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MORTGAGE FINANCE NEWSLETTER

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Flat-fee Pricing for Credit Reporting Does Not Violate RESPA

In *Price v. Landsafe Credit, Inc.*, the United States District Court for the Southern District of Georgia considered, and rejected on summary judgment, plaintiffs' contention that Section 8(a) of the Real Estate Settlement Procedures Act ("RESPA") prohibits companies from adopting flat-fee pricing structures to recoup their business expenses

in providing credit reporting services to borrowers.

In *Price*, plaintiffs challenged the \$35 flat-fee credit report charge they paid to their lender, Countrywide Home Loans, Inc. Countrywide obtained credit reports from Landsafe, a credit reporting company. Landsafe charged \$35.00 dollars for its credit reporting services regardless of the number of reports that it ultimately provided in any given transaction, and regardless of whether the transaction actually closed. Countrywide retained no portion of the \$35 fee. Plaintiffs contended that Landsafe essentially provided Countrywide with "free" credit reports for potential customers who did not secure a mortgage loan with Countrywide, in exchange for charging an increased fee to customers who in fact did close their loans with Countrywide. Plaintiffs claimed that Countrywide and Landsafe therefore had entered into an agreement to refer business



in exchange for illegal kickbacks, in violation of Section 8(a) of RESPA.

In rejecting the plaintiffs' claim, the Court first noted that the evidence clearly established that the challenged fee structure was designed to be revenue-neutral. Further, the Court acknowledged that (1) other courts have specifically rejected challenges to the reasonableness of flat-fee price structures, "even though cross-subsidization between customers is inherent in such an arrangement;" and (2) courts consistently have rejected the premise that RESPA is a price control statute that regulates whether the price of a particular settlement fee is "too high."

The Court reasoned that the cost of investigating potential borrowers' creditworthiness—a necessary business expense—is an appropriate overhead cost, and that overhead costs are a necessary and reason-

Regulators React to Subprime Mortgage Meltdown

On March 8, 2007, the OCC, the Federal Reserve Board, the FDIC, the OTS, and NCUA (the "Agencies") published a proposed Statement on Subprime Mortgage Lending (the "Proposed Statement") and requested comment thereon. Comments are due on May 7, 2007. The Proposed Statement addresses issues relating to subprime mortgage-lending practices in connection with ARM loans containing certain features, and discusses risk management and consumer compliance policies and procedures that institutions regulated by the Agencies should implement to respond to these concerns.

The Proposed Statement discusses principles and standards, such as payment shock, that an institution should review in determining a borrower's ability to repay a subprime ARM loan. The Proposed Statement also discusses consumer protection issues and practices, including reminders about some of the existing statutes, regulations, and guidance intended to protect consumers from unfair, deceptive, and other predatory practices. Finally, the Proposed Statement discusses the need for policies, procedures, and systems to assure that institutions' subprime mortgage lending is conducted in a safe and sound manner.

The Agencies are concerned that subprime borrowers may not understand the risks of certain ARM loans, particularly, those with following characteristics: (i) low initial payments based

MAINE—Continuing Education Requirements Adopted

Effective February 10, 2007, the Maine Office of Consumer Credit Regulation adopted continuing education requirements for loan officers of Supervised Lender Licensees and Loan Broker Licensees. On or before January 31, 2008, each individual registered as a Maine loan officer must complete no fewer than 12 hours of approved continuing education courses. Thereafter, such individuals will be required to complete 12 hours of approved continuing education courses annually. Individuals that are not licensed to conduct business as a Maine loan officer as of January 31, 2008 will be required to complete a minimum of 16 hours of approved continuing education courses immediately subsequent to qualification. Thereafter, such individuals will be required to complete 12 hours of approved continuing education courses annually. Also, note that all approved continuing education courses will include a proctored examination or another verifiable testing process to ensure that each individual has retained the material discussed in the continuing education courses.

OREGON—Department of Consumer and Business Services Amends Loan Originator Requirements

Effective January 17, 2007, the Oregon Department of Consumer and Business Services issued regulations updating loan originator-related education and examination requirements. Loan originators are no longer permitted to take the entry-level course and pass the examination within the six-month period following their hire date. Instead, loan originators hired by a Mortgage Lender Licensee on or after January 17, 2007 who have not already completed the entry-level course and passed an examination, must complete a Certified Authority approved course and pass a Certified Authority approved examination prior to taking loan applications from any Oregon consumer. Any loan originator hired prior to January 17, 2007 that is required to complete the entry-level course and examination must complete the required entry-level course and pass the examination on or before April 13, 2007.

NEVADA—Caution: Nevada Changes Monthly Reporting Requirements

Effective January 1, 2007, all Nevada Mortgage Banker Licensees and Mortgage Broker Licensees must submit their monthly activity reports as an e-mail attachment to one of two e-mail addresses. Licensees with offices within Southern Nevada should send their reports to MARLV@mld.nv.gov and licensees with offices within Northern Nevada should send their reports to MARCC@mld.nv.gov.

able part of the price structure for credit reports in the industry. The Court stated that RESPA does not require lenders to eliminate overhead by charging a separate credit report fee to all customers, including pre-qualification requests by prospective borrowers. Nor does it require lenders to recoup their business expenses only through the levy of a specific charge for “overhead.” Rather, overhead costs are properly allocated to customers. The Court analogized the overhead at issue to mortgage insurance costs, which may be passed through to borrowers, even though such service doesn’t benefit the borrowers directly.

Finally, citing to Section 8(c)’s safe harbor provision, the Court noted that the relevant inquiry was not whether the cost of the service performed was reasonable, but rather whether the overall compensation was reasonable. Noting that the defendants had provided evidence establishing that the \$35 charged was reasonably related to the value of the services furnished by Landsafe; that similar charges were levied by others in the industry; and that bundled pricing is becoming more prevalent in the industry because it allows for cost certainty in estimating closing costs to customers; and that plaintiffs had presented no evidence to the contrary, the Court concluded that “overhead costs are a necessary and reasonable part of the price structure for credit reports in the industry.”

Noting that plaintiffs had produced no precedent to support their “remarkable supposition” that business charges for overhead violate federal law, the Court declined to find that they do. Instead, the Court observed that, if settlement service providers were prohibited from recouping their business expenses, they would not be able to provide credit reports for borrowers at all. The Court therefore concluded that such overhead charges are reasonable and necessary, and permitted by governing law. ■

on a fixed introductory or “teaser” rate that expires after a short initial period then adjusts to a variable rate; (ii) so called “low doc.” or “no doc.” loans (i.e., stated income); (iii) high limits on the amount the monthly payment or interest rate may increase (so called “caps”) at reset periods; (iv) prepayment penalties extending beyond the initial interest rate adjustment period; and/or, (v) lack of information to borrowers regarding product features, loan terms, product risks, prepayment penalties, and the borrower’s responsibility for property taxes and insurance.

The Agencies note that many of the concerns outlined in the Proposed Statement are also addressed in existing interagency guidance, including the 1993 Interagency Guidelines for Real Estate Lending (Real Estate Guidelines), the 1999 Interagency Guidance on Subprime Lending (Subprime Lending Guidance), and the 2001 Expanded Guidance for Subprime Lending Programs (Expanded Subprime Guidance).

While the 2006 Interagency Guidance on Nontraditional Mortgage Product Risks may not explicitly pertain to products with the characteristics addressed in the Proposed Statement, it outlines prudent underwriting and consumer protection principles that institutions should also consider with regard to subprime mortgage lending. The Proposed Statement reiterates many of the principles addressed in existing guidance relative to prudent risk management practices and consumer protection laws.

In the Proposed Statement, the Agencies request comment on a specific list of questions, including whether the principles outlined in the Proposed Statement: (i) should be applied beyond the subprime ARM market; (ii) will result in fewer borrowers qualifying for subprime loans, and (iii) will unduly restrict the ability of existing subprime borrowers to refinance their loans and avoid payment shock. The Agencies also seek comment on certain practices of institutions that limit prepayment penalties to the initial fixed rate period of an ARM loan. ■

FDCPA Applies to Attorneys that Regularly File Summary Dispossess Actions

The New Jersey Supreme Court recently held that attorneys who regularly file summary dispossess actions for nonpayment of rent are debt collectors under the Federal Debt Collection Practices Act (“FDCPA”). In so ruling, the court noted that the goal of such actions is to secure the payment of back rent – conduct expressly covered by the FDCPA.

In *Hodges v. Sasil Corp.* plaintiffs Renita and Rochelle Hodges rented separate apartments from the defendant Sasil Corporation (“Sasil”). Both plaintiffs’ rent was subsidized by the Department of Housing and Urban Development (“HUD”), referred to as Section 8 rental assistance. Both plaintiffs were consistently in arrears on their rent. The plaintiffs’ rental agreements defined rent as “all late charges, reasonable attorneys’ fees and court costs” incurred by the defendant. Notably, however, Section 8 tenants may only be evicted for nonpayment of rent, as defined by federal law. Such “rent” does not include tangential fees such as late charges, attorneys’ fees or costs.

Defendant Feinstein, Raiss, Kelin & Booker, L.L.C. (“Feinstein”), representing Sasil, filed summary dispossess actions against the plaintiffs seeking plaintiffs’ eviction or, alternatively, the payment of rent, as defined by their respective rental agreements. Over the course of one year, Feinstein filed three such summons and complaints against Renita Hodges. Similarly, from 2002 to 2004 Feinstein brought four summary dispossess actions against Rochelle Hodges. Each of these actions claimed actual rent due, legal fees, late fees and other miscellaneous charges and did not make clear that payment of actual statutory rent due would stave off

eviction. Plaintiffs paid the charges enumerated in the various summary dispossess complaints. They then filed suit against Sasil and Feinstein alleging, inter alia, violations of the FDCPA.

Feinstein claimed that the FDCPA had no application to it because summary dispossess proceedings seek only to regain possession of leased property, and do not permit monetary damages. Plaintiffs countered that summary dispossess actions are inherently coercive, and specifically

seek to collect the charges contained in the summons and complaint.

In considering whether the FDCPA was properly invoked, the court first agreed with the finding of the majority of federal courts that the collection of rent is a "debt," and therefore subject to the FDCPA. The Court then pointed to the United States Supreme Court's decision in *Heinz v. Jenkins* that attorneys who regularly attempt to collect debts are subject to the FDCPA. Finally, although the court agreed with the defendants

that summary dispossess actions are designed to recover possession rather than rent, the court concluded that "summary dispossess litigation is an effective -- and at times coercive -- mechanism for collecting rent and other fees." Noting that the plaintiffs had remitted amounts exceeding the minimum needed to prevent eviction, the court held that a firm that regularly files summary dispossess actions for nonpayment of rent is a debt collector within the meaning of the FDCPA. ■

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