

UNDERWRITING BULLETIN

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NY000303

Date: March 7, 2007

To: All New York State Office Counsel, Managers and Agents

From: Harold H. Boxer, Vice President and Senior Agency Counsel

Re: Stewart Title Rate Calculator

Stewart hopes that you have found the most recent version of the Stewart Title Rate Calculator now out for the past year most helpful. It can be found at the STIC website at www.stewartnewyork.com.

Last June we issued Bulletin 287 in connection with the approval of Stewart's Rate Deviation filing prompted by the settlements reached by two Underwriters with the Attorney General. In that Bulletin we strongly urged you to use the Rate Calculator, print a copy of the calculated rate and attach it to the file. Today we reiterate that request so as to ease prospective regulatory rate reviews and audits. We have asked our Auditors to check for the printed rate calculation and for its accuracy as part of the audit process. As always, to the extent that a user has a question, comment or concern as to the accuracy of results or how to use the Rate Calculator, please direct those questions and comments to Legal Services personnel and not to the IT Department. Legal Services can be reached at 212.922.0050.

Now more than ever care in calculating rates and adhering to the TIRSA Manual and your Underwriting Agreement with us is critical. By utilizing these procedures we can enhance our commitment to our customers. The attached article from RESPA Alert illustrates the types of cases that can emanate from improper rates.

References:

Bulletins Replaced:	None
Related Bulletins:	287
Underwriting Manual:	None
Exceptions Manual:	None
Forms:	None
Attachments:	One

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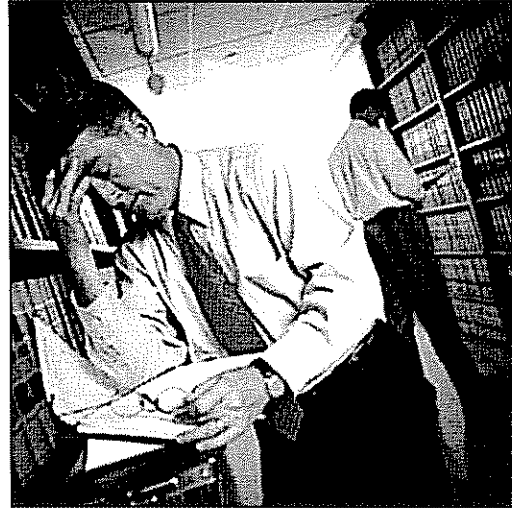
Major underwriters face RESPA challenge in new sweep of lawsuits

A new twist on RESPA class action litigation has cropped up in the courts, as several cases are now accusing United General Title Insurance Co (UGTIC), First American Title, Security Title Guarantee Corp. of Baltimore, Old Republic Title and Ticor Title of failing to charge discounted title premiums in the form of "reissue rates" and splitting the excess premiums as a kickback in violation of RESPA.

At least five cases have been filed in the U S District Court for the Eastern District of Pennsylvania and the U S. District Court of Maryland alleging that the underwriters violated RESPA by splitting the overcharge earned as a result of the failure to offer the discounted rates through their title agents

Perhaps unsurprisingly, the now-infamous RESPA litigation firm of Quinn Gordon and Wolf Chtd is involved in all of the cases, along with the increasingly ubiquitous Philadelphia firm, Donovan Searles, LLC

While reissue rate cases are nothing new in the title industry, these latest accusations illustrate that plaintiffs' counsels are getting more creative about how they use RESPA in class action litigation



Security Title and Section 8(b)

One of the most recent cases was filed in October 2006 by plaintiff James Jackson against Security Title Guarantee Corp of Baltimore

In the complaint, Jackson alleged that Security Title "violated RESPA with respect to [Jackson] by giving, paying or receiving fees or kickbacks to insurance producers in Maryland, including by not limited to Custom Title & Escrow and Express Financial Services., resulting from the unearned, excessive and illegal premiums charged to and collected from [Jackson] and the class."

The case claimed that the payments constituted a violation of RESPA Section 8(a), which prohibits referral fees and kickbacks, as well as Section 8(b) which prohibits fee splitting

The complaint noted that Section 8(b) provides that the prohibition of splitting fees shall not be "construed as prohibiting (1) the payment of a fee ... (B) by a title company to its duly appointed agent for services actually performed in the issuance of a policy of title insurance " However, "if the payment of a thing of value bears no reasonable relationship to the market value of the goods or services provided, then the excess is not for services or goods actually performed or provided "

Based upon those facts, Jackson claimed that Security Title violated Section 8(b) by splitting title insurance premiums that not only bore no reasonable relationship to the market value of the goods or services provided, but were unearned and actually far in excess of the actual premium permitted under the law of Maryland

Security Title never filed a formal response to the complaint, however, as the case went straight into alternative dispute resolution. The reason? "Both parties wanted to explore the possibilities of settlement before the significant costs of litigation were incurred," court papers stated. A settlement conference has been scheduled for March 28

Other parties in RESPA/reissue rate cases have not been as eager to seek the negotiating table, however

UGTIC, First American defy overcharge claims

One of the longest-running cases is *Mitchell-Tracey v. United General Title Insurance Co and First American Title Insurance Co*, which was filed in Maryland in May 2005. The RESPA claims made in this case were nearly identical to the claims made in the Security Title case.

In responding to the RESPA allegations, the defendants said that the plaintiffs' claims were "defective" because RESPA is not a rate-regulation statute. "Instead," the defendants said, "[RESPA] prohibits kickbacks for the referral of settlement service business, and it prohibits splitting settlement services fees with parties who perform none of the work."

Citing the Fourth Circuit markup case of *Boulware v. Crossland Mortgage*, the defendants noted, "Fourth Circuit law is well settled that allegations of alleged overcharging by a settlement service provider cannot form the basis for a RESPA claim. Since the plaintiffs' allegations and testimony amount to nothing more than the contention that they were overcharged for title insurance, the defendants are entitled to summary judgment on the RESPA claim."

The defendants further elaborated on the history of markup claims in the circuit courts, emphasizing that the Fourth, Seventh and Eighth Circuits have all rejected HUD's 2001 Statement of Policy "because HUD's interpretation did not dispel ambiguity or fill in gaps in the statute, and moreover was inconsistent with the plain language of the statute."

Although the defendants acknowledged that three other circuit courts have now come to a different conclusion, they said, "These circuits purport to distinguish between a simple overcharge and a mark-up of a third-party vendor's fee, but that distinction is inapplicable here because (1) plaintiffs allege only an overcharge and not a mark-up and (2) the Fourth Circuit rejected a mark-up claim in *Boulware* in any event."

The defendants further noted that their agency relationships are "clearly covered" by the Section 8(c) exemption for the payment of fees by title companies to their agents for services actually performed.

On Sept. 26, 2006, the court granted the defendants motion for summary judgment on the RESPA claims, but also granted the plaintiffs' request for class action certification on the remaining state law claims. The case has since moved to settlement discussions.

Old Republic and Tigor Title take up arms

In Pennsylvania, the RESPA/reissue rate case of *Markocki v. Old Republic National Title* has been ongoing since June 2006.

Tigor Title is also battling two similar cases in Pennsylvania that were filed in October 2006: *Guizarri v. Tigor Title Insurance Co* and *O'Day v. Tigor Title Insurance Co of Florida*.

Again, the RESPA claims of lead plaintiffs **Donna Markocki, Ramona Guizarri and Lynn O'Day** are verbatim repetitions of the charges outlined in the above cases.

In their motions to dismiss, both Old Republic and Tigor Title cited the case of *Santiago v. GMAC Mortgage* when contesting the RESPA claims.

Tigor added that, as Section 8(b) prohibits the splitting or sharing of fees "other than for services actually performed," that "the claim fails because Tigor and Accurate Escrow [the agent in O'Day's loan] each performed actual services to earn their respective shares of the lender's policy premium."

Whose side is *Santiago* really on?

In its defense, Old Republic stated, "Plaintiff purports to claim a violation of RESPA as a result of an alleged premium overcharge. . . The Third Circuit has ruled that an alleged overcharge for services rendered in connection with a real estate closing is not a RESPA violation."

Markocki responded, "This case is not merely about overcharging for title insurance, but whether, as prohibited by RESPA, defendant used the premium overcharges as part of a scheme to pay illegal referral fees and kickbacks to its title agents."

Markocki added that it was curious the defendants should cite *Santiago*, when *Santiago* "strongly support[s] the plaintiff's position in this case."

"Indeed, the opinion lends additional support for the argument that where one can, as here, actually discern what portion of a charge is 'reasonable' and what is 'unreasonable,' such discernment may constitute evidence of a RESPA violation."

Markocki said, "Even putting aside, *Santiago's* 'reasonable' and 'unreasonable' analysis in the context of markups, *Santiago* is abundantly clear that, like *Boulware*, a RESPA cause of action exists for markups, kickbacks and unearned fees. Contrary to the defendant's assertion, the facts of this case fit squarely within *Santiago* and *Boulware*

"Moreover," Markocki continued, "under the facts alleged in this case, and as discussed above, the overcharges in this case — the excessive premiums charged to plaintiff and the class through the defendant's uniform failure to give the class the discounted rates to which it was entitled — were unearned. In line with the framework for Section 2607(b) of RESPA, defined in *Santiago* and *Boulware*, the marked up fees in this case were split between Old Republic and its title agents, and thus, violate RESPA."

Passing the buck

Interestingly, just a few days after the court denied Old Republic's motion to dismiss in November 2006, Old Republic filed a third-party joinder complaint against Citizens' Abstract Inc. of Southampton, Pa., who was the title agent in Markocki's transaction. The complaint accuses Citizens of negligence in failing to charge Markocki the proper rate, alleges a breach of fiduciary duty, and says Citizens must indemnify Old Republic for the claims of Markocki in her complaint.

Most recently, Old Republic has filed a motion for the case to be consolidated with another reissue rate currently pending against it and Transcontinental Title in Pennsylvania. That case does not allege any RESPA violations, however.

Although the RESPA claims in the case against UGTIC and First American have been dismissed, the RESPA claims against the other underwriters remain pending, and only time will tell if the other courts will validate a RESPA cause of action in a reissue rate lawsuit. Stay tuned.

Feedback? Contact Robin Wardzala at rwardzala@octoberresearch.com