

LENDERS UPDATE™

ALT & ASSOCIATES NEWSLETTER

A COMPLIMENTARY SERVICE TO THE MORTGAGE LENDING INDUSTRY

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CFPB TAKES ANOTHER STEP BACK

In the last year, we have seen the CFPB take steps to back away from the enforcement of previous Bureau policies such as pay day lending rules and discrimination in lending. What does this suggest for the future? How much can we depend on previous CFPB conduct and policies, positions which many would call aggressive? How does this affect the lending industry's future conduct?

As recently as two weeks ago, CFPB Acting Director Mick Mulvane repeated, in front of the National Association of Realtors, what he has previously said. Regulation by enforcement is really simple. "We aren't doing it anymore." Some who have seen recent enforcement actions might disagree, but the intent from the acting Director would seem to be to defang the Bureau.

A recent court action leads to the same conclusion. Even before the CFPB, HUD was investigating a law firm in Kentucky by the name of Borders and Borders for potential RESPA Section 8 violations. When the CFPB was created in 2011 it assumed control of the investigation and ultimately filed a law suit in a Kentucky Federal District Court. The court ruled against the CFPB in 2017. The CFPB filed a motion to reconsider which the Court refused to grant. The CFPB could have appealed that decision but decided not to do so. The decision overturned a fairly well known and long existing regulatory position dating back to the days when HUD enforced RESPA.

The law firm was in the position to refer settlement services in the form of title insurance. The firm set up a number of “affiliated business arrangements”, “ABA”s, partnering with local mortgage brokers and real estate brokers. When Borders generated potential title insurance, it referred this business to these ABAs. The profits from the business were split between the owners of the business. So far on its face, this seems well within RESPA guidelines.

The problem was that the CFPB claimed that these were not bona fide entities but were set up to disguise the payment of referral fees. This is a violation of the RESPA prohibition of the payment of referral fees for the referral of a settlement service.

Here the ABAs had no separate offices, phone numbers, emails or employees. They did not advertise for 3rd party business and performed little independent work. Most of the services were performed by Borders. A short while ago, this structure would have seemed a classic violation of RESPA. The ABAs would have been declared to be mere “shams” used to disguise the illegal payment of referral fees.

The Kentucky Court did not agree and for rather strained reasons in its initial decision found for Borders. The CFPB made a motion for the Court to reconsider the ruling.

The Court again found for Borders. This time, the District Court used different reasons for its decisions, reasons that, in our opinion, are again legally questionable.

It would seem, because of the importance of the decision and the perceived weakness of the legal reasoning of the court, that an appeal would have been appropriate to move the case out of the District Court to the appellate level. The CFPB did not agree and decided not to appeal, which we believe reflects the views and stated enforcement policy of the Acting Director.

We will have to see what position the CFPB takes next. Does it let the case stand for the principles it enunciates? Or, does the CFPB come out with guidelines or policies to clarify what it considers to be a “sham” ABA and whether that concept remains relevant. The latter would seem to be in line with Mr. Mulvane’s intent to “bring clarity to both consumers and businesses about what is and is not legal.

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