

[Banking and Finance Law Daily Wrap Up, RESPA—W.D. Ky.: Judgment for law firm accused by CFPB of receiving illegal kickbacks, \(Jul. 18, 2017\)](#)

Banking and Finance Law Daily Wrap Up

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By Annie Matonis, J.D.

The U.S. District Court for the Western District of Kentucky granted Borders & Borders' motion for summary judgment, finding that the law firm did not violate the anti-kickback provisions of the Real Estate Settlement Procedures Act through its use of affiliate title companies. The Court determined that the arrangement met the requirements of the safe harbor provision found in Section 8(c)(4) of RESPA ([*Consumer Financial Protection Bureau v. Borders & Borders, PLC*](#), July 13, 2017, Simpson, C.).

Background. As previously reported (see [*Banking & Finance Law Daily*](#), Oct. 25, 2013), the Consumer Financial Protection Bureau filed a lawsuit against Kentucky law firm Borders & Borders, PLC and its principals for illegally paying kickbacks for real estate settlement referrals through a network of shell companies, specifically Title LLCs used as title insurance agencies in real estate closings.

Motions. Borders & Borders filed a motion for summary judgment; the Bureau filed a motion for partial summary judgment; and Borders & Borders moved to strike certain declarations filed in support of the CFPB's motion for partial summary judgment. Borders & Borders' motion for summary judgment was granted; the Bureau's motion for partial summary judgment was denied; and Borders & Borders' motion to strike the declarations was denied as moot.

Memorandum Opinion. In support of its motion for summary judgment, Borders & Borders offered five arguments, only one of which the court found persuasive.

The court granted summary judgment in response to Borders & Borders' argument that the arrangement fell under the safe harbor provision found in Section 8(c)(4) of RESPA, "[g]iven that Borders & Borders disclosed the relationship with the Title LLCs, the customers could reject the referral, and the Bureau failed to show that the Title LLCs received anything of value beyond their ownership interests."

However, the court evaluated each of Borders & Borders' arguments in a Memorandum Opinion, in the interest of providing a full and complete record in case of appeal.

The court found Borders & Borders' argument that the Bureau failed to satisfy its burden of demonstrating the core elements of a Section 8(a) violation "meritless," determining that the Bureau had met its burden of showing: "(1) a payment or a thing of value; (2) made pursuant to an agreement to refer settlement business; and (3) an actual referral" in a transaction involving a "federally-related mortgage loan. See 12 U.S.C. § 2607(a)".

Similarly unconvincing was Borders & Borders' argument that the settlement services at issue were performed for fair market compensation and thus protected by Sections 8(c)(1) and 8(c)(2) of RESPA. The bureau did not allege in its complaint that the kickback occurred as a result of customers being overcharged, but rather through distributions paid by Borders & Borders to the joint venture partners.

The court also shot down Borders & Borders' argument that there was no viable remedy available, determining that disgorgement and injunctive relief may both be proper remedies under the circumstances.

Finally, the Court declined to entertain Borders & Borders' argument that the CFPB's complaint was an *ultra vires* act arising out of the unconstitutionality of the bureau's structure, as the argument relied solely on a case that had not yet been decided.

As the Court had already addressed the CFPB's arguments in the discussion of Borders & Borders' motion, no additional comments were provided on this matter; the bureau's motion for partial summary judgment was

[denied](#). The denial rendered Borders & Borders' motion to strike moot, as the declarations had been submitted in support of the CFPB's motion.

The case is [No. 3:13-CV-01047-CRS-DW](#).

Companies: Borders & Borders, PLC

LitigationEnforcement: CFPB EnforcementActions KentuckyNews Mortgages RESPA