemnification for the lender in cases in which the lender's negligence may have partially caused the loss. However, the *New Freedom* court recognized that the title insurer would not be liable under the CPL if the lender's loss was caused entirely by the lender's negligence.

The court also reiterated the longstanding rule that CPLs are not insurance policies, but used a notably different rationale in arriving at its conclusion. Under Georgia law, an insurance policy is defined as a plan to allocate losses by indemnifying another party or pay benefits under certain circumstances. A necessary element to any insurance policy is distributing risk. The Court reasoned that under the CPL issued by Lawyer's Title, there was no other party that assumed the risk of loss. The CPL did not distribute risk and therefore was not an insurance policy. This is an important distinction, because courts have previously relied on the premise that no premium is collected for a CPL when determining that a CPL is not an insurance policy.

Finally, the *New Freedom* court found that the lender did not need to prove that the agent intended to commit fraud. Instead, the lender-claimant only needed to prove that the closing agent acted with the intent to deceive in order for liability under the insured closing protection letter.

[1] Although title insurers issue CPLs to lenders, purchasers passively receive the same ultimate benefits as the lender through the protections of a CPL. Moreover, purchasers still retain claims against an agent through the agent's errors and omissions (E & O) carrier and against the title insurer under theories of agency and their owner's policy.

After *New Freedom*, lenders now have the ability to argue that a closing protection letter should indemnify the lender for its losses due to the acts of the closing agent – even when the lender's broker or appraiser was part and parcel to the fraud.

Are Damages Under a CPL Available in Tort or Contract?

The Middle District of Florida recently held that tort damages are inappropriate when a lender asserts a claim under an insured closing protection letter. In *Lehman Brothers Holdings, Inc. v. Hirota*, No. 8:06-cv -2030-T-24MSS, 2007 WL 1471690 (M.D. Fla. May 21, 2007), Lehman Brothers was induced to fund loans based on false financial information, undisclosed second mortgages, and overvalued appraisals. This scheme left Lehman Brothers with a number of unsecured loans and millions of dollars in damages. The defendants, including the title insurer, moved to dismiss Lehman Brothers's claims of fraud, negligent misrepresentation, and negligence, alleging they were barred by the precedent established in *Indemnity Insurance Co. of North America v. American Aviation, Inc.* 891 So. 2d 532 (2004).

In *Indemnity Insurance*, the Florida Supreme Court applied "economic loss rule" to prohibit the use of tort claims to bypass previously negotiated contract remedies for nonperformance. Under the "economic loss rule," the Court held, tort remedies cannot be used to get a "better bargain" than the contractual remedies already afforded by the underlying agreement.

The *Hirota* court used the "economic loss rule" to bar Lehman Brothers's fraud and misrepresentation claims because they arose out of the closing and were already addressed by the prenegotiated contractual remedies in the CPL. Moreover, the court found that Lehman Brothers's breach of fiduciary duty claims were also barred because they were based on the closing instructions which served as a contract between Lehman Brothers and the closing party.

The Court therefore established that a lender is not entitled to seek recovery outside the terms of the CPL when it is issued in conjunction with an insured's closing.

Next Steps in CPL Litigation

More loan fraud cases were filed in 2007 than in any previous year. As this trend continues, lenders will require title insurers to write CPLs to allow for additional coverage or to provide for additional damages – much like insurers' expanded coverage in the new ALTA form policies of title insurance.

The two cases discussed in this article illustrate one truth evident in closing protection letter litigation. One court will issue an opinion limiting coverage under the closing protection letter, as the Florida Supreme Court did in *Hirota*. Conversely, in the same year, another court will issue an opinion expanding coverage under these letters, as the Georgia Court of Appeals did in *New Freedom*. Practitioners who have occasion to deal with CPLs in their practice should stay current of such rapid developments in case law.

David E. Austin recently joined Alston Hunt Floyd & Ing in Honolulu, Hawai`i as an associate, and will practice in its Real Estate and Title Litigation group. He is a member of the bar in Maryland and the District of Columbia. He can be reached at daustin@ahfi.com.

Risks in Construction: Fair Housing Exposure

By Lauren M. Lyon-Collis

Federal law requires that commercial and residential buildings be designed and constructed for access by the disabled. The Americans with Disabilities Act of 1990 mandates that certain newly-altered or newly-constructed public facilities be made accessible in accordance with strict federal standards. The federal Fair Housing Act requires all covered multi-family dwellings, built for first occupancy after March 13, 1991, to be designed and constructed to incorporate accessibility and adaptable design features, such as usable doors, kitchens and bathrooms, reinforced walls for grab bars and accessible and usable public and common use areas. The Department of Housing and Urban Development has developed the Fair Housing Accessibility Guidelines and the Fair Housing Act Design Manual, which, if followed, provide a safe harbor under the Fair Housing Act. Other codes and guidelines address these requirements and several of them also offer safe harbors. These prolific guidelines include measurements of countertops, doorways, and plumbing appliances. Yet, when interpreting the legal requirements, agencies are using these guidelines as the minimum thresholds of compliance with the Fair Housing Act, at times down to the ¼ inch, with no recognition that variances typically occur during construction. In addition, state and local jurisdictions have developed their own building codes and accessibility requirements, which often differ from federal laws and guidelines.

Owners and developers may be held liable for breach of federal accessibility laws years after the completion of construction. Injunctive relief includes corrective construction that can cost hundreds of thousands of dollars per project. A number of advocacy groups, including the Equal Rights Center and the National Fair Housing Alliance, are sending out testers and filing civil claims on behalf of persons with disabilities against owners and developers. Claims may affect the developers' entire portfolios rather than a single project. The U.S. Department of Justice is also investigating claims and bringing costly federal lawsuits after a lengthy administrative process.

Protecting owners and developers requires not only engaging architects, engineers and general contractors experienced in accessibility requirements, but also including protective provisions and certifications in the design and construction contracts to address applicable requirements. While such provisions may not limit the liability of owners and developers,

they ensure that third-party contractors will be obligated in the event of violations. Third-party consultants are also available and, in most cases, should be used, to navigate the complex accessibility requirements and evaluate the construction process at critical stages for compliance.

Owners and developers are not without defenses available to them. For example, in the recent decision *Garcia v. Brockway*, 526 F.3d 456 (9th Cir. 2008), the court affirmed the trial court's decision that the two-year statute of limitations period for a civil suit ran from the time of construction completion. *But see Fair Housing Council, Inc. v. Village of Olde St. Andrews, Inc.*, 210 Fed. Appx. 469, 481 (6th Cir. 2006) (holding that the limitation period will depend on the specific circumstances of the case), and *Kuchmas v. Towson University*, No. RDB 06-3281 (May 15, 2008) (holding that the statute of limitations begins to run at the time the apartment unit is leased). The Supreme Court may settle these conflicting circuit views in the near future.

When, however, settlement is the best option, the agreement should generally be structured with a consent decree that requires the implementation of the corrective work and other provisions over a period of years. *See Equal Rights Center v. Bozzuto & Associates, et al.*, Case No. DKC-05-CV-255 8 (filed Sept. 15, 2005), United States District Court for the District of Maryland. Settlement should be structured to displace as few residents as possible during periods of substantial work to avoid additional costs in disrupted operations and lost occupancy.

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HUD's Renewed RESPA Reform: Significant Impact on the Residential Mortgage Origination Process

By Christy Ames and Sean Renfroe

The Real Estate Settlement Procedures Act (RESPA) was enacted in 1974 to educate consumers about settlement services and eliminate referral fees and kickbacks at closing. Currently, the Office of Housing and Urban Development (HUD) has been trying to amend the RESPA requirements governing residential loans. In 2002, HUD published a proposed rule in the Federal Register but withdrew the amendment after it received abundant criticism.

On March 14, 2008, HUD submitted another proposed amendment with the hopes that such an amendment would assist the consumers by simplifying the mortgage process through better disclosures of settlement costs and would aid the borrower in shopping for loans. This proposed amendment is based on the comments to the 2002 Amendment, as well as suggestions made at roundtable discussions.

The proposed rule seeks to adopt a standard Good Faith Estimate (GFE) form to be used in any RESPA loan, impose certain tolerance levels depending on the cost category to prevent increases on the GFE, and improve the disclosure of yield spread premiums. Additionally, the proposed rule would amend the HUD-1 settlement statement by referencing the GFE on the statement and would require the reading aloud of a "closing script" that compares the GFE with the final settlement statement. Finally, the proposed rule would permit a settlement service provider to use average cost pricing and negotiated discounts, modify the definition of "required use" to strengthen the prohibition against the use of affiliates, and authorize the use of electronic forms for all RESPA documents and RESPA disclosures upon the satisfaction of certain conditions.

Modifications to the Good Faith Estimate - Standard Good Faith Estimate Form

HUD is proposing a four-page standard GFE form to be given to borrowers for any RESPA loan. Page one of the summary would provide a borrower with a summary of the key loan terms, including the initial loan amount, the loan term, the initial interest rate, the rate lock period, whether there is a prepayment penalty, and whether there is an escrow for taxes and insurance. HUD believes that the standard GFEs will enable a borrower to more easily shop for loans by providing a form to compare GFEs.

As provided on Page 3 of the GFE form, the proposed rule would explain how the interest rate will affect the settlement costs, as well as provide the borrower with other available alternatives. A borrower has three options: (1) choose the loan provided on the GFE; (2) choose an identical loan with a lower interest rate and monthly amounts, but higher settlement costs; or (3) choose an identical loan with a higher interest rate and monthly amounts but lower settlement costs. If a borrower

chooses an alternative method, the loan originator would provide the borrower with a new GFE.

Page 4 of the GFE form provides important information to the borrower on how to apply for a loan, as well as borrowers' financial responsibilities as homeowners. A chart is also made available on Page 4 of the GFE to help borrowers compare GFEs from loan originators.

The proposed rule does permit a loan originator to collect a fee for the cost of preparing the GFE, even though HUD would prefer that borrowers are not charged any fees.[1]

Modifications to the Good Faith Estimate - Specific Modifications

Under the proposed rule, HUD is recommending the following modifications to the GFE:

- Change in the Definition of "Application": Similar to the 2002 amendment, HUD has proposed a change in the definition of "application." Under the current rule, "application" is defined as the "submission of a borrower's financial information in anticipation of a credit decision, whether written or computer generated, relating to a federally related loan." The proposed amendment would establish an entirely new definition for a "GFE application" and create a new definition for "mortgage application." The GFE application would comprise those items needed to receive a GFE, such as the borrower's name, Social Security number, property address, gross monthly income, borrower's information on the house price or best estimate of the value of the property, and the amount of the mortgage loan sought. The trigger for the initial RESPA disclosure occurs upon the submission of the GFE application.

On the other hand, the mortgage application would be an expansion of the GFE application to include all other information required by the loan originator for underwriting purposes. HUD is specifically requesting comments on how the proposed GFE will impact other disclosure requirements.

- 10-Day Lock Period for GFE Terms: While the interest rate, the per diem interest and the monthly payment estimate for the loan set forth on the GFE are subject to change until the rate is locked, under the proposed rule, all other estimates may not be modified for a period of ten (10) business days. This is a reduction from the thirty (30) day period suggested by the 2002 Amendment. According to HUD, this period should provide borrowers with ample amount of time to shop for loans.

- Consolidation of Major Settlement Categories: Instead of a laundry list of fees and charges, the proposed GFE would provide a single, consolidated amount for each major settlement cost category.

- Limited to No Available Tolerances: Due to complaints by borrowers that the GFE did not accurately reflect the settlement costs, the proposed rule prohibits loan originators from increasing their own service charges as well as the government recording transfer charges, absent unforeseeable circumstances. While these charges have a zero tolerance, all other fees and charges can be increased by 10 percent. This permitted tolerance is still subject to a limitation. The increase is permitted so long as the total cost of the fees subject to the 10 percent tolerance does not increase by more than 10 percent.

HUD does recognize, however, that in the event the borrower requests a change in the loan amount, loan type or loan product, the originator will obviously not be bound to the figures on the original GFE. Any changes would result in a new application in which a new GFE would have to be provided to the borrower by the loan originator.

- Definition of "Unforeseeable Circumstances": As noted above, a loan originator is not bound to a figure on the GFE in the event of an unforeseeable circumstance. The proposed rule defines "unforeseeable circumstances" as "1) Acts of God, terror, disaster or other types of emergency that makes it impossible or impracticable for an originator to perform; or 2) circumstances that could not be reasonably foreseen at the time of the GFE application, that are particular to the transaction and that result in increased costs." Market fluctuations are specifically excluded from the definition of "unforeseeable circumstances."

- Potential Cure Period: Under the proposed rule, failure to meet the requirements set forth on the GFE form would result in a violation of Section 5 of RESPA. HUD is seeking comment as to whether a cure period should be granted to violating loan originators so as to avoid possible sanctions. During such period, a loan originator can pay to the consumer any excess amount of the charge so as to be in compliance with Section 5.

Disclosure of Yield Spread Premiums

Yield Spread Premiums (YSPs) have been the subject of many consumer complaints and lawsuits over the past decade. Consumers claim they were unaware of the additional compensation for the mortgage brokers, as well as any benefit for mortgage brokers garnered from having an interest rate above the par interest rate as a result of borrowers being placed with a loan with a higher interest rate than was necessary. HUD, however, believes that YSPs can serve a useful purpose by aiding borrowers with the payment of closing costs. Accordingly, the proposed rule requires disclosure of all lender

[1] A copy of the form GFE is located at http://www.hud.gov/offices/hsg/sfh/res/200803/5180GFE.pdf.

payments to mortgage brokers on the GFE and on the HUD-1 settlement statement for all table funded and intermediary transactions. The proposed disclosures are based on an interactive process conducted by the FTC and HUD testing the GFE form during the 2003-2007 period.

Additionally, the proposed rule modifies the definition of "mortgage broker." HUD is proposing that the definition of "mortgage broker" include any "person (not an employee of the lender) or entity that renders origination services in a table funded or intermediary transaction," and specifically eliminates the exclusion granted to "exclusive agents" of a lender. The Mortgage Bankers Association and the National Association of Mortgage Brokers, who were adamantly against the YSP provisions in the 2002 Amendment, have praised the proposed amendment.

Facilitating the Comparison Between the GFE and the HUD-1 Settlement Statement

Under the proposed rule, the HUD-1 settlement statement would be modified to make it more comparable to the GFE. In order to aid in the comparison, a reference to the corresponding GFE would be inserted on the HUD-1 settlement statement so as to allow the borrower to compare the figures between the two documents. In addition, the HUD-1 would itemize all items provided by third parties but would not itemize services connected to the origination.

An addendum to the HUD-1 would also be provided to the borrower at the closing under the proposed rule. The addendum would compare the final settlement costs with the GFE, and would describe the specific details of the loan. The settlement agent would be required to read the addendum aloud and to explain the comparison between the document and the GFE. She or he would also be required to state whether or not the tolerance was met as well as the loan terms. The proposed rule provides that failure to complete the HUD-1 in the manner set forth in the rule will constitute a violation of Section 4 of RESPA.[2]

Permissibility of Average Cost Pricing and Negotiated Discounts

The proposed rule would also permit the charges for third party services to be based on average cost pricing mechanisms utilizing accounting methods approved by HUD. According to the proposed rule, a loan originator would designate a six-month period as an "average period," and the average price would be used on every transaction. HUD is seeking comment on the methods for determining the average price.

In addition, the definition of "things of value" as set out in Section 8 of RESPA would be clarified by the amendment to specifically exclude negotiated pricing arrangements by settlement service providers. The permissibility of the negotiated discounts is conditioned on the borrower not being charged for the discount.

Prohibitions Against Requiring the Use of Affiliates

According to HUD, some businesses have attempted to use the affiliated business arrangement exception in Section 8 of RESPA to send consumers to an affiliated business that may provide a lesser quality of service. Thus, HUD has proposed a modification of the definition of "required use" to include not only builders and their affiliated settlement service providers, but also any businesses that are clearly affiliated due to their corporate structure or that would be deemed an "affiliated business arrangement" under RESPA.

ESIGN

The proposed rule would specifically authorize the statutory applicability of the Electronic Signatures in Global and National Commerce Act (ESIGN). As such, as long as the consumer consents and the ESIGN requirements are met, the RESPA disclosures may be provided in electronic form and all of the documents required by RESPA may be retained in electronic form.

Technical Amendments

The proposed rule would amend the current RESPA regulations governing mortgage servicing disclosure statement and the current escrow regulations.

Planned Implementation of the Final Rule

Under the proposed rule, upon adoption of the final rule, there will be a 12 month transitional period in which settlement service providers may comply with either the current requirements or revised requirements.

Timeline

The proposed rule was published in the Federal Register on March 14, 2008. Comments on the proposed rule were originally due on May 13, 2008, but HUD extended the public comment period until June 12, 2008. During the next several months, HUD will review and assess the comments that it has received. HUD plans on publishing the final rule by the end of 2008.

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[2] A copy of the proposed HUD-1 settlement statement can be found at http://www.hud.gov/offices/hsg/sfh/res/200803/5180HUD1.pdf.

representation of lenders in connection with sophisticated commercial lending transactions, with an emphasis on capital market lending. Sean can be reached by e-mail at srenfroe@stites.com.

Property Flipping 101: The Schemes and Potential Liability

By Adam R. Lorenz

The "sub-prime crisis" exposed a number of mortgage fraud schemes that became increasingly sophisticated and widespread during the years of low interest rates and relaxed lending practices. Despite the relative tightening in lending practices and concerted efforts to combat mortgage fraud, these schemes still persist, and their architects continue to find new ways to exploit the system. For those who represent lenders, borrowers, title companies, insurers and other players in the real estate business, it is critical to be aware of these schemes, how they operate, and the potential liability involved. This article provides an overview of these issues and focuses on a few current cases that discuss the potential liability that can arise from fraudulent property flipping.

One of the more notable phenomena in this area has been the proliferation and increasing sophistication of so-called "property flipping schemes." Appraisal fraud, which is often involved with such schemes, also presents a persistent problem. As the real estate and mortgage markets tighten, flipping schemes become increasingly difficult to operate. Most of them rely upon a supply of willing buyers and easy availability of mortgages. However, as these markets recover, it is virtually inevitable that such fraud will proliferate again.

At its base, "flipping" property simply describes a series of transactions whereby an investor purchases a property and resells it in a relatively short timeframe, often at a much higher price. In the abstract, there is nothing illegal or unethical about the practice. It is the market at work: buying low and selling high. However, too often, these schemes rely upon falsely inflated property values, false or embellished borrower information, or sham transactions through "straw parties." The fact that this business can be conducted in a perfectly ethical and legitimate manner makes it particularly difficult to detect and expose the underlying fraudulent conduct. As such, it is useful to understand the tactics that dishonest players employ to make these schemes work.

Types of fraudulent property flipping schemes

Perhaps the most common and obvious form of fraudulent property flipping involves the use of a falsely inflated appraisal to resell a property at a substantial profit. This type of conventional property flipping scheme is unfortunately quite common, particularly in urban areas. The properties that flippers target are generally "distressed" in some sense, in that the property has fallen into disrepair or the owner has an urgent need to sell. The property is often "rehabilitated" in a superficial sense without any meaningful investment. Once facially rehabilitated and re-appraised, the property is marketed to the public. Such schemes usually rely upon at least a careless appraiser who is duped by the investor's improvements. However, it is not unusual to find appraisers actively participating in this type of scheme.

Even legitimate real estate investors often possess a friendly relationship with at least one appraiser. Appraisers regularly deal with pressure from a good customer to arrive at a certain value; some are more willing than others to be flexible in response to the client's requests. However, this relationship can facilitate collusion on the part of the appraiser to falsely inflate appraisals in exchange for a larger fee or kick-back out of the transaction. Without question, a fine line divides appraisals that are "inflated" using the best possible comparables (even if they are not the most comparable) and other such data from those appraisals that are simply contrived. While both practices distort the market and ultimately place the lender at risk, the latter practice causes much larger and more frequent losses for the banks and owners involved.

It should be noted that these schemes do not necessarily involve a dishonest appraiser. Often, a group of investors will hold properties as rental properties. Over time, they will transfer the properties between and among each other and increase the sale price with each sale. When the property sells, often to an unsophisticated buyer, the price appears justified by the amount the current owner paid. This series of transactions can skew the opinion of even an honest appraiser, particularly when it involves several properties in the same neighborhood. The apparent values of the property itself and the comparables all become falsely inflated.

Because lenders and buyers have become more aware of such schemes, more involved property flipping schemes have evolved. One such common scheme involves the "recruiting" of unsophisticated buyers by the participants in the fraud. In this type of scheme, a buyer is often sought out directly or through directed advertising. Once engaged, a buyer is convinced to accept a higher-than-market price for the property by the seller's promise of a "no money down" closing and affordable payments for at least some period of time. Often times, such sellers will work with a friendly mortgage broker that secures the financing. To obtain financing, the seller or broker often falsify or inflate the buyer's income or secure an inflated appraisal. The seller may also give the buyer a loan for the down payment, which is not disclosed to the buyer's primary lender, who is provided with a false gift letter. These schemes tend to rely upon very unconventional mortgage loans, which have become much less available recently. It remains to be seen whether this will remain the case.

More complex schemes often rely upon buyers that cannot readily afford to purchase a house, whether because of poor credit, low income or lack of cash to close. Because the buyers cannot afford to look elsewhere, they are willing to pay an inflated sale price and are often tempted to participate in a deal even though they know that the lender is being misled. The net

effect of these transactions, as the market is feeling now, is that ultimately the buyer often cannot afford the loan and defaults.

These more subtle schemes tend to involve additional levels of fraud. In addition to a potentially fraudulent appraisal, the primary lender is often misled as to the terms the buyer is actually receiving. In addition, sellers often mislead unsophisticated buyers as to the terms of the transaction. If the fraud also involves the title company, a loan may be secured for more than is needed to close the deal with the excess proceeds distributed to the scheme's participants.

The types of fraudulent property flipping schemes and tactics discussed above are typical variations on a common theme. Dozens more exist, and new ones evolve daily. However, a basic ability to recognize how these schemes work is useful to those who practice in the real estate area, particularly those who represent lenders, title companies, independent investors or appraisers.

Civil Liability Implicated By Fraudulent Property Flipping Schemes

While an in-depth review of the civil and criminal implications of the many types of fraudulent property flipping schemes goes well beyond the scope of this article, it is useful to consider the applicable law. The types of schemes discussed above have resulted in civil liability under state consumer protection and fraud laws as well as federal racketeering statutes. A number of the participants in such schemes have also been prosecuted and convicted of federal crimes.

A recent opinion from a trial court in the Western District of Missouri illustrates the range of civil remedies that a mortgage company or bank may possess against those parties to a property flipping scheme. The court in *First Magnus Financial Corp. v. Summit Mortgage, L.L.C.*, 2006 WL 2418918 (2006), detailed a scheme that involved property speculators, mortgage brokers, and appraisers willing to inflate their valuations and "enabling title companies." The mortgage company that held the loans originated through this scheme filed suit against all of these parties for fraud and civil conspiracy under Missouri law and for civil violations of the federal Racketeering Influenced and Corrupt Organizations Act or "RICO." *Id.* at 1.

The court determined that the complaint stated a cause of action for fraud and civil conspiracy and that the organization as a whole could be considered a "criminal enterprise" that engaged in a "pattern of racketeering activity" under RICO. *Id.* at 2-4; *see also* 18 U.S.C. § 1962(c). This case establishes that, in addition to state law civil remedies for fraudulent misrepresentations, banks and other persons injured through these schemes possess a civil remedy under the federal racketeering statutes.

Falsely inflating appraisals can also provide a basis for civil liability against an appraiser under state and federal law. Under several state laws, a buyer can state a cause of action for fraudulent misrepresentation against an appraiser if he or she relies upon the appraised value in deciding to purchase property. *See Dueker v. Gill*, 175 S.W.3d 662, 667 (Mo. App. 2005).

In the *Dueker* case, the Court explained that the elements required to establish a fraudulent misrepresentation as to an appraiser are the same as to any other potentially false representation. The plaintiff must prove "(1) a representation; (2) its falsity; (3) its materiality; (4) the speaker's knowledge of its falsity or ignorance of its truth; (5) the speaker's intent that his statement be acted upon; (6) the hearer's ignorance of the falsity of the statement; (7) his reliance on the truth of the statement; (8) the hearer's right to rely on the statement; and (9) the hearer's consequent and proximate injuries." *Id.* at 667. In that case, the court ultimately found that the buyer decided to purchase the property before viewing the appraisal and, thus, did not rely on the statement of value to his detriment. *Id.*

While the appraiser escaped liability in the *Dueker* case, that case made clear that an appraiser's opinion will be treated by many courts as any other potentially false representation. *See Costa v. Neimon*, 366 N.W.2d 896 (Wis. Ct. App. 1985)(holding that appraiser's opinion of value constituted an actionable statement of fact due to professional appraiser's "implied assertion" of knowledge of the facts supporting the opinion). The very purpose of an appraisal is to provide information that is assembled by a professional and is reasonably reliable. Buyers and banks rely heavily on the integrity of this profession and should have some recourse against dishonest professionals.

One should note that not all states allow a false appraisal to form the basis of a fraudulent misrepresentation claim. At base, an appraisal is an opinion. Generally, statements of opinion cannot form the basis of a fraud claim. Some states follow this rule, while others carve out an exception for professionals such as appraisers. Missouri, for instance, follows the general rule that "opinions about value cannot form the basis of a fraud claim." *First Magnus Financial*, 2006 WL 2418918 at 5. However, "[a]n opinion as to value of property 'amounts to fraud if the representing party has, or holds himself out to have, special knowledge as to the value; and the representing party, knowing the other party is ignorant, makes a false representation as to value intending it to be relied upon.'" *Id.* (citations omitted). This approach contrasts sharply to those that treat appraisals purely as statements of opinion that cannot form the basis of a fraud claim. *See First Tennessee Bank, N.A. v. C.T. Resorts, Co.*, 1997 WL 677945 (Ten. Ct. App. 1997); *George v. Federal Land Bank of Jackson*, 501 S.2d 432 (Ala. 1986); *Block v. Lake Mortgage Co.*, 601 N.E.2d 449 (Ind. Ct. App. 1992).

As more and different types of fraudulent property flipping schemes are discovered, state and federal law must continually adapt to combat them. Permitting lenders and borrowers to pursue dishonest appraisers, as some states allow, provides a powerful remedy. Most of these schemes rely at some level on a dishonest appraiser. Perhaps raising the stakes for participation in such schemes will discourage such behavior. The civil relief available under the federal RICO statutes also provides a potentially forceful remedy for both lenders and borrowers damaged through a flip scheme. Many states are also

in the process of developing specific statutes to combat mortgage fraud. As the number and complexity of these schemes continues to increase and this area of law continues to evolve, practitioners would be wise to remain attuned to both.

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Federal Reserve Board Issues Far-Reaching Mortgage Lending Amendments to Regulation Z

By Amanda Schroering Nall and Stephanie R. Renner

On July 14, 2008 the Board of Governors of the Federal Reserve (Board) adopted final rules under the Truth in Lending Act (TILA) and the Home Ownership and Equity Protection Act (HOEPA), amending Regulation Z. Truth In Lending, 73 Fed. Reg. 44522.[1] The Board promulgated the rules through its powers under HOEPA to proscribe "unfair," "deceptive," and "abusive" acts and practices. 15 U.S.C. § 1639(l)(2) (2008). The amendments follow a letter dated April 23, 2007 from members of the Senate Committee on Banking, Housing, and Urban Affairs, including Chairman Christopher Dodd, urging the Board to increase rulemaking under HOEPA, which "clearly mandates action." The Board's comprehensive amendments significantly affect the mortgage industry and are the most sizable measures implemented by a federal supervisory body so far during the recent subprime mortgage crisis. The rules, with the exception of those related to escrow for taxes and insurance, will become effective on October 1, 2009. The escrow rules will become effective on April 1, 2010 for site-built homes, and October 1, 2010 for manufactured homes.

First, the amendments not only affect current high cost loans under HOEPA, but also apply four protections to a new category of "higher-priced mortgage loans." Second, the modifications provide two new protections to all mortgage loans secured by a consumer's principal dwelling. Third, the amendments contain provisions requiring accurate information in advertisements and prohibiting certain misleading or deceptive advertising practices. Finally, the amendments compel lenders to provide TILA mortgage loan disclosures within a certain amount of time for the majority of residential mortgages, rather than simply for the purchase-money mortgages that are currently subject to the advance disclosure requirement.

Rules for Higher-Priced Mortgages

Under the current version of HOEPA, protected loans are limited to closed-end refinancings where (i) the annual percentage rate (APR) exceeds the Treasury rate by 8% or more for first-lien loans or 10% or more for subordinate-lien loans, or (ii) the total points and fees payable by the consumer at or before closing exceeding the greater of 8% of the total loan amount or $400. Home purchase mortgage transactions are excluded. 12 C.F.R. pt. 226.32(a)(1) and (2). The new version provides four protections for consumers receiving "higher-priced mortgage loans," which are defined as (i) consumer credit transactions (ii) secured by the consumer's principal dwelling (iii) with an annual percentage rate that exceeds the average prime offer rate for a comparable transaction as of the date the interest rate is set by 1.5 or more percentage points for loans secured by a first lien on a dwelling, or by 3.5 or more percentage points for loans secured by a subordinate lien on a dwelling.[2] By creating the new category of higher-priced loans, the Board brought under its protection not only loans with a significantly lower APR threshold, but home purchase loans as well.

The rules regarding higher-priced mortgage loans (i) prohibit extending credit without consideration of a borrower's ability to repay the debt from resources other than the collateral, (ii) prohibit reliance on income or assets in determining repayment ability if the lender does not verify these amounts, (iii) prohibit prepayments penalties during the first two years of a loan, for loans that are refinances by the creditor or its affiliate, and on loans in which the borrowers payment changes during the first four years of the loan, and (iv) mandate the use of escrows to pay property taxes and insurance for the first year of the loan, after which the lender could allow the borrower to opt out of the use of the escrow.

Disregard of Consumers' Ability to Repay

Roughly three-fourths of securitized subprime origination pools from 2004 to 2006 were adjustable rate mortgages with interest rates discounted for two or three years and fully-indexed thereafter. 73 Fed. Reg. 1672, 1686. According to the Board, a number of subprime lenders did not sufficiently asses whether borrowers would be able to afford the higher payment. Lenders may have assumed that these borrowers would refinance before the rate reset, a belief that proved to be impracticable due to tighter lending standards and falling house prices, with borrowers unable to amass adequate equity to refinance.

Regulation Z currently disallows a pattern or practice of making HOEPA loans based solely on the borrower's collateral with no other consideration of the borrower's repayment capability. 12 C.F.R. pt. 226.34(a)(4). The purpose behind the "pattern or practice" component of the rule is to balance the prospective costs with the benefits of the regulation, according to the Board, and is determined based on the totality of the circumstances and on a case-by-case basis. As discussed above, however, HOEPA

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[1] To view the final rule, please go to: http://www.federalreserve.gov/newsevents/press/bcreg/bcreg20080714a1.pdf

[2] Construction loans, "bridge" loans, HELOCs, and reverse mortgages are excluded from this change.

loans are only a small segment of the subprime market. Therefore, the the Board originally proposed to extend this prohibition to higher-priced mortgage loans, and to add several additional rebuttable presumptions of violation as well as a safe harbor. The final rule, however, removed the "pattern or practice" qualification and therefore prohibits a creditor from extending any HOEPA loan or higher-priced mortgage loan based on the collateral without regard to repayment ability. The final rule also shifts the proposed new presumptions of violations to a presumption of compliance. 73 Fed. Reg. 44543.

Creditor Verification of Current and "Reasonably Expected" Income and other Assets

The Board also noted that growing numbers of loans in the subprime market were underwritten without a complete verification of the borrower's income and assets. The share of "low documentation" and "no documentation" loans in the securitized subprime market rose from 20% in 2000 to 40% in 2006. 73 Fed Reg. 1672, 1690. Therefore, the Board has required creditors for higher-priced mortgage loans to verify, with third-party documentation, any amounts those creditors rely on in terms of assets or income, including expected income. The goal is to make it more difficult for any party in the process of obtaining a mortgage loan to inflate income or assets on higher-priced mortgage loans.

Prepayment Penalties

Currently, a HOEPA loan may not contain a prepayment penalty unless (i) the borrower's debt-to-income ratio at commencement does not exceed 50%, (ii) prepayment is not made using funds from a refinancing by the same creditor or its affiliate, (iii) the penalty term does not exceed five years from loan commencement, and (iv) the penalty is not prohibited under other applicable law. 12 C.F.R. pt. 226.32(d)(7). The Board proposed to apply these restrictions to higher-priced mortgage loans, and in addition require that any prepayment period must expire at least sixty days before the first date, if any, on which the periodic payment amount may increase under the terms of the loan.

The Board substantially revised the proposed rules for prepayment penalties. The final rules provide that a lender may not charge a prepayment penalty unless (i) the penalty is inapplicable to prepayments made after the first 2 years of the loan, (ii) the penalty is inapplicable if the source of the funds used for repayment is a refinancing by the creditor or its affiliate, and (iii) the borrower's payment does not change during the first 4 years of the loan. The Board declined to adopt the proposed rule requiring a prepayment penalty provision to expire at least sixty days before the first date on which a periodic payment amount may increase under the loan's terms because it believed the final rule made it unnecessary. 73 Fed. Reg. 44551.

Escrows for Taxes and Insurance

As noted by the Board, escrows are uncommon in the subprime market. Further, first-time homebuyers may not be cognizant of the need to save separately for tax and insurance payments if they are given loans without escrows. These borrowers may have difficulty meeting those debts when they are due. Thus, the Board decided to bar a lender from extending higher-priced loans secured by a first lien without creating escrows for property taxes and homeowners insurance. However, the lender may permit a borrower to opt out of the escrow one year after the commencement of the loan.

Rules for All Mortgages Secured by a Consumer's Principal Dwelling

Creditor Payments to Mortgage Brokers

The rules originally proposed by the Board would have barred lenders, in connection with all closed-end, consumer-purpose loans secured by the borrower's principal dwelling, from paying yield spread premiums or other compensation to a broker, unless the broker has signed a written agreement with the borrower detailing all of the broker's compensation. The Board sought to "reduce the incentive of the broker to increase a consumer's rate and increase the consumer's leverage to negotiate with the broker." 73 Fed. Reg. 44564. After analysis of comments, consumer testing, and other information, the Board withdrew the proposal, stating that "the proposed agreement and disclosures would confuse consumers and undermine their decision-making rather than improve it." *Id.*

Coercion of Appraisers

As discussed by the Board, inaccurate and often inflated appraisals are a growing problem in the mortgage industry. One of the major problems with inflated appraisals is that they may lead a consumer to believe that he or she has more equity in the home than is really the case, and the consumer will most likely borrow money or make other financial decisions based on the inaccurate information. The new rule is aimed at limiting these situations by prohibiting, in all closed-end mortgage loans secured by a borrower's principal dwelling, a lender or broker from persuading, pressuring, or otherwise influencing appraisers to provide false appraisals. Further, the rule prohibits lenders from extending credit when the lender knows, at or before loan consummation, that an appraiser has misrepresented a residence's value.

The rule provides examples of prohibited conduct and conduct that is not prohibited. Some notable examples of prohibited conduct are telling an appraiser a minimum reported value of a home that is needed to approve the loan, conditioning an appraiser's compensation on loan consummation, and implying to an appraiser that current or future retention of that appraiser depends on the appraisal amount.

Servicing Abuses

The revised rule requires servicers to credit payments as of the day of receipt, prohibits fee pyramiding, and requires servicers to provide a consumer with a payoff statement within a reasonable time after request.

Article continued on page 13

American Bar Association
Section Of Litigation
Real Estate Litigation Committee

Any attorney who wishes to contribute an article to the Real Estate Litigation Newsletter is encouraged to do so. We welcome both new articles and articles that have been published in another newsletter or publication. If your law firm has prepared materials that would be of interest to members of the Real Estate Litigation Committee, please consider having them published here. The next submission deadline is October 15, 2008.

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We hope you find this Newsletter a helpful resource.

Veronica, David, Blake, Jennifer and Adam

Federal Reserve Board Amendments

Continued from page 11

Improvements to Mortgage Advertising

The rules clarify the "clear and conspicuous" standard for TILA disclosures, and require lenders to focus less on an introductory "teaser" rate, by, for example, barring the advertising of interest rates lower than the rate at which interest is accruing. The new rules also amend the required TILA disclosures for open-ended home loans, such as Home Equity Lines of Credit.

Additionally, the rules detail seven advertising practices which the Board declares "unfair" and "deceptive." These practices include (i) misleading uses of the term "fixed rate" for loans where the interest rate is "fixed" for only a certain amount of time, (ii) misleading comparisons between a consumer's current interest rate and the advertised teaser interest rate, (iii) claiming that a loan that is not approved by the Federal Housing Administration or the U.S. Department of Veterans Affairs is insured as a "government-supported loan," (iv) deceptive use of the current lender's name by a lender who is not associated with the current lender, (v) misleading claims of debt elimination rather than debt restructuring, (vi) misleading descriptions of a fiduciary or similar relationship that does not exist, and (vii) foreign-language advertisements that supply important loan information only in English.

Early Mortgage Loan Disclosures

The law currently requires that "good faith estimates" of certain mortgage loan disclosures, including a disclosure of the APR, be made "before the credit is extended" or "not later than three business days after the creditor receives the consumer's written application, whichever is earlier." 15 U.S.C. § 1638(b)(2). This rule currently only applies to purchase money mortgage transactions; therefore, a lender does not have to give mortgage loan disclosures on non-purchase money mortgage transactions until the consummation of the loan. As the Board notes, at that point, a borrower is not able to utilize the information provided by the disclosures in any meaningful way. Therefore, the Board has extended the early disclosure requirement to other types of closed-end mortgage transactions, including mortgage refinancings. The disclosure must be delivered no later than three business days after application and before the consumer pays any fees, other than a reasonable fee for the lender's review of the consumer's credit history.

Civil Liability and Remedies

The amendments are based on the Board's authority under TILA § 129(l)(2), which grants the Board discretion to prohibit "acts or practices" that are "unfair or deceptive." 15 U.S.C. § 1639(l)(2). Therefore, a consumer could ultimately recover the following under the statute: (i) actual damages, (ii) statutory damages in an individual action of up to $2,000 or, in a class action, total statutory damages for the class of up to $500,000 or 1% of the creditor's net worth, whichever is less, (iii) special statutory damages equal to the sum of all finance charges and fees paid by the consumer, and (iv) court costs and attorney fees. 15 U.S.C. § 1640(a).

The new rules requiring advertising disclosures, such as the disclosures about rates or payments, do not create civil liability, because they are promulgated under the Board's general rulemaking authority in TILA § 105(a). *Id.* These rules, however, are subject to administrative enforcement by appropriate agencies. The rules prohibiting certain acts or practices in connection with closed-end advertisements for credit secured by a dwelling, are promulgated under the Board's authority in TILA § 129(l)(2), and TILA authorizes a civil action against a creditor who fails to comply with a rule adopted under the authority of that section. 15 U.S.C. § 1639(l)(2) and 15 U.S.C. § 1604(a). The Board notes, however, that it is unclear whether a borrower may bring an action against a lender for breaching an advertising restriction if the borrower has not received a mortgage loan from the lender.

Reactions to the Revised Rules

Lenders have argued against more stringent regulations, believing that market forces have already put an end to the majority of the more egregious practices and that new prohibitions could exacerbate the credit crunch. "There is much to commend and much to worry about in the proposed rules," the American Bankers Association (ABA) said in a March 2008 statement on the proposed changes.[3] The ABA was receptive to "uniform, national standards" that would take aim at abuses by unregulated or lightly regulated non-bank lenders, but was concerned that "replacing important lending flexibility with rigid formulas might also limit lending to some creditworthy borrowers." *Id.*

While the proposed regulations elicited a mixed reaction from various groups, Senator Christopher Dodd issued a statement in December 2007 criticizing the proposed amendments as "deeply disappointing," and "a significant step backwards" from current regulations.[4] Dodd was unhappy with the preservation of the "pattern or practice" language in the provisions requiring lenders to evaluate a borrower's ability to repay a loan, citing that standard as difficult to prove. Additionally, he argued that a borrower's ability to opt out of tax and insurance escrows after one year could present unprincipled lenders with a "tool to 'flip' borrowers into another, wealth-stripping refinance." *Id.* Altogether, he felt that the proposal raised "serious questions as to whether the Federal Reserve is the appropriate institution to house consumer protection functions," and was "a clear signal that legislation is necessary to help protect homeowners from abusive and predatory lending practices." *Id.*

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[3] ABA Statement on Federal Reserve's New Mortgage Lending Proposal, Edward L. Yingling, President and CEO. To view, please go to: http://www.aba.com/Press+Room/121807FederalReserve.htm.

[4] Statement of Sen. Dodd, Chairman of the Senate Banking Committee, in reaction to Proposed Fed Housing Rules, Dec. 18, 2007. To view, please go to: http://dodd.senate.gov/index.php?q=node/4178.

In response to the *final* rules, Kieran P. Quinn, Chairman of The Mortgage Bankers Association (MBA), said that the "MBA applauds the Federal Reserve for stepping up to the plate and providing consumers with comprehensive rules to guide lenders and protect consumers in the mortgage process. These rules are a thoughtful effort to tackle difficult concerns and attempt to balance the need for new standards against the need for available, relatively low cost mortgage credit."[5] He went on to note that MBA is carefully reviewing the rules. We can expect substantial commentary from industry members and organizations as lenders and servicers attempt to comply with the rules and as litigation provides opportunity for their interpretation.

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[5] Statement of Kieran P. Quinn, Chairman of the Mortgage Bankers Association, in Reaction to the approval of the final rules, July 14, 2008. To view, please go to: http://www.mortgagebankers.org/NewsandMedia/PressCenter/63625.htm.

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