Resolving RESPA's § 8(b) Circuit Split

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Homebuyers entering the final stage of a real estate transaction are confronted with a number of tasks that need to be accomplished, such as underwriting mortgages and recording deeds. To complete these tasks consumers often obtain real estate settlement service providers at a cost. In the mid-1970s, Congress passed the Real Estate Settlement Procedures Act[1] (RESPA) in order to control the prices that these professionals charge naïve homebuyers. Section 8 of the act aims at eliminating unnecessary fees that settlement service providers often include in the final prices they charge consumers.[2]

Recently, RESPA's § 8(b) has become the subject of a three-way circuit split. At the heart of the disagreement is whether § 8(b) creates liability for three different types of charges: kickbacks, markups, and overcharges. Some circuits read the statute to prohibit only kickbacks.[3] Others hold that it also covers markups and overcharges.[4] Meanwhile, a third set of circuits holds that it covers markups and kickbacks but not overcharges.[5]

Much of the debate centers on the reading of the statute's plain language. All sides of the split provide plausible interpretations of the language, and thus have highlighted a genuine ambiguity within the statutory text. Consequently, it appears that one must go beyond the statute's plain language to properly interpret § 8(b). This Comment attempts to do just that.

This Comment proceeds in three parts. Part I first provides a brief overview of RESPA and its goals and then discusses the three different types of fees that § 8(b) could potentially prohibit. Part II dissects the development of the circuit split, focusing on the holdings and rationales behind each court's interpretation of the disputed statute. Finally, Part III attempts to resolve the circuit split by invoking methods of statutory interpretation that have been either ignored by the

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1 Pub L No 93-533, 88 Stat 1724 (1974), codified at 12 USC §§ 2601–17 (2000).

2 See 12 USC § 2607 (prohibiting kickbacks and unearned fees).

3 See, for example, *Kruse v Wells Fargo Home Mortgage, Inc*, 383 F3d 49, 61 (2d Cir 2004).

4 See, for example, *Sosa v Chase Manhattan Mortgage Corp*, 348 F3d 979, 982–83 (11th Cir 2003).

5 See, for example, *Krzalic v Republic Title Co*, 314 F3d 875, 877 (7th Cir 2002).

courts or not examined at great length. Based on this analysis, this Comment ultimately concludes that § 8(b) creates an action for both kickbacks and markups, but not overcharges.

I. HISTORY OF RESPA AND § 8(B)

This Part offers background information on RESPA, including its original goals and parameters. In Part I.B the Comment proceeds to outline § 8(b) and details the potential charges the section might prohibit.

A. History of RESPA

RESPA was enacted in 1974 "to insure that [real estate] consumers . . . are provided with greater and more timely information on the nature and costs of the settlement process and are protected from unnecessarily high settlement charges caused by certain abusive practices."[6] The strictures of this Act apply to all "residential real estate closings that are financed by 'federally related mortgage loans.'"[7]

These loans include almost all mortgages sought by homeowners.[8] As a result, the act extends to virtually all settlement service providers that deal with consumers of residential real estate.[9] The Department of Housing and Urban Development (HUD) is responsible for promulgating regulations to help ensure proper enforcement of RESPA and further its goals.[10] These regulations are collectively referred to as "Regulation X."[11]

RESPA attempts to protect consumers in two distinct manners. First, it helps them make informed decisions by requiring that settlement service providers disclose pertinent information regarding costs, lender servicing, and other settlement practices throughout the settlement process.[12] Second, it attempts to eliminate various fees charged by these service providers that unreasonably increase the costs of real estate settlements.[13] The latter of these two objectives is covered by § 8 of RESPA.

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6 12 USC § 2601(a).

7 Eloisa C. Rodriguez-Dod, *RESPA—Questioning Its Effectiveness*, 24 Hamline L Rev 68, 69 (2000), quoting 12 USC § 2603(a).

8 Rodriguez-Dod, 24 Hamline L Rev at 69.

9 U.S. Department of Housing and Urban Development, *More Information About RESPA*, online at http://www.hud.gov/offices/hsg/sfh/res/respamor.cfm (visited Oct 17, 2006) (instructing that RESPA applies to all loans secured with a mortgage placed on a one to four family residential property).

10 12 USC § 2617(a).

11 24 CFR §§ 3500.1, 3500.14 (2000).

12 See HUD, *More Information About RESPA* (cited in note 9).

13 See id.

While those who violate § 8 may be susceptible to criminal sanctions,[14] they are more commonly faced with private lawsuits brought by aggrieved consumers.[15] If a real estate consumer feels as though a settlement service provider has charged him an unreasonable fee that is prohibited by one of § 8's subsections, he may bring a lawsuit against that provider. Such lawsuits are often brought as class actions,[16] which significantly increases the stakes for the settlement providers accused of wrongdoing.

Recently, a circuit split has developed regarding private lawsuits brought under § 8(b). The circuits disagree as to the types of fees that are prohibited by this subsection. Given the large monetary disputes that the class action lawsuits create, proper resolution of the circuit split is an important matter for current and future litigants.

Consistent with its responsibility for the regulation of RESPA's contours, HUD recently weighed in on the circuit split, providing its own interpretation of § 8(b) in the form of a policy paper.[17] The amount of deference that should be given to HUD's interpretation under *Chevron USA, Inc v Natural Resources Defense Council, Inc*[18] is an open question—one on which the courts have not always agreed.[19] This Comment argues that HUD's policy statement does not warrant a great degree of deference, and in so doing only touches on the *Chevron* issue tangentially. Instead, this Comment focuses on resolving the circuit split by offering a reading of the disputed statute based on other accepted principles of statutory interpretation that the courts have yet to consider.

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14 See 12 USC § 2607(d)(1) (listing criminal sanctions including a fine of up to $10,000 and imprisonment for up to one year).

15 See HUD, *More Information About RESPA* (cited in note 9) ("In a private law suit a person who violates Section 8 may be liable to the person charged for the settlement service an amount equal to three times the amount of the charge paid for the service.").

16 See, for example, *Santiago v GMAC Mortgage Group, Inc*, 417 F3d 384, 385 (3d Cir 2005).

17 See Department of Housing and Urban Development, *Real Estate Settlement Procedures Act Statement of Policy 2001-1: Clarification of Statement of Policy 1999-1 Regarding Lender Payments to Mortgage Brokers and Guidance Concerning Unearned Fees Under Section 8(b)*, 66 Fed Reg 53052, 53057 (2001).

18 467 US 837 (1984) (holding that an executive agency's interpretation of a statute is given deference unless arbitrary, capricious, or manifestly contrary to the text of the statute).

19 Compare *Kruse v Wells Fargo Home Mortgage, Inc*, 383 F3d 49, 61 (2d Cir 2004) ("After weighing all these circumstances, we accord *Chevron* deference to HUD with respect to its analysis of the application of section 8(b) to mark-ups."), with *Krzalic v Republic Title Co*, 314 F3d 875, 878–80 (7th Cir 2002) (concluding that the statute was unambiguous and thus not entitled to *Chevron* deference). For a more complete discussion regarding the amount of deference that ought to be given to HUD's interpretation, see generally Jennifer Katehos, *Case Comment:* Kruse v. Wells Fargo Home Mortgage, Inc., 49 NY L Sch L Rev 993 (2004–2005).

B. Subsection 8(b) and Potentially Prohibited Fees

Subsection 8(b) of RESPA states that "[n]o person shall give and no person shall accept any portion, split, or percentage of any charge made or received for the rendering of a real estate settlement service in connection with a transaction involving a federally related mortgage loan other than for services actually performed."[20] While it is clear that the goal of this subsection is to protect real estate consumers from certain fees that settlement providers frequently charge, the current controversy centers on exactly which fees the statute prohibits. The types of fees that § 8(b) potentially covers can be separated into two categories: kickbacks and unilateral charges.

1. Kickbacks.

A kickback occurs when "[t]wo or more persons split a fee for settlement services, any portion of which is unearned."[21] For example, a kickback is present when a real estate closing agent recommends a particular lawyer to a borrower who is looking to settle his real estate transaction, and the lawyer subsequently splits a portion of his legal fees with the closing agent as a reward for "recommending to the borrower that he use [the lawyer's] services."[22] Such kickbacks unreasonably increase the cost of transactions because the amount that is kicked back is generally passed on to the borrower in the form of higher fees.[23]

It is widely recognized that, at the very least, § 8(b) prohibits kickbacks.[24] Indeed, despite the current circuit split regarding other charges that might be covered by § 8(b), every circuit that has ruled on the matter agrees that the statute prohibits kickbacks.[25]

2. Unilateral charges.

Unilateral charges differ from kickbacks in that the relevant fee is not split between two parties; rather the party that charges the fee retains it in its entirety. The circuits currently disagree as to whether

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20 12 USC § 2607(b).

21 66 Fed Reg at 53057 (cited in note 17), referencing 24 CFR § 3500.

22 *Krzalic*, 314 F3d at 879.

23 See *Sosa v Chase Manhattan Mortgage Corp*, 348 F3d 979, 981 (11th Cir 2003) (noting congressional intent to eliminate "fees for which no service was performed and no goods were furnished . . . [that] are passed along to consumers and increase settlement costs without providing any benefits").

24 See, for example, *Durr v Intercounty Title Co of Illinois*, 14 F3d 1183, 1186 (7th Cir 1994) ("At its core, RESPA is an anti-kickback statute.").

25 See *Santiago*, 417 F3d at 386–89; *Kruse*, 383 F3d at 61–62; *Sosa*, 348 F3d at 981; *Haug v Bank of America, NA*, 317 F3d 832, 836 (8th Cir 2003); *Krzalic*, 314 F3d at 877; *Boulware v Crossland Mortgage Corp*, 291 F3d 261, 265 (4th Cir 2002).

such charges should also be prohibited by § 8(b). There are two types of unilateral charges at the center of the current circuit split: markups and overcharges.

a) Markups. A settlement service provider imposes a markup on a service when he "outsources the task of providing the service to a third-party vendor . . . and then, without providing an additional service, charges homeowners seeking mortgages a higher fee" than he paid the third-party vendor.[26] For example, in *Sosa v Chase Manhattan Mortgage Corp*,[27] the settlement provider "charged borrowers a $50 fee for messenger or courier services."[28] It then outsourced the relevant task to an independent courier service that charged far less than $50 and pocketed the difference—or, in more technical terms, the markup.[29]

b) Overcharges. Overcharges occur when lenders perform services for borrowers but charge those borrowers "substantially more than . . . [the services] cost" to complete.[30] Another source describes overcharges as bearing no relation to "the reasonable value of goods or facilities provided" or as fees that are given to settlement providers even though they have completed "no, nominal, or duplicative work."[31] For example, in *Kruse v Wells Fargo Home Mortgage, Inc*,[32] the settlement providers used an automated software program to perform underwriting services at a cost of $20 per loan, yet they charged borrowers as much as $500 per loan for those services.[33]

II. CIRCUIT SPLIT EXPLAINED

In 1985, the Seventh Circuit became the first appellate court to hear a RESPA § 8(b) case. Since then, five other circuit courts have weighed in on the matter, creating a three-way split. This Part navigates the history of the split's development, starting with the circuits that first heard such cases (all of which held that the statute only prohibited kickbacks) and concluding with the courts that have recently diverged from these earlier rulings. After assessing the courts' interpretations of the disputed statute, this Part concludes by addressing the merit of HUD's statutory construction.

26 *Kruse*, 383 F3d at 53.
27 348 F3d 979 (11th Cir 2003).
28 Id at 981 (internal quotation marks omitted).
29 Id.
30 *Kruse*, 383 F3d at 53.
31 66 Fed Reg at 53057 (cited in note 17).
32 383 F3d 49 (2d Cir 2004).
33 Id at 53.

A. Kickback-Only Circuits

During the 1980s and 1990s, the Seventh Circuit was the only appellate court to determine whether § 8(b) covered unilateral charges.[34] On two separate occasions, the court held that § 8(b) only prohibited kickbacks, and not unilateral charges.[35] In these early cases, the court relied heavily on the legislative intent of RESPA. In holding that § 8(b) only prohibited kickbacks, it focused on the Senate Report that accompanied RESPA. That report stated that the act's goal was "to *prohibit all kickback and referral fee arrangements* whereby any payment is made or 'thing of value' furnished for the referral of real estate settlement business."[36] While the court conceded that "RESPA is a broad statute, directed against many things that increase the cost of real estate transactions," it maintained that it could not stretch the statute's language beyond the "stopping point" that Congress intended.[37]

After these cases were decided, HUD made an amendment to Regulation X—the regulation espousing the department's interpretation of RESPA[38]—by adding a sentence which stated that "[a] charge by a person for which no or nominal services are performed or for which duplicative fees are charged is an unearned fee and violates this section."[39] When the Seventh Circuit subsequently heard another case involving unilateral overcharges for real estate settlement services, however, it was undeterred by the amended regulation.[40] The court held that the additional sentence might appear to create a cause of action for unilateral charges, but when read in context of the entire regulation, "the amendments to Regulation X did not scrap the third party fee-splitting element of a RESPA § 8(b) claim."[41]

In response to this ruling, HUD released a "Statement of Policy" in which it explicitly stated that, in addition to kickbacks, overcharges and markups were prohibited by § 8(b).[42] The Seventh Circuit, how-

34 See *Durr v Intercounty Title Co of Illinois*, 14 F3d 1183 (7th Cir 1994); *Mercado v Calumet Federal Savings & Loan Association*, 763 F2d 269 (7th Cir 1985).

35 See *Durr*, 14 F3d at 1187 (dismissing the plaintiff's claim based on an alleged markup on grounds that unilateral charges are not covered by § 8(b)); *Mercado*, 763 F2d at 270 (dismissing the plaintiff's claim that she was overcharged for the defendant's refinancing services, because § 8(b) only covers fees that are kicked back to a third party).

36 *Mercado*, 763 F2d at 270–71, quoting Real Estate Settlement Procedures, S Rep No 93-866, 93d Cong, 2d Sess 6 (1974), reprinted in 1974 USCCAN 6546, 6551 (emphasis added).

37 *Mercado*, 763 F2d at 271–72.

38 24 CFR §§ 3500.1, 3500.14.

39 Id at § 3500.14(c).

40 See *Echevarria v Chicago Title & Trust Co*, 256 F3d 623, 628 (7th Cir 2001) (concluding that "HUD did not attempt to expand liability past situations involving fee splitting between the fee collector and a third party").

41 Id.

42 The statement read:

ever, was not persuaded by this policy statement. In *Krzalic v Republic Title Co*,[43] the court refused to defer to HUD's interpretation because a clear and unambiguous reading of the "statutory language describes a situation in which *A* charges *B* (the borrower) a fee of some sort, collects it, and then . . . splits it with *C*."[44] Given this language, the court concluded, the statute's requirements were not fulfilled unless a third party ("C" in the court's example) sends a kickback to the settlement service provider.

During the last four years, both the Fourth and Eighth circuits have aligned themselves with the Seventh Circuit on this issue.[45] While both courts came to this result by analyzing the statute's language and intent, the Fourth Circuit conducted an exceptionally thorough investigation of the statute's plain language. In doing so, the court paid particular attention to the statutory phrase "[n]o person shall give *and* no person shall accept."[46] The court held that the word "and" unambiguously necessitates a third party receiving a kickback, because in the absence of such a party (which is the situation that is created by unilateral charges) a consumer paying large fees "would have to be the giver contemplated by the statute."[47] Because "[i]t would be irrational to conclude that Congress intended consumers to be potentially liable under RESPA for paying unearned fees," the court refused to include anything but kickbacks under § 8(b)'s purview.[48]

B. The Other Side of the Split

Despite the aforementioned courts' stoic refusal to include unilateral charges in § 8(b), other circuits have ruled differently on the matter. These courts generally fall into one of two camps: courts that include all unilateral charges in § 8(b)'s purview and courts that distinguish between the two types of unilateral charges.

> HUD regards all of these situations as legally indistinguishable, in that they involve payments for settlement services where all or a portion of the fees are unearned and, thus, are violative of the statute. HUD, therefore, specifically interprets Section 8(b) as not being limited to situations where at least two persons split or share an unearned fee for the provision to be violated.

66 Fed Reg at 53057 (cited in note 17).

43 314 F3d 875 (7th Cir 2002).

44 Id at 879.

45 See *Boulware v Crossland Mortgage Corp*, 291 F3d 261, 268 (4th Cir 2002); *Haug v Bank of America, NA*, 317 F3d 832, 836 (8th Cir 2003).

46 12 USC § 2607(b) (emphasis added).

47 *Boulware*, 291 F3d at 265.

48 See id ("It would be perverse to find that Congress intended to impose such liability on consumers—the very group it was trying to protect in enacting RESPA.").

1. Courts that treat all unilateral charges the same.

Following the aforementioned decisions, the Eleventh Circuit created a circuit split with its holding in *Sosa*,[49] a case involving a markup on courier services that were performed by a third-party vendor. The court held that violations of § 8(b) do not require the presence of a third party who receives a kickback; rather "a single party can violate subsection 8(b)" when imposing certain unilateral charges.[50] The court came to this conclusion by proffering a different interpretation of the statutory phrase "no person shall give and no person shall accept"[51] from that espoused by the Seventh Circuit. Relying on a definition for the word "and" provided from the American Heritage Dictionary, the court determined that "[t]he [word] 'and' in subsection 8(b) . . . operates to create two separate prohibitions:" one for giving unearned fees and *another for accepting them*.[52] Regardless of whether an overcharge or markup is kicked back to a third party, it is illegal for a single party to accept such fees if they are unearned.

Additionally, the court rejected the theory that this interpretation would lead to the absurd result of imposing liability on consumers who pay overcharges or markups. Instead, a giver of unearned fees only violates the statute when he provides them for unperformed services, whereas "a consumer would always pay a fee to a settlement service provider intending that it be used for a service actually performed."[53] Consumers could therefore never be liable for violating the statute.

After presenting its interpretation of § 8(b), however, the court actually dismissed the case because the complaint failed to allege "that the portion of the charge that [the defendant] retained was accepted *other than for services actually performed*."[54] The court also expressed doubt as to whether "the borrowers could credibly make such an allegation," as the defendant could argue that it provided an ancillary service by connecting the borrower to the third-party vendor, which justified the markup.[55]

Although the Eleventh Circuit's opinion seemed to apply to all unilateral charges—it made no explicit distinction between markups and overcharges—one could argue that the court's holding should be confined to the facts of the case and applied only to markups. While its language indicated that any unilateral charge for an unperformed ser-

49 348 F3d at 979–84.

50 Id at 983.

51 12 USC § 2607(b).

52 See *Sosa*, 348 F3d at 982.

53 Id at 983.

54 Id (internal quotation marks omitted) (emphasis added).

55 See id at 983–84.

vice would violate § 8(b),[56] the case's facts did not include an overcharge, so the court did not have the opportunity to distinguish between markups and overcharges. Perhaps the court would have drawn such a distinction if an overcharge had also been alleged.

2. Courts that distinguish between different types of unilateral charges.

Following the Eleventh Circuit's holding in *Sosa*, the Second and Third circuits both heard cases involving unilateral charges.[57] Instead of making a decision regarding all unilateral charges, these courts analyzed the two types of unilateral charges—markups and overcharges—separately.

In both instances, the courts started their analyses with overcharges. The plaintiffs in both cases argued that while overcharging does not explicitly violate § 8(b), "it is contrary to the requirement that the cost of a service bear a *reasonable relationship* to its market value and thus 'may be used as evidence of a violation of Section 8 and may serve as a basis for a RESPA investigation.'"[58] Both courts rejected this argument, as such an interpretation would require courts to divide charges into "reasonable" and "unreasonable" portions—a task for which the statute provides no guidance.[59] As the *Kruse* court explained, "nothing in [the statute's] language authorizes courts to divide a 'charge' into what they or some other person or entity deems to be its 'reasonable' and 'unreasonable' components. Whatever its size, such a fee is 'for' the services rendered by the institution and received by the borrower."[60] This factor, the courts said, made it clear that § 8(b) did not create a prohibition against overcharges.

The courts then shifted their analysis to markups. The Second Circuit evaluated the statutory constructions provided by both sides of the existing circuit split and concluded that both interpretations were plausible readings of the statute.[61] Because the statutory language was ambiguous, the court explicitly deferred to HUD's policy with respect to markups.[62] The Third Circuit also concluded that both interpreta-

56 See id at 982 ("[A]ccepting a portion of [an unearned] charge is prohibited regardless of whether there is a culpable giver.").

57 See *Kruse*, 383 F3d at 55–61; *Santiago v GMAC Mortgage Group, Inc*, 417 F3d 384, 386–90 (3rd Cir 2005).

58 *Santiago*, 417 F3d at 387, quoting 24 CFR § 3500.14(g)(2) (emphasis added). See also *Kruse*, 383 F3d at 55 ("The plaintiffs urge [the court] to defer to the view . . . that charging 'unreasonably' high prices for certain settlement services . . . is a violation of section 8(b).").

59 See *Santiago*, 471 F3d at 387; *Kruse*, 383 F3d at 56.

60 *Kruse*, 383 F3d at 56.

61 Id at 59.

62 Id at 61.

tions of the statutory language were plausible, but it found further evidence that markups should be included in § 8(b) by analyzing the subsection's context.[63] The court noted that "[t]he title of Section 8 of RESPA is 'Prohibition against kickbacks *and unearned fees*'" and that while § 8(a) explicitly refers to "kickbacks," § 8(b) does not—focusing instead on "[s]plitting charges."[64] According to the court, "[t]his use of language suggests that Section 8(b) is meant to provide for a situation other than kickbacks."[65]

After explaining their holdings, both courts remanded their respective cases in order to determine whether the defendants' markups actually violated § 8(b).[66] The circuit courts expressed doubt as to whether on remand the plaintiffs would be able to make the necessary showing that they were actually charged for unperformed services in violation of § 8(b).[67] As the Third Circuit noted, the defendants could argue that they provided the borrowers with an additional service by connecting them to the third-party vendor.[68] This requirement left the plaintiffs with an uphill battle on remand.

C. The Relevance of HUD's Policy Statement to the Interpretation of the Statute

Congress clearly granted HUD authority to promulgate regulations in furtherance of RESPA.[69] Therefore, official regulations passed by HUD that purport to interpret ambiguous sections of RESPA fall under the *Chevron* doctrine, which binds the judiciary to defer to such interpretations unless they are unreasonable.[70] As a threshold matter, however, HUD's policy statement does not qualify for such deference.

Chevron deference is normally only applied to regulations that have "the effect of law," which means that they were enacted by way of a "formal administrative procedure tending to foster the fairness and deliberation that should underlie a pronouncement of such force" or were the product of "notice-and-comment rulemaking or formal adjudication."[71] While some agency interpretations occasionally receive *Chevron* deference even if they were not adopted pursuant to a formal

63 See *Santiago*, 417 F3d at 388–89.
64 Id at 389 (emphasis added).
65 Id.
66 See *Santiago*, 417 F3d at 389; *Kruse*, 383 F3d at 62.
67 See *Santiago*, 417 F3d at 389; *Kruse*, 383 F3d at 62.
68 See *Santiago*, 417 F3d at 389.
69 See 12 USC § 2617(a).
70 See *Chevron*, 467 US at 842–44.
71 *United States v Mead Corp*, 533 US 218, 230 (2001).

procedure,[72] the Court has held clearly that "policy statements . . . which lack the force of law [ ] do not warrant *Chevron*-style deference."[73]

As the *Krzalich* court found, HUD's policy statement regarding § 8(b) was not adopted by way of a formal or deliberate process—rather it was a "simple announcement . . . [that] appeared in the Federal Register . . . [and was not preceded by a] public process."[74] Because it was not written pursuant to some formal adjudication, administrative procedure, or lengthy process, HUD's policy statement should not receive *Chevron*-style deference; instead, it is "entitled to respect . . . only to the extent that [it has] the power to persuade."[75] Courts may consider it and the arguments it espouses as a factor in their overall interpretation of the disputed statute, but they have no obligation to defer to it.[76]

Against this background, HUD's policy statement is not very persuasive. As the Seventh Circuit has noted, the statement provides no evidence to justify its interpretation, and it points to no specific abuses that might support its position.[77] HUD also provides no explanation or "interpretive methodology" to illustrate how it arrived at its statutory construction.[78] Because of the lack of substantiation found in this policy statement, courts are probably better off giving less weight to this factor and focusing instead on other methods of statutory interpretation to resolve the statute's ambiguity.

Still, there is at least one court that disagrees with this analysis. Not only did the *Kruse* court find that HUD's policy statement was persuasive, but it went so far as to explicitly grant it *Chevron* deference.[79] This conclusion, however, has been highly criticized by at least one commentator, as it seems to conflict with the Supreme Court's pronouncement that policy statements which are not produced by some formal procedure should not receive *Chevron* deference but

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72 See id at 231 ("[W]e have sometimes found reasons for *Chevron* deference even when no such administrative formality was required and none was afforded.").

73 See *Christensen v Harris County*, 529 US 576, 587 (2000) (holding that a policy pronouncement by the Department of Labor does not bind the court in its interpretation of a statute because it is not the authoritative view of the agency).

74 314 F3d at 881.

75 *Christensen*, 529 US at 587, citing *Skidmore v Swift & Co*, 323 US 134, 140 (1944) (internal quotation marks omitted).

76 See *Krzalic*, 314 F3d at 882 (Easterbrook concurring) (arguing that when an agency produces a policy statement, "courts owe the administrative interpretation careful attention . . . but nothing more").

77 Id at 881 (majority).

78 Id.

79 See *Kruse*, 383 F3d at 61 (finding that HUD's statement was meritorious, in part because it represented the "culmination of HUD's reflections" on the statute and because HUD "possesses expertise regarding the market for federally related home mortgage loans").

should rather be given consideration only as a factor in a court's overall evaluation of a disputed statute.[80]

Even if courts accept *Kruse*'s erroneous conclusion that *Chevron* analysis applies, there is still reason to disregard HUD's policy statement. HUD's interpretation could be considered unreasonable as it provides no evidentiary substantiation and fails to consider important methods of statutory construction. This conclusion would make it illegitimate under *Chevron*[81] and leave courts free to apply their own interpretations.

III. Resolving the Split

At this point, the circuits are clearly split regarding the various charges that are included in § 8(b). Their differing conclusions were apparently reached primarily through the same method of statutory construction—by interpreting the plain language of the subsection.[82] These alternative interpretations provide two distinct positions, each based on opposing definitions of the word "and."

Unfortunately, it seems virtually impossible to rest one's conclusion on the plain language, or more specifically, to choose which definition of the word "and" is correct. As the Second Circuit articulated, both constructions of the word are plausible.[83] This observation is valid, as the word "and" can function in two distinct manners, each of which compels a different interpretation.[84] Because of this ambiguity, different methods of statutory interpretation are necessary to resolve the split.

A good starting point for interpreting the statute as it relates to unilateral charges is to consider them in light of the one type of charge

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80 See Katehos, 49 NY L Sch L Rev at 1001–06 (cited in note 19).

81 See text accompanying note 70.

82 This statement is of course a simplification. The courts that include only kickbacks in their reading also point to the statute's legislative history. See, for example, text accompanying note 36. Additionally, the Third Circuit also considered the context in which § 8(b) arises in order to determine that markups were covered by the statute. See text accompanying notes 63–65. Nevertheless, it is clear that the split developed and currently rests on two different interpretations of the plain language.

83 See *Kruse*, 383 F3d at 58.

84 First, as the Eleventh Circuit noted, the word can be "used to connect words, phrases, or clauses that have the same grammatical function." *Sosa*, 348 F3d at 982, quoting *American Heritage Dictionary of the English Language* 49 (Houghton Mifflin 1976). When considered in this light, the word "and" is simply a grammatical tool that connects two similar phrases, each of which creates a separate prohibition; one of the phrases prohibits the giving of unearned fees and the other phrase prohibits their acceptance. But dictionaries also note that the word "and" can be used to mean "together with" or "in addition to." See, for example, *American Heritage College Dictionary* 50 (Houghton Mifflin 3d ed 1993). This definition of the term permits a reading of the statute that requires a culpable giver *in addition to* a culpable receiver in order for liability to attach. Because both interpretations involve plausible readings of the term "and," the statute's language is ambiguous.

that the circuits *do* agree is included: kickbacks. By identifying the sorts of characteristics that led Congress to outlaw kickbacks, one can gain greater insight regarding how the courts should treat unilateral charges. Additional methods of statutory interpretation that the courts have yet to utilize can then be invoked to resolve the split. Finally, because the split is really based on two separate issues—the potential inclusion of markups *and* overcharges—this Comment addresses them separately.

A. Markups

Kickbacks and markups share similar characteristics, and produce almost identical results. Prohibiting one and not the other is an absurd result. Despite legislative history to the contrary, Part III.A concludes that § 8(b) prohibits markups.

1. Comparing markups to kickbacks.

Kickbacks and markups have a number of characteristics in common. First, they both involve the inclusion of a third-party vendor into the settlement process on account of the settlement service provider's suggestion. While the two types of fees might differ slightly with regards to the consumer's awareness of the third party's role,[85] in both situations a settlement service provider must take the initiative to include a third-party vendor in the interaction between the service provider and the consumer.

Additionally, when either kickbacks or markups are present, both the settlement service provider and the third party realize a profit that they might not have otherwise obtained. In a kickback arrangement, the settlement service provider gets a referral fee from the third-party vendor and the vendor obtains a client who might have otherwise taken his business elsewhere. When the settlement service provider charges a markup, he retains the value of the markup, while the third party gets a customer who might have used a different vendor if given the opportunity.

Furthermore, it is imperative to note that kickbacks and markups result in identical economic outcomes for all three parties. For example, consider three actors: a consumer (C), a settlement service provider (S), and a third-party vendor (V). Assume that C has hired S to complete his real estate transaction, and during the process it becomes clear that V's services, which typically cost $50, will be needed. To complete the transaction, S can either outsource V's services and mark

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[85] A kickback requires that a settlement service provider expressly refers a consumer to a third-party vendor, see text accompanying note 22, whereas when a markup is assessed, the consumer may never be aware of the third party's inclusion.

up the cost, or refer C to V and hope for a kickback from V. If S chooses the first alternative, he would hire V at a cost of $50, and then charge C an increased price (for example $70) and keep the difference for himself. In the end, C pays $70, S makes $20 off the markup, and V makes $50 for his services.

If, instead, S and V had a kickback arrangement in place, S would simply advise C to hire V to perform the necessary services. Because it is generally agreed that the cost of the kickback is passed on to the consumer in the form of higher fees[86]—indeed that is the reason that all circuits agree that kickbacks ought to be outlawed[87]—V will pass along the cost of the kickback to C, in the form of a higher fee (in this instance $70). This dynamic makes the final result of this transaction identical to the result that arose when a markup was charged: C pays $70, S receives $20 in the form of a kickback, and V makes $50 for his services. In both instances, the existence of and interactions between two commercial parties have caused A to pay $20 more than he would have if he had simply hired V directly. The only difference between kickbacks and markups is which commercial party charges the extra fee. This economic and structural equivalence is very important to the forthcoming analysis. Curiously, none of the circuits have used this dynamic as a deciding factor in their analyses.[88] This point, however, implicates particular rules of statutory construction that are critical to resolving this issue.

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86 See text accompanying note 23.

87 See text accompanying notes 24–25.

88 Indeed, only one court, the Third Circuit, has even explicitly noticed this equivalence. See *Santiago*, 417 F3d at 388–89. Nevertheless, even in *Santiago*, the court did not use this fact as a critical means of deciding the case. Instead, it simply noted it as a reason to accept either of the two proposed readings of the statute's plain language. See id at 388 ("Both the textual interpretation supported by Santiago and HUD and the one supported by GMAC are plausible readings of the statutory language. This conclusion is supported by the fact that under either reading of the statute, the parties would be in the same economic position."). As will become clear, the court should have gone further with this observation and enlisted it in support of its ultimate conclusion that markups are banned by § 8(b).

Additionally, in illustrating the economic equivalence, the court seemed to display a somewhat flawed conception of a kickback arrangement. The court explained it as a situation in which the consumer pays the initial fee to the settlement service provider, who then passes it along to the third party in return for the completed services and simultaneously receives a kickback from the third party. See id at 388–89. In actuality, this description seems closer to a markup charge, as it describes a situation in which the settlement provider is outsourcing the third party's services. The more generally accepted view of kickbacks is the one described in the text of this Comment; the settlement provider refers the consumer to a third party, and at a later time, the third party kicks back a portion of the fee to the settlement provider.

2. The Golden Rule and its application to § 8(b).

The "Golden Rule" of statutory interpretation mandates that whenever a statute's plain language yields an absurd outcome, courts must not adopt that result, even if the language is clear on its face.[89] This legal rule has a long-standing history, finding its roots in English common law.[90] American courts have always adhered to this policy,[91] as illustrated by the Supreme Court's recent pronouncements that "[l]ooking beyond [a statute's] naked text for guidance is perfectly proper when the result it apparently decrees is difficult to fathom,"[92] or where a "literal reading would compel an odd result."[93]

As it pertains to the RESPA circuit split, this maxim becomes even more powerful. Because the rule instructs courts to go so far as to discard a statute's *clear* meaning, it follows that when a statute's language has *no* clear meaning, as is the case with § 8(b),[94] any proposed interpretation of the language that results in an absurdity ought to be rejected. If courts are allowed to ignore clear interpretations of statutory language in order to avoid absurd results, then they are certainly allowed to reject contested interpretations to achieve the same end.[95]

Based on this logic, if either of the proposed interpretations of § 8(b) produces an absurd result with respect to markups, it ought to be discarded. To determine whether any interpretation produces an absurdity, it is first necessary to consider what it means for an outcome to be absurd. Though there is no consensus as to what sorts of results

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89 See R. Randal Kelso, *Statutory Interpretation Doctrine on the Modern Supreme Court and Four Doctrinal Approaches to Judicial Decision-making*, 25 Pepperdine L Rev 37, 49–50 (1997) (describing the Golden Rule as the second of three variations of the formalist approach: the Literal Rule, the Golden Rule, and the Plain Meaning Rule). See also Karl N. Llewellyn, *Remarks on the Theory of Appellate Decision and the Rules or Canons About How Statutes Are to be Construed*, 3 Vand L Rev 395, 403 (1950) (listing as a canon of construction the notion that the plain language is not followed "when literal interpretation would lead to absurd or mischievous consequences or thwart manifest purpose").

90 See, for example, *Becke v Smith*, 150 Eng Rep 724, 726 (Ex 1836) (proclaiming that courts should "adhere to the ordinary meaning of the words used, and to the grammatical construction, unless that . . . leads to any manifest absurdity or repugnance, in which case the language may be varied or modified, so as to avoid such inconvenience").

91 See Kelso, 25 Pepperdine L Rev at 49 (cited in note 89) (claiming that "[t]o [his] knowledge, no American court has ever" refused to depart from the statute's language when failure to do so would result in an absurd outcome).

92 *Public Citizen v United States Department of Justice*, 491 US 440, 455 (1989).

93 *Green v Bock Laundry Machine Co*, 490 US 504, 509 (1989).

94 See note 84 and accompanying text.

95 See Veronica M. Dougherty, *Absurdity and the Limits of Literalism: Defining the Absurd Result Principle in Statutory Interpretation*, 44 Am U L Rev 127, 128 (1994) (finding that "when a genuine question exists about the actual meaning of the statute's words" the absurd results principle gives judges the power "to make the choice between possible meanings on the basis that the real-life result of one meaning strikes the judge as somehow objectionable").

qualify as absurdities, legal commentators have noted that judges will be more inclined to view an outcome as absurd when it somehow offends their sense of "rationality, reasonableness, and common sense."[96] If the application seems not only unfair, but also "illogical" or "ridiculous" then it is likely to be considered absurd.[97]

When viewed in that light it seems very inconsistent—perhaps even illogical—to include kickbacks but not markups within § 8(b)'s purview. Both of these fees arise from an interaction between two commercial parties, and the fees' respective results leave both those parties in identical financial positions and take advantage of real estate consumers to the same extent.[98] This point is even more salient in light of the fact that RESPA's ultimate concern is the general protection of real estate consumers.[99] If consumers could deal only with third-party vendors without having to go through settlement service providers, they would not be charged additional fees. By involving settlement providers in these transactions, consumers are exposed to the possibility that markups or kickbacks might be charged—both of which affect them equally. It is thus absurd to conclude that settlement service providers and third-party vendors are entitled to exploit consumers via markups but cannot do so to an identical extent by way of a kickback arrangement.

This point is well illustrated (by way of analogy) in a recent Supreme Court criminal case. In *Muscarello v United States*,[100] the defendant was arrested for selling marijuana from his truck and was also charged with an additional offense under a statute that made it illegal to "carr[y] a firearm during and in relation to a drug trafficking crime."[101] In this particular case, the defendant did not have a gun on his person, but he did have one in the glove compartment of his truck at the time of the drug transaction.[102] The defendant argued that his actions did not fall within the scope of the word "carries" in the relevant statute.[103]

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96 Id at 152.

97 Id at 151. See also *United States v Kirby*, 74 US (7 Wall) 482, 487 (1869). In *Kirby*, the Court provided examples of absurd outcomes by pointing to two archetypal laws whose plain language yielded such illogical or unreasonable results that they could only be described as absurdities: 1) extending a law that prohibited people from drawing "blood in the streets" to surgeons who try to help injured people in the streets, and 2) extending a law that made it illegal for prisoners to break out of jail to a prisoner who fled a burning prison. Id.

98 See Part III.A.1.

99 See *Sosa*, 348 F3d at 981 ("Congress passed RESPA in order to reduce the costs consumers pay to settle their real estate transactions.").

100 524 US 125 (1998).

101 Id at 126, quoting 18 USC § 924(c)(1) (internal quotation marks omitted).

102 *Muscarello*, 524 US at 127.

103 Id.

Despite the defendant's plausible reading of the statute's language, the Court refused to hold in his favor, in part because it would be absurd to give different treatment to two very similar acts that produced identical outcomes.[104] Invoking common sense and rationality, the Court asked,

> [W]hat sense would it make for this statute to penalize one who walks with a gun in a bag to the site of a drug sale, but to ignore a similar individual who . . . travels to a similar site with a similar gun in a similar bag, but instead of walking, drives there with the gun in his car?[105]

The Court then answered its rhetorical question by proclaiming, "[i]t is difficult to say that, considered as a class, those who prepare, say, to sell drugs by placing guns in their cars are less dangerous, or less deserving of punishment, than those who carry handguns on their person."[106]

The point that *Muscarello* raises seems clear: when two similar or identical parties take similar actions to produce the exact same outcome, it makes no sense to prohibit one action and not the other. As demonstrated earlier, kickbacks' characteristics are extremely similar to those of markups; the relevant parties and fees do not change and the only difference (a trivial one) is which party charges the increased fee.[107] More importantly, the eventual economic outcomes of the two situations are identical. It is therefore absurd to prohibit one act and not the other. Both equally deserve punishment.

Finally, if one considers the potential consequences of outlawing only kickbacks, it becomes even clearer that markups should also be prohibited. If settlement service providers are aware that only kickbacks are prohibited by § 8(b), they can easily escape liability simply by structuring all of their transactions with third-party vendors by means of exclusive outsourcing contracts (the price of which they would mark up to consumers) as opposed to kickback arrangements. Because the financial consequences of these arrangements are identical to those that arise from kickbacks, it would make no sense for these parties to risk liability by means of a kickback arrangement. Thus, they could contract with one another such that whenever a customer requires a service that entails the use of a third party, the settlement service provider could—instead of referring that customer to

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104 Id at 132–33. The identical outcome produced by both situations was that a dangerous weapon was present at the scene of a drug offense.

105 Id.

106 Id at 133.

107 Perhaps this similarity could be equated to the similarity of carrying a gun versus having one in a car's glove compartment.

the relevant third-party vendor—simply tell the customer that he has a particular third-party vendor that always performs such services for his clients, then charge the consumer a marked-up price giving the vendor his customary fee. Because it is nonsensical to give settlement service providers and third-party vendors such a clear path to evade liability, markups should also be prohibited by § 8(b).

3. Rejecting legislative history.

A counterargument that can be raised to the above analysis is that the legislative history of § 8(b) strongly indicates that the statute's drafters were really more concerned with kickbacks than any other sort of fee. This point is a valid one; when read in part or in whole, the Senate Report accompanying RESPA's passage contemplates only "referral fees, kickbacks, rebates and unearned commissions as inducements to those persons who are in a position to refer settlement business."[108] This fact is probably the reason that the initial courts to hear these sorts of cases relied heavily on the relevant Senate Report in holding that the statute only covered kickbacks,[109] and why courts that have held otherwise have all conspicuously ignored the legislative history.

It seems appropriate in this instance, however, to disregard the relevant legislative history when considering markups. As some legal commentators have noted, even if the legislature has a specific purpose in mind when drafting a statute and there is "an express statement to this effect in the legislative history, [that purpose] would not be controlling. . . . It does no violence to the statute to read it to authorize a different [purpose] . . . once the facts have been revealed to be otherwise."[110] While Congress may have had only kickbacks in mind when it drafted RESPA, this fact does not mean that courts should automatically exclude markups from the prohibition. In this instance, Congress's legislative intent could be said to be the "product of certain factual judgments [ ] that have proved inaccurate."[111] If it had been clear to the drafters that markups could have as predatory an effect on consumers as kickbacks, a fact that the significant markup litigation

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108 S Rep No 93-866 at 6 (cited in note 36).

109 See text accompanying note 36.

110 Cass R. Sunstein, *Is Tobacco a Drug? Administrative Agencies as Common Law Courts*, 47 Duke L J 1013, 1031–32 (1998). For a more general discussion of reasons to exclude legislative history from statutory interpretation, see Adrian Vermeule, *Interpretive Choice*, 75 NYU L Rev 74, 129–39 (2000) (arguing for broader use of interpretive alternatives to legislative history because "the expense of legislative history is exorbitant").

111 Sunstein, 47 Duke L J at 1032 (cited in note 110) (referring analogously to a hypothetical scenario where the Congress that passed the Food, Drug, and Cosmetic Act thought tobacco was not a drug). To be clear, the parallel here is Congress's inaccurate judgment that kickbacks were the only predatory practice that could significantly exploit consumers.

seems to demonstrate, then it is likely that markups too would have been included in the legislative history.

Some opponents of this viewpoint may insist on relying on the legislative history as a means of clearing up the statute's ambiguous language, but the striking similarities between kickbacks and markups illustrate the flaws in this argument. While an ambiguous statute "generally should not be taken to extend to a case that Congress did not consider," if there is no "arguable difference between that case and the exemplar cases covered by the [legislative history]" then courts should not feel constrained by the legislature's intent.[112] Because there is virtually no difference—let alone an arguable one—between markups and kickbacks,[113] it is inappropriate to use legislative history as the deciding factor in settling the statute's ambiguity.

Finally, § 8(c) of RESPA specifically excludes certain payments from RESPA's prohibition.[114] The legislative history elaborates on these exceptions by detailing a number of different charges that are not prohibited by RESPA.[115] Nowhere in this explication did Congress exclude markups from § 8(b). The fact that § 8(c) does not specifically exclude markups only buttresses the assertion that Congress's explicit prohibition of kickbacks does not necessarily exclude markups from the ban.

4. Valuing markups.

Despite this Comment's contention that § 8(b) prohibits *unearned* markups, there might still be some markups that could be considered acceptable. As the Second, Third, and Eleventh circuits have all noted, if a settlement service provider was justified in charging a markup (on account of the provision of some ancillary service), then it would be considered an *earned* fee, and not within § 8(b)'s purview.[116] Indeed, these courts have gone on to hold that upon remand, the defendants will have an opportunity to demonstrate that their markups were so justified.[117]

To be fair, it is true that settlement providers are probably justified in charging customers at least some markup. They do, after all, provide a service by connecting consumers with third-party vendors.

112 Id at 1044.

113 See Part III.A.1.

114 See 12 USC § 2607(c).

115 See S Rep No 93-866 at 6–7 (cited in note 36) (setting forth "the types of legitimate payments that would not be proscribed by the section," including "commissions paid by a title insurance company [and] . . . the payment of a bona fide salary for goods or services actually furnished or for services actually performed").

116 See text accompanying notes 54 and 67.

117 See text accompanying note 68.

This service saves consumers time that they otherwise would have spent searching for such a vendor as well as any other costs they might have incurred as a result of such a search. The critical problem, however, is in determining just how much of a markup is warranted by that service.[118] Any greater amount charged would render a portion of the fee *unearned* and thus prohibited by § 8(b).

Other industries have experienced similar problems with regards to exorbitant markups, and they have found ways to place reasonable values on markups. For example, many auto dealers have come under fire recently for charging consumers markups on services provided by third-party vendors.[119] When a consumer purchases a new vehicle from a dealer and needs a loan to do so, the dealer will often outsource the necessary lending services to a third party at a particular interest rate, and then mark up that interest rate significantly.[120] This practice has become so widespread and abusive that a number of consumer activists have made attempts to determine the value of a reasonable markup that auto dealers should be allowed to charge and have subsequently lobbied for regulations which would place a cap on markups at this level.[121] At least one state legislature (Louisiana) has responded

118 A fair amount of literature acknowledges that a variety of situations justify reasonable markups. For example, some commentators have noted that stockbrokers are entitled to charge consumers reasonable markups on securities that consumers purchase through them, and those markups are justified by "all relevant circumstances including market conditions with respect to such security at the time of the transactions, the expense of executing the order and the value of any service [the broker] may have rendered by reason of his experience in and knowledge of such security" in addition to the fact that the broker "is entitled to a profit." See Joseph I. Goldstein and L. Delane Cox, *Penny Stock Markups and Markdowns*, 85 Nw U L Rev 676, 680 (1991), quoting NASD Manual, Rules of Fair Practice (CCH) ¶ 2154 at 2054 (1990). Indeed, none of the literature seems to question the legitimacy of reasonable markups; the real concern is in controlling the size and disclosure of such markups. See generally Ian Ayres and F. Clayton Miller, *"I'll Sell it to You at a Cost": Legal Methods to Promote Retail Markup Disclosure*, 84 Nw U L Rev 1047 (1990) (arguing that the government should increase the enforcement of prohibitions against markup misrepresentation, develop accounting standards so retailers can speak more credibly about their costs, and mandate disclosure in appropriate markets).

119 See Brett Clanton, *Auto Loan Markups Rile Buyers*, Detroit News 1A (Apr 25, 2004) (explaining that due to consumer advocate criticism some automakers are imposing caps on dealer markups). For a discussion of auto dealers' discriminatory use of markups, see Ian Ayres, *Further Evidence of Discrimination in New Car Negotiations and Estimates of its Cause*, 94 Mich L Rev 109, 144–45 (1995) (finding that auto dealers generally charge significantly higher markups to female and African-American consumers, and ultimately suggesting that "no-haggle" dealing and full disclosure be required to avoid such discrimination).

120 See Clanton, *Auto Loan Markups Rile Buyers*, Detroit News at 1A (describing a situation in which an auto dealer marked up the interest rate charged to a particular consumer from 12 percent to 24 percent).

121 See id (describing laws that have been proposed in California, Florida, Illinois, and Louisiana that would make it much more difficult for auto dealers to charge excessive markups). For more information on these legislative proposals, see Donna Harris, *California Proposal Aims at Flat Fees; Initiative Sets $150 Limit on Dealer Profit for Arranging Loans*, Automotive News 8 (Feb 14, 2005) (describing California's proposal, which would place a cap on the dollar value of

to the activists' pleas by passing a law against exorbitant markups in the auto industry.[122]

Other industries have combated unreasonable markups with some sort of regulation. For example, stockbrokers often charge naïve securities consumers high markups over the prevailing market price.[123] In order to bring these markups down to reasonable levels, the Securities Exchange Commission and the National Association of Securities Dealers promulgated a number of standards for stockbrokers to abide by when charging markups.[124]

The essential point to grasp from these analogies is that if it is possible to value a markup in the auto and securities industries, there is reason to believe that the same could be done in the real estate industry. It could be argued that these examples involve legislative action, and thus do not parallel RESPA which requires judges to determine the reasonableness of markups. However courts could be just as effective in making these judgments as legislatures. Courts have all the necessary faculties and resources to determine the sorts of markups that are unwarranted, and thus in violation of § 8(b); they can simply take testimony from both sides of the debate (which could include examples of reasonable markups in other industries or expert economic testimony), and make a judgment as to what price seems fair. If a court were ever to set such a value, settlement providers within its jurisdiction would be on notice with regards to the markups that they could justifiably charge. Even if courts encounter difficulty in setting reasonable markups, they could at least try to defer responsibility by remarking that legislatures are better equipped to make such determinations—a deferral that could ignite the same sort of lobbying and subsequent legislative action that arose in other industries.

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the markup). See also Illinois Attorney General Press Release, *Madigan to Propose Full Disclosure of Auto Financing, Says Dealers Target African-Americans, Latinos, and Woman for Inflated Interest Charges* (Jan 29, 2004), online at http://www.ag.state.il.us/pressroom/2004_01/20040129.html (visited Oct 17, 2006) (announcing Attorney General Lisa Madigan's plans to introduce legislation that would require auto dealers to fully disclose markups to consumers); New York State Attorney General Press Release, *Auto Dealer Agrees to Landmark Reforms* (Mar 31, 2004), online at http://www.oag.state.ny.us/press/2004/mar/mar31a_04.html (visited Oct 17, 2006) (announcing that Attorney General Eliot Spitzer persuaded Armory Nissan, Inc. to set flat rates for their markups).

[122] See Donna Harris, *Louisiana Limits Loan Markup; Initiative by Dealers Brings 1st State Law*, Automotive News 32 (Aug 9, 2004) (noting that Louisiana's law caps auto loan markups at 3 percent).

[123] See Daniel R. Fischel and David J. Ross, *Should the Law Prohibit "Manipulation" in Financial Markets?*, 105 Harv L Rev 503, 539–42 (1991).

[124] Id at 540 (noting that the NASD considers "a five percent markup from the prevailing market price as a guideline for determining a fair spread"). When analogized to the RESPA split, these agencies' standards are akin to potential standards that HUD could impose regarding reasonable markups. However, given HUD's abhorrence for all markups, it seems unlikely that it would provide such regulations.

B. Overcharges

As with markups, the analysis for overcharges should begin by comparing them to the one sort of fee that all courts agree are outlawed by the statute: kickbacks. Other principles of statutory construction may then be invoked to consider the legitimacy of prohibiting overcharges. Based on these principles, Section III.B concludes that § 8(b) does not prohibit overcharges.

1. Comparing overcharges to kickbacks.

Unlike markups, overcharges differ substantially from kickbacks. Most importantly, the transaction involves no third party at all. Rather, the settlement service provider charges a fee to the consumer and provides the relevant service without interacting with another vendor. This dynamic has two important ramifications.

First, there is no split or division of a single charge in the same way as there is with kickbacks or markups. Instead the settlement service provider keeps the entire payment for himself. Because no third party hopes to profit from the consumer, there are no similar concerns over "commercial bribery"[125] as are present in kickback arrangements.

Second, the presence of only two parties makes it impossible to have the same sort of economic equivalence between kickbacks and overcharges as exists between kickbacks and markups. The consumer pays the settlement service provider a certain amount for a particular service and the settlement service provider profits by that amount, less any costs incurred in rendering the service. This outcome differs from the results of markups and kickback arrangements, as no third party receives a payment.[126]

2. Rejecting the canon of absurd results as it pertains to overcharges.

Given these significant differences between overcharges and kickbacks it seems as though it would be much harder to fit overcharges within § 8(b)'s purview than it was to include markups. First, one cannot invoke the canon of absurd results in the same manner as demonstrated earlier[127] because overcharges lack the structural equivalence to kickbacks that markups have. Overcharges do not result in two distinct parties profiting off of a consumer in the same way that kickbacks and markups do. While overcharges might allow settlement

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125 *Krzalic*, 314 F3d at 879.

126 See Part III.A.1.

127 See Part III.A.2.

providers to extract excessive profits from consumers,[128] such exploitation is not equivalent to the sort that is clearly prohibited by § 8(b), because it does not arise from an interaction between two commercial parties that are looking to gain at the consumer's expense. Thus, it is not necessarily objectionable (and certainly not absurd) to exclude overcharges from the statute.

3. Legislative history and statutory context.

Just because it is not absurd to exclude overcharges from § 8(b) does not necessarily mean they *ought* to be excluded. Other means of statutory interpretation, however, also indicate that overcharges should not be included in § 8(b).

This Comment previously argued that even though one should generally not stray from the legislative history when interpreting an ambiguous statute, it is appropriate to do so when considering markups because there is no material difference between markups and kickbacks.[129] But the same logic does not apply to overcharges, because overcharges are significantly different from kickbacks.[130] Because overcharges do not present a case that is structurally similar to the paradigm case of kickbacks, it is wrong to drift too far from the legislative history on this matter.[131]

It is quite clear that the legislature did not intend to outlaw all charges that seemed exorbitant in comparison to the services that were being provided. To the contrary, the legislature was really only concerned with kickbacks and referral fees, which at that time were becoming quite common "[i]n a number of areas of the country [as a result of] competitive forces in the conveyancing industry."[132] As the Second Circuit emphasized, before Congress passed RESPA in its final form, it considered including a provision that would have given HUD the power to "establish the maximum amounts of the charges to be imposed upon the borrower and seller for services incident to or a part of a real estate settlement . . . designed to reflect the reasonable charges for necessary services."[133] This description sounds particularly similar to the sorts of fees that consumers equate to illegal overcharges. Given that Congress ultimately decided to pass the act absent

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128 See 66 Fed Reg at 53057 (cited in note 17), citing 24 CFR § 3500.

129 See Part III.A.3.

130 See Part III.B.1.

131 See Sunstein, 47 Duke L J at 1069 (cited in note 110) ("[A]s a general rule, ambiguous terms should not be taken to cover cases far beyond the contemplation of the enacting legislature.").

132 S Rep No 93-866 at 6 (cited in note 36).

133 *Kruse*, 383 F3d at 56, quoting A Bill to Regulate Closing Costs and Settlement Procedures in Federally Related Mortgage Transactions, S 2288, 93d Cong § 4(a)(1) (1973).

this provision, it indicates that the legislature did not intend for the act to regulate such fees.

Additionally, the potential inclusion of overcharges in § 8(b) should be considered in light of the statute's context. Statutes' titles often provide clues regarding the sorts of acts that they regulate. This method of statutory construction is a longstanding one, as evidenced by its use in the Supreme Court's notorious opinion on statutory interpretation, *Holy Trinity Church v United States*.[134] The Third Circuit considered this method of statutory interpretation when it analyzed § 8(b)'s potential prohibition against markups,[135] but it did not undertake a comparable investigation with respect to overcharges.

Section 8(b) is entitled "Splitting Charges."[136] According to one source, to split something is defined as "to divide and share."[137] Based on this understanding, the prohibition against "splitting charges" seems to prohibit the collection, division, and sharing of a fee. Clearly this prohibition could include kickback arrangements since they entail a third party sharing charges with settlement providers. Markups also seem to comport with the statute's title since they require a settlement service provider to accept a charge from the consumer, and then give a portion of that amount to a third-party vendor. An overcharge, however, does not present a situation where any portion of a charge is split. Rather, the settlement service provider who accepts the fee retains the entire amount for himself. While such charges may be excessive, they are never split or shared by two or more parties and are consequently inconsistent with the statute's title.

4. Policy and economic issues.

The RESPA circuit split raises additional policy and economic issues that merit brief consideration. These concerns militate in favor of excluding overcharges from § 8(b)'s purview.

a) Fear of group acts. As a general matter, courts and legislative bodies alike are more concerned with illicit acts undertaken by multiple participants than with those of just one culpable party.[138] As the Seventh Circuit has noted, "[w]hat makes the joint action of a

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134 143 US 457, 462 (1892) (noting that "the title of the act . . . may help to interpret its meaning").

135 See text accompanying notes 63–65. No other circuit has considered the statute's title when analyzing any of the potential charges that § 8(b) may include.

136 12 USC § 2607(b).

137 *The American Heritage College Dictionary* at 1314 (cited in note 84).

138 See, for example, Joseph L. Barloon, Note, *An Economic Analysis of Group Crime and the Federal Sentencing Guidelines*, 84 Georgetown L J 2261, 2265 (1996) (arguing that a convincing rationale for conspiracy law "is the belief that concerted criminal action poses a greater threat to society than does individual criminal action").

group of *n* persons more fearsome than the individual actions of those *n* persons is the division of labor and the mutual psychological support that collaboration affords."[139] This fear of concerted action is clearly evident in criminal law, as conspiratorial acts are generally punished much more harshly than individual acts.[140] While the RESPA § 8(b) circuit split arose over a series of civil actions, violators of § 8(b) are also eligible for criminal penalties,[141] so it is appropriate to have this policy in mind when considering potentially prohibited fees.

This important policy concern should make courts even more wary of adding overcharges to § 8(b)'s list of prohibitions. Kickbacks clearly excite fears of concerted action because both the third party and the settlement provider conspire to charge an unearned fee.[142] Markups create such a situation in a slightly less obvious way. While third parties may never know that their fee is being marked up to end consumers (which would not create a situation of concerted action), as discussed earlier, one could reasonably foresee a situation in which settlement providers and third-party vendors form exclusive outsourcing contracts, thereby creating a multiparty arrangement.[143] Overcharges, however, create no such cause for concern. There is never more than one party charging the increased fee; instead the settlement service provider is the only commercial party to the transaction.[144] Thus, he should not be treated as harshly as parties who violate the statute through concerted action.

b) Noncompetitive prices. As a number of legal scholars have suggested, there are many competitive markets that, for a variety of reasons (including a lack of consumer information and consumer biases), still succeed at charging noncompetitive prices.[145] Consumers in the real estate settlement services market do not receive very good information with regards to settlement costs,[146] so despite the relatively

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139 *United States v Townsend*, 924 F2d 1385, 1394 (7th Cir 1991), quoting Leo Katz, *Bad Acts and Guilty Minds: Conundrums of the Criminal Law* 274 (Chicago 1987).

140 See Barloon, 84 Georgetown L J at 2265 (cited in note 138).

141 See 12 USC § 2607(d)(1) (holding violators liable for fines of no more than $10,000 or imprisonment of no longer than one year, or both).

142 See Part I.B.1.

143 See Part III.A.2.

144 See Part I.B.2.b.

145 See, for example, Colin Camerer, et al, *Regulation for Conservatives: Behavioral Economics and the Case for "Asymmetric Paternalism*,*"* 151 U Pa L Rev 1211, 1231–32 (2003) (describing "rent-to-own" furniture markets which, despite being competitive, are able to charge consumers high prices because of a lack of consumer information); Donald C. Langevoort, *Behavioral Theories of Judgment and Decision Making in Legal Scholarship: A Literature Review*, 51 Vand L Rev 1499, 1523 (1998) (noting that consumer biases and cognitive deficiencies will be present even in competitive markets).

146 See Rodriguez-Dod, 24 Hamline L Rev at 81–82 (cited in note 7) (concluding that RESPA has failed in its attempt to give consumers relevant information, as "[t]he average bor-

high level of competition in the market, it should not be particularly surprising that settlement service providers are often able to charge home purchasers high prices for fairly routine services. While these practices may seem unfair, it is not for courts to seek out such situations and eliminate them without any statutory authority to do so.[147] Given courts' roles as legal interpreters (as opposed to lawmakers), granting them this measure of authority would be quite inappropriate.

CONCLUSION

As highlighted by the statutory interpretations put forth by various circuit courts, the language of § 8(b) of RESPA is ambiguous. The statute must therefore be interpreted by looking beyond the plain language. On account of their striking similarity to kickbacks, markups ought to be included in § 8(b)'s purview in order to avoid an absurd result. Overcharges, however, do not evince the same characteristics as kickbacks. This difference, in conjunction with the statute's context and other policy objectives, militates in favor of excluding overcharges from § 8(b)'s prohibitions.

rower[s] . . . do not fully comprehend the closing procedure . . . [and information] is still written in an incomprehensible code-like manner").

147 At first glance, this statement might seem to contradict an argument made in Part III.A.4, which claimed that courts should be allowed to determine the reasonable value of markups and eliminate all unreasonable markups. If courts can correct markets that charge unreasonable markups, why should they not be allowed to correct markets that charge unreasonable overcharges? This Comment's reasoning is that courts have statutory authority to prohibit markups, so it follows that they should be allowed to eliminate unreasonable markups. Since courts do not have the same statutory authority with respect to overcharges, the same logic does not apply.