

**Appeal No. 10-3922
IN THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT**

ERICK C. CARTER, ET AL.,

Plaintiffs-Appellants,

v.

WELLES-BOWEN REALTY, INC., ET AL.,

Defendants-Appellees.

**On Appeal from the U.S. District Court for the Northern District of Ohio
Case No. 3:05 CV 07427
Judge Jack Zouhary**

**BRIEF OF THE AMERICAN ESCROW ASSOCIATION,
CONSUMER MORTGAGE COALITION, MORTGAGE BANKERS
ASSOCIATION, NATIONAL ASSOCIATION OF REALTORS®,
THE REALTY ALLIANCE, AND
REAL ESTATE SERVICES PROVIDERS COUNCIL, INC. (RESPRO®)
AS AMICI CURIAE IN SUPPORT OF APPELLEE CHICAGO TITLE
INSURANCE COMPANY AND IN SUPPORT OF AFFIRMANCE**

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**DISCLOSURE OF CORPORATE AFFILIATIONS
AND FINANCIAL INTEREST**

Sixth Circuit Case No.: 10-3922

Case Name: Carter v. Welles-Bowen Realty, Inc., et al.

Names of Counsel: Jay N. Varon

Pursuant to Sixth Cir. R. 26.1: The American Escrow Association, Consumer Mortgage Coalition, Mortgage Bankers Association, National Association of Realtors®, The Realty Alliance, and Real Estate Services Providers Council, Inc. (RESPRO®)

Name of Party[ies]

make the following disclosure:

1. Is said party[ies] a subsidiary or affiliate of a publicly owned corporation? If yes, list below the identity of the parent corporation or affiliate and the relationship between it and the named party[ies]:

Not applicable. *Amici Curiae* are all non-profit trade associations.

2. Is there a publicly owned corporation, not a party to the appeal, that has a financial interest in the outcome? If yes, list the identity of such corporation and the nature of the financial interest:

No. Some publicly owned corporations are members of *Amici Curiae*, but they do not have a financial interest in the litigation as discussed in 6th Cir. R. 26.1(2).

Fed. R. App. P. 29(c)(5) Certification

Pursuant to Rule 29(c)(5), *Amici* affirms that no counsel for a party authored this brief in whole or in part, nor did any person or entity, other than *Amici* or its counsel, make a monetary contribution to the preparation or submission of this brief.

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CONSENT TO FILING

Plaintiff-Appellants, Defendants-Appellees and Intervenor United States have consented to the filing of this *Brief of Amicus Curiae in Support of Appellee Chicago Title Insurance Company and in Support of Affirmance*.

INTEREST OF THE *AMICI CURIAE*

The *Amici Curiae* and their members have a strong interest in the proper and consistent construction and application of existing federal statutes governing the residential real estate industry. They consist of: the American Escrow Association, a national association of real estate settlement agents; the Consumer Mortgage Coalition, an industry trade group representing national residential mortgage lenders, servicers, and service providers; the Mortgage Bankers Association, a national association representing the real estate finance industry with over 2,200 members; the National Association of Realtors®, the country's largest membership organization for residential and commercial real estate agents; The Realty Alliance, a network of North America's elite real estate firms, and the Real Estate Services Providers Council, Inc. (RESPRO®), a national non-profit trade association of real estate service providers from all segments of the residential home buying and financing industry.

Each of the foregoing organizations (collectively "*Amici*") support, and have numerous members who engage in, the provision of a diversified menu of services

(commonly referred to as “one-stop shopping”) for home buyers and home owners through wholly-owned subsidiaries or through joint ventures with other providers, each of which is designated under the Real Estate Settlement Procedures Act, 12 U.S.C. § 2601, *et seq.*, (“RESPA”) as an “affiliated business arrangement” (or “ABA”). HUD Statement of Policy 1996-2¹ purports to address issues that can be raised by ABAs, with which members of the *Amici* are very familiar. Accordingly, *Amici* have a strong interest in, and significant practical experience and knowledge regarding, HUD’s and RESPA’s regulation of ABAs.

¹ HUD Statement of Policy 1996-2, Regarding Sham Controlled Business Arrangements, 61 Fed. Reg. 29,258, 29,262 (June 7, 1996).

SUMMARY OF ARGUMENT

Amici seek to make two major points. First, the named Plaintiffs, as well as the *Amici* supportive of Plaintiffs (“Plaintiff *Amici*”), have set forth a highly inaccurate description of what are currently known under RESPA as “affiliated business arrangements” (“ABAs”) and how RESPA and HUD’s “Statement of Policy 1996-2, Regarding Sham Controlled Business Arrangements,” 61 Fed. Reg. at 29,262 (“Policy Statement”) supposedly apply to such arrangements.

Accordingly, to place the issue in a more accurate and balanced context, *Amici* herein discuss ABAs and legal standards that apply to them.

Second, Plaintiffs, HUD, and Plaintiff *Amici*’s legal arguments are flawed in at least three major respects. (1) The most cursory review of the “Guidelines” in HUD’s Policy Statement and the manner in which they are supposed to be balanced reveals that the standards are so subjective and centered on HUD’s own expertise and enforcement discretion that the Guidelines should not be—and were never meant to be—privately enforced. HUD itself concedes that the Guidelines are not a legislative rule, yet this is precisely how Plaintiffs and Plaintiffs’ *Amici* seek to use them. (2) The Guidelines are not entitled to *Chevron* deference because they seek to interpret a concept of “bona fide provider” that was never a part of the statute or regulation and because there was no notice and comment

rulemaking. (3) Finally, the rule of lenity also supports the District Court's award of summary judgment.

ARGUMENT

I. BACKGROUND REGARDING ABAs IN THE RESPA CONTEXT.

A. ABAs Are The Product Of Vertical Integration In The Residential Real Estate Industry.

An ABA essentially exists where one residential real estate service provider has an ownership interest, whole or partial, in another residential real estate service provider, not unlike when an auto company buys a parts company or a drug company buys distributors. Specifically, RESPA defines ABAs as arrangements in which:

(A) a person who is in a position to refer business incident to or part of a real estate settlement service involving a federally related mortgage loan, or an associate of such person,² has either an affiliate relationship with or a direct or beneficial ownership interest of more than 1 percent in a provider of settlement services; and (B) either of such person directly or indirectly refers such business to that provider or affirmatively influences the selection of that provider.

² The term "associate" is a catchall phrase that includes certain family members of the referring person, as well as various business associates. *See* 12 U.S.C. § 2602(8).

12 U.S.C. § 2602(7). Thus, ABAs arise when real estate providers have cross-ownership interests in other providers and refer or endorse their affiliate(s) to consumers.

B. ABAs Provide Consumers With Significant Benefits.

For a residential real estate transaction to close successfully, many moving parts must come together. Once a real estate broker assists a consumer in finding a home, the home buyer generally requires mortgage financing and the parties and the lender typically obtain title insurance to ensure that the title to the property is clear and homeowners insurance to protect the underlying property. And of course, someone—a title company, escrow company, or lawyer—must close the transaction and help transfer the property. If any one of these providers does not do its job, the transaction will not close. Thus, one critical reason why residential real estate companies have formed ABAs is to coordinate and ensure these services are provided with the desired level of quality.

From the consumer perspective, ABAs also provide a one-stop shopping alternative. A consumer need not hunt down five different providers. Rather, when talking to a real estate brokerage firm, the customer might learn about or even meet a mortgage lender, title company, insurer, and/or escrow company, who have experience working together. Moreover, because the companies are affiliated, there is some accountability. Instead of a title company and a mortgage

lender pointing fingers at each other when a problem exists, they will work together toward resolution.

Contrary to some charges leveled at ABAs, economic studies show that the convenience and accountability of one-stop shopping do not cost extra and can actually cost less. *See HUD'S Proposed RESPA Rule, Hearing Before the Subcomm. on Oversight & Investigations of the H. Comm. on Fin. Servs.*, 110th Cong. 138 (2008) (statement of David H. Stevens, then-President of Affiliated Businesses, Long & Foster Companies, on behalf of RESPRO) (in 2009, Mr. Stevens was subsequently appointed to be HUD Assistant Secretary and Federal Housing Administration Commissioner). Indeed, HUD and other regulators have consistently acknowledged the benefits that ABAs (previously called “controlled business arrangements” or “CBAs”), offer to consumers. *See, e.g.*, Amendments to Regulation X, HUD’s proposed RESPA regulation, 59 Fed. Reg. 37,360, 37,361 (Jul. 21, 1994) (“[ABAs] and so-called ‘one-stop shopping’ may offer consumers significant benefits including reducing time, complexity, and costs associated with settlements”).³

³ *See also In re Request for Comment on Proposed Amendments to the Regulations Implementing RESPA*, Docket No. FR-5180-P-01, at 30 (June 11, 2008), <http://www.ftc.gov/os/2008/06/V080012respa.pdf> (“Bundling related services can create efficiencies in—lower the costs of—providing those services, and discounting the bundle allows consumers to pay less for the services.”).

Thus, although Plaintiffs display little understanding of this context, there are numerous justifications for an ABA other than, as Plaintiffs claim, avoiding and evading RESPA's anti-kickback provisions. (Pl. Br. 3; NCLC Br. 16 (suggesting there could be no valid reason for forming the joint venture other than to avoid RESPA's prohibitions).)⁴

C. Congress Chose to Exempt ABAs that Exhibit Three Main Characteristics From RESPA Scrutiny.

A recurring but false premise of this lawsuit is that ABAs are inherently improper or illegal. In fact, however, nowhere in RESPA is there a prohibition against ABAs.

1. Before 1983, RESPA did not address ABAs.

Congress enacted RESPA in 1974. Before 1983, when Section 8 of RESPA introduced an exemption for ABAs (then known as controlled business arrangements or "CBAs"), 12 U.S.C. § 2607(c)(4), there was no provision

⁴ Plaintiffs' argument also ignores that RESPA contains no element of intent. *See Glover v. Standard Fed. Bank*, 283 F.3d 953, 964-65 (8th Cir. 2002) (rejecting argument that payments for a referral were automatically illegal under RESPA Section 8(a) because "inventive minds making clever arguments can turn virtually *any* payment flowing from a lender to a broker, in connection with the payment of a mortgage loan, into a purported payment for the unlawful referral of business;" such an argument would "clash" with Section 8(c), which expressly permits reasonable payments for goods and services even when done in connection with a referral) (emphasis in the original). As the *Glover* court recognized, Section 8(c) exempts from liability payments made for fair value, regardless of intent or whether those payments accompany a referral.

expressly prohibiting or regulating such arrangements. In the summer of 1980, HUD published a Federal Register notice (labeled an “interpretative rule”), which HUD said was issued in response to public inquiries about “controlled business.” *See* 45 Fed. Reg. 49,360 (July 24, 1980). This notice stated that a “‘controlled business’ relationship *may* be a violation of Section 8,” but did not really explain how or when this could occur. *Id.* (emphasis added). Two years later, HUD withdrew the 1980 interpretative rule. HUD had received “severe criticism” for failing to address the real question—“whether, or under what circumstances, a return on capital invested which did *not* vary in proportion to volume or value of business referred” was impermissible—and for implying that CBAs might be illegal *per se*. *See* 47 Fed. Reg. 21,304, 21,304 (May 18, 1982). HUD replaced its original notice with one clarifying that ABAs were not *per se* illegal but that a problem could be raised if returns of capital were based on referrals rather than ownership interests—a concern that Plaintiffs have not raised here. *See id.*

2. In 1983, Congress provided that ABAs were exempt from RESPA Section 8 scrutiny under three provisos.

In 1983, Congress passed what is currently the affiliated business arrangement exemption: Section 8(c)(4) of RESPA. At the Housing Subcommittee markup of the bill, a proposal to limit or prohibit CBAs by permitting them in only

a small percentage of transactions was raised but ultimately rejected.⁵ Thus, Congress introduced the ABA “exemption” but declined to otherwise prohibit or regulate ABAs. The exemption as enacted places ABAs beyond Section 8 scrutiny if the parties satisfy three provisos: (1) make the appropriate disclosure to the consumer; (2) do not require use of the ABA; and (3) receive returns based on ownership interests rather than referrals. *See* 12 U.S.C. § 2607(c)(4). All three provisos were apparently satisfied here.

3. In 1996, HUD issued its Policy Statement 1996-2 requiring ABAs to be “bona fide service providers” as a condition for HUD to recognize the 8(c)(4) ABA exemption, but did not specify an objective and precise standard that anyone other than HUD could apply.

In 1996, HUD issued its Policy Statement 1996-2, in which HUD declared that the Section 8(c)(4) exemption is only intended to apply to “a *bona fide* ‘provider of settlement services’” and was not intended to apply to “shell entities or sham arrangements.” 61 Fed. Reg. at 29,259. HUD indicated that when it considers whether an enforcement action against “sham” entities is warranted, it

⁵ Representative Jerry M. Patterson proposed placing a 50 percent limitation on arrangements involving title companies, meaning that a title company participating in a transaction involving a CBA for that company would have to obtain 50 percent of its business from outside referrals. Patterson argued this restriction would require the entity to demonstrate that it could compete successfully in the marketplace. *See Impact of Regulations Under the Real Estate Settlement Procedures Act on Small Business: Hearing before the H. Comm. on Small Bus., 103rd Cong. 32, at 187-89 (1993).*

balances a number of factors by trying to answer questions in ten enumerated areas, most of which involve subparts. Nothing in the Policy Statement describes how many of these questions, or in which areas, must be answered satisfactorily to justify a finding that an ABA is “bona fide” versus a “sham.”⁶ The Policy Statement does explain that a “response to any one question by itself may not be determinative[.]” *See* 61 Fed. Reg. at 29,262. In other words, even some “unsatisfactory” responses will not, in HUD’s view, disqualify the venture from satisfying the exemption. *See id.* at 29,263.⁷

4. Failure to satisfy HUD’s 1996-2 Policy Statement is not a *per se* RESPA violation.

A common misperception voiced in this case and others is that a violation of the HUD Guidelines is a violation of RESPA. This is not the case. The Policy

⁶ In this respect, the closest thing to guidance that HUD offers is a series of five illustrations at the end of the Policy Statement. Even if these were instructive, they do not provide guidance for resolving this case. HUD offers only five isolated fact patterns out of countless scenarios that might exist, and provides no protocol for how the factors in the Guidelines should be weighted or balanced relative to each. 61 Fed. Reg. at 29,263-64.

⁷ By way of illustration, in example 3 of the Policy Statement, HUD posits that even if a real estate broker were the sole source of referrals to the venture and the venture shared a business address with the broker participant and processed out some work to its lender participant (all seemingly undesirable characteristics), the ABA would be “*bona fide*.” 61 Fed. Reg. at 29,263. However, there is no way to tell what further leeway might exist. Have those three factors walked the ABA right up to the line as far as HUD is concerned? Or, as seems likely, must one carefully examine and balance all of the responses to the Guidelines together?

Statement merely explains HUD's view that, unless ABAs involve "*bona fide* service providers," their participants are not entitled to the Section 8(c)(4) exemption. *See* 61 Fed. Reg. at 29,262.

In fact, in 1988, HUD considered but *rejected* an interpretation that would have equated the failure to satisfy the ABA exemption with a *per se* violation, and instead proposed the use of a less severe presumption:

[I]t is HUD's view that there is little legal or factual justification for viewing [an ABA] which fails to meet all elements of the new exemption as a *per se* Section 8 violation (i.e., legal only if the elements of the new exemption are satisfied). . . . *If Congress wanted this result it could easily have modified Section 8(a) or otherwise stated directly that some or all [affiliated] business arrangements were always illegal without regard to Section 8(a). The RESPA amendments passed in 1983 do not compel this reading.*

53 Fed. Reg. 17,424, 17,425 (May 16, 1988) (emphasis added). HUD later abandoned even the proposed presumption of a RESPA violation. *See* Regulation X, 57 Fed. Reg. 49,600, 49,601 (Nov. 2, 1992) (rather than declare that the mere existence of an ABA raises a presumption of a Section 8 violation, HUD's final rule stated simply that ABAs do not violate Section 8 if the exemption is met).

Accordingly, an affiliated business arrangement that fails to meet all of the elements of the ABA exemption or HUD's Guidelines is *not* a *per se* (or even a presumed) Section 8 violation, and the ABA exemption in Section 8(c)(4) is only

one of a series of exemptions that is set forth in RESPA and in Regulation X, each of which might still apply to a party in an ABA.

Although one district court in this circuit said, in dictum, that a contravention of the Guidelines could violate RESPA, *see Pettrey v. Enterprise Title Agency, Inc.*, 241 F.R.D. 268, 275-76 (N.D. Ohio 2006),⁸ most case law is to

⁸ The *Pettrey* court's reasoning, however, was deeply flawed. It stated that Sections 8(a) and 8(b) prohibit certain conduct while 8(c) provides for safe harbors (*id.* at 275), although these safe harbors are really "exemptions." *See* 12 U.S.C. § 2607(c). It found that Section 8(c)(4) is necessary because ABAs are, by their nature, likely to fall under the sweeping language of Sections 8(a) and 8(b). 241 F.R.D. at 275. According to the *Pettrey* court, "[i]t follows that a purported ABA that fails to meet the statutory requirements for an ABA violates Section 8." *Id.* This reasoning, however, ignores that payments made under ABAs may have been pursuant to business obtained from outside (i.e. unaffiliated) sources (and thus unquestionably outside the purview of Section 8) or might qualify for other exemptions under Section 8(c), including a payment that was reasonably related to a service actually furnished. *See Gardner v. First Am. Title Ins. Co.*, 296 F. Supp. 2d 1011, 1017 n.7 (D. Minn. 2003). The *Pettrey* court believed that its conclusion was also supported by Section 8(d)(3), "which provides that '[n]o person or persons shall be liable for a violation of the provisions of subsection (c)(4)(A)' regarding disclosure of the ABA relationship" if they prove that the failure to provide the disclosure was not intentional and that it resulted from a bona-fide error. *Pettrey*, 241 F.R.D. at 275-76 (citing 12 U.S.C. § 2607(d)(3)). But all Section 8(d)(3) means is that one may still qualify for the 8(c)(4) exemption despite failing to provide the disclosure required by 8(c)(4)(A). Lastly, although *Pettrey* held that a sham ABA is an automatic Section 8 violation, the court's ruling demonstrated otherwise. Rather, in denying class certification, the court noted that a flaw in the plaintiffs' class definition was that not all the borrowers in the class would have loans covered by RESPA—that is, loans that were "federally related." 241 F.R.D. at 284; *see also* 12 U.S.C. § 2607(a). Hence, *Pettrey* implicitly conceded that the elements of a Section 8(a) claim must still be pleaded and proven.

the contrary.⁹ Indeed, a recent district court decision in this circuit expressly disagreed with *Pettrey*. See *McCullough v. Howard Hanna Co.*, No. 1:09CV2858, 2010 WL 1258112, at *3 (N.D. Ohio Mar. 26, 2010) (“the statute and regulations promulgated thereunder do not create a cause of action for failing to comply with the § 2607(c)(4) ABA requirements”).

5. Misinterpretations of the Guidelines and their impact by Plaintiffs and their *Amici*.

The misguided efforts by the Plaintiffs and their *Amici* in this private litigation to interpret and apply the Guidelines only further serve to illustrate their vagueness and subjective nature, as well as the difficulties of private enforcement.

a. Employees

The Guidelines examine whether the ABA has its own employees performing the services it provides. Here, Plaintiffs criticize Welles Bowen Title Agency, LLC (“WB Title”) for having only one permanent employee and for using a shared employee with Integrity Title Agency of Ohio & Michigan, Ltd.

(“Integrity Title”). (Pl. Br. 8, 14.) Yet not only is there no definition of a bona

⁹ See *Cornelius v. Fid. Nat’l Title Co.*, No. C08-754MJP, 2009 WL 596585, at *6 (W.D. Wash. Mar. 9, 2009) (failure to comply with the three ABA requirements is not itself a RESPA violation); *Capell v. Pulte Mortg. L.L.C.*, No. Civ. A. 07-1901, 2007 WL 3342389, at *5 (E.D. Pa. Nov. 7, 2007) (same); *Gardner*, 296 F. Supp. 2d at 1017 n.7 (“Because the section 8(c) exceptions are expressed in the disjunctive, a transaction between affiliated entities that does not satisfy the [ABA] exception” is not an automatic RESPA violation.).

vide employee under RESPA, there is nothing in the Guidelines or elsewhere holding that an employee cannot be shared under any circumstances. Similarly, Plaintiffs criticize WB Title and Integrity Title (“Defendant title agencies”) for using Chicago Title’s parent to provide payroll services. (*Id.* at 21.) While the Guidelines do not address this factor, it can hardly be an offense: companies all over the country contract out payroll services. Likewise, it is difficult to see the harm in subcontracting payroll services at fair value or how that could amount to subcontracting out an “essential service” under the Guidelines.

b. Office Space

Plaintiffs criticize the Defendant title agencies for their supposed lack of segregated office space—arguing, for example, that one must pass through Chicago Title’s workspace to reach WB Title’s offices (Pl. Br. 22), or that the Defendant title agencies received space from Chicago Title (NCLC Br. 28-29). Yet nothing in the Guidelines prohibits obtaining space from a partner as long as fair value is paid, nor do the Guidelines address the degree, if any, to which work space must be segregated (e.g., whether separate entrances and receptionists are required or whether one’s space may be accessed through a common hallway or an easement).

c. Core Services

Plaintiffs and Plaintiff *Amici* also argue repeatedly that the Defendant title agencies failed to perform core title services or subcontracted out essential services. This, however, suggests a lack of understanding regarding the Guidelines, other relevant HUD Policy Statements, and title insurance in general.

For example, Plaintiffs claim that core title services comprise escrow services and that the Defendant title agencies are shams for not offering them. (Pl. Br. 11.) NCLC similarly characterizes the underwriting and issuance of the title commitments and title policies as “trivial” steps. (NCLC Br. 20-21.) In fact, however, a separate policy statement issued by HUD in 1996 contradicts such arguments.¹⁰

HUD has stated that it considers the handling of the closing (i.e., escrow work) to be a core service only “when it is customary for title insurance agents to provide such services and when the agent’s compensation for such services is customarily part of the payment or retention from the insurer.” 61 Fed. Reg. at 49,399. Here, Plaintiffs cannot satisfy either requirement. Conversely, the services that NCLC brushes aside as “trivial” *are* included in HUD’s definition of

¹⁰ See HUD Statement of Policy 1996-4, Statement of Enforcement Standards: Title Insurance Practices in Florida, 61 Fed. Reg. 49,398 (Sept. 19, 1996). This statement makes clear that while it addresses issues and practices that HUD reviewed in Florida, “its general principles may apply by analogy to other geographic and settlement service areas.” *Id.* at 49,398.

core title services, including examining and evaluating title evidence; preparing and issuing a title commitment; and preparing and issuing a title policy. (*Compare* NCLC Br. 20-21 *with* 61 Fed. Reg. at 49,399.) Finally, despite NCLC's claim that by doing the title search, Chicago Title handled all the work (NCLC Br. 21), the title search is just a summary of the state of title and is not a core service. *See* 61 Fed. Reg. at 49,399.

From a legal perspective, HUD's Policy Statement 1996-2 demonstrates that where a title agent performs core title services, the agent satisfies the Section 8(c)(1)(B) exemption, such that "HUD does not normally scrutinize the payments as long as they are 'for services actually performed in the issuance of a policy of title insurance.'" 61 Fed. Reg. at 49,399. Importantly, however, the inverse is not necessarily true: the failure to perform core services does not mean that there is an automatic RESPA violation or sham finding. Rather, "[i]f the practices of a title insurance company or its agent do not qualify under the section 8(c)(1)(B) exemption, the company and the agent may still qualify under section 8(c)(2)," under which "HUD will examine the amount of the payments to or retentions by the title insurance agent to see if they are reasonably related to services actually performed by the agent." *Id.*

d. Active Competition

Although Plaintiffs claim that the Defendant title agencies subsist on agency referrals, HUD has stated that exclusive reliance on a broker's business is not itself impermissible. *See supra* note 7. Plaintiffs further contend that this establishes that the Defendant title agencies are not actively competing for business. (Pl. Br. 28.) However, this does not logically follow: it may mean that the title agencies are not successful in obtaining business from additional sources, but it does not mean they are not actively seeking it.¹¹ *Cf. supra* at 8-9 and note 5 (discussing House subcommittee's rejection of requirement of minimum percentage of outside business).

e. Miscellaneous

Finally, in response to Defendants' declarations that they strove to establish the Defendant title agencies in accordance with the Guidelines, NCLC contends that Defendants could have requested more guidance from HUD. Unfortunately, however, this is untrue and makes the vagueness inherent in the Guidelines—particularly when subject to private enforcement—all the more frustrating and problematic. In a 1992 RESPA regulation, HUD determined to cease its former

¹¹ In fact, there is a strong argument that the existence of ABAs fosters healthy competition in the real estate services marketplace by allowing companies to diversify their product offerings and enter geographic markets that they would not normally enter because of the costs of establishing separate branches and personnel.

practice of providing informal opinions to industry and, indeed, rescinded the hundreds of informal counsel opinions and staff interpretations issued before that date. *See* 57 Fed. Reg. at 49,609. Since then, HUD has refused to approve individual company business plans or efforts to comply with a particular HUD policy statement.

II. THE VAGUE, AMBIGUOUS, AND SUBJECTIVE NATURE OF THE GUIDELINES, ALONG WITH HUD’S STATEMENTS ABOUT THEIR PURPOSE, ESTABLISH THAT THEY WERE NEVER INTENDED TO BE PRIVATELY ENFORCED.

HUD concedes that its Policy Statement 1996-2 “is not a legislative rule that establishes any binding requirements.” (HUD Br. 13.) Of course, however, this is precisely how Plaintiffs in this case, and virtually all similar class actions with which the *Amici* are familiar, attempt to use the Guidelines. Plaintiffs’ entire theory is that the Guidelines were violated so Defendants have violated RESPA. (*See, e.g.*, Pl. Br. 14, 19-26.)

Rather than a rule with the force of law, HUD characterizes the Guidelines as intended “to guide the exercise of HUD’s enforcement discretion.” (HUD Br. 13.) The *Amici* have no quarrel with the notion that HUD intended its Policy Statement and Guidelines to facilitate the Department’s own enforcement discretion and to be “applied flexibly” by the Department. 61 Fed. Reg. at 29,262. But this confirms, rather than disputes, the fact—as is obvious from the most cursory review of the Guidelines—that HUD did not intend them to be privately

enforced and offered no viable mechanism to permit private enforcement. The Guidelines provide no clear standard to help make the “*bona fide* service provider” determination that HUD believes is necessary. While the Guidelines purport to ask questions in ten areas, the terms utilized (*e.g.*, “sufficient,” “essential,” “substantial,” “of value,” etc.) are undefined and ambiguous, and the Guidelines often have numerous sub-parts. Thus, even if capable of eliciting meaningful responses, the Guidelines provide no baseline regarding how many questions, and in which areas, a defendant must answer satisfactorily, especially since the answers are often qualitatively distinct. Indeed, it is often unclear whether an answer to a particular inquiry is satisfactory or not.¹²

¹² For example, with respect to Questions 6 and 7 of the Guidelines, it is unclear which services are regarded as “substantial” or “essential,” such that it is impossible to determine the exact subject matter of the question or what a given response might mean in the analysis. Question 6 reads, “Does the new entity perform all of the substantial services itself? Or does it contract out part of the work? If so, how much of the work is contracted out?” 61 Fed. Reg. 29,258, 29,262 (June 7, 1996). Question 7 reads, “If the new entity contracts out some of its essential functions, does it contract services from an independent third party? Or are the services contracted from a parent, affiliated provider or an entity that helped create the controlled entity? If the new entity contracts out work to a parent, affiliated provider or an entity that helped create it, does the new entity provide any functions that are of value to the settlement process?” *Id.* It is unclear what any given answer to these Questions would mean. For instance, while Question 7 appears to suggest that contracting out an “essential” function is not necessarily impermissible, there is no way to tell how this should factor into the overall analysis. Similarly, there is no guidance regarding how to distinguish between responses to Question 6 as varied as, for example, whether 33%, or 50%, or 65% of an entity’s services are contracted out.

Amici respectfully suggest that the very subjective, vague, and ambiguous nature of the Guidelines make it plain that because they were never intended to be (and cannot be) privately enforced, such that it is not even necessary for this Court to reach the question of whether they are unconstitutionally vague. HUD itself concedes they are not binding, and indeed the language in the Guidelines illustrates the extremely subjective nature of the inquiry that HUD will make by speaking of HUD “balanc[ing] a number of factors,” “consider[ing]” them and “weigh[ing] them in light of the specific facts” to determine “whether [a HUD] enforcement action under Section 8 is appropriate.” 61 Fed. Reg. at 29,262 (emphasis added). This Court should articulate the obvious implication of HUD’s concessions. The very subjective nature of this inquiry—which calls for an *undefined* balancing of factors by the regulator based on its own expertise—confirms that these Guidelines are inappropriate for private enforcement.¹³

¹³ While Congress gave HUD the discretion to decide when to bring an enforcement action, it did not give HUD the power to bring claims for damages as Plaintiffs seek to do here. Rather, HUD only has the power to seek injunctive relief. *Compare* 12 U.S.C. § 2607(d)(4) (HUD can sue to enjoin violations) *with* 12 U.S.C. § 2607(d)(2) (private plaintiffs can sue for damages). Private litigation, particularly class actions, raise the stakes of enforcing these vague and ambiguous Guidelines. *See generally Castano v. Am. Tobacco Co.*, 84 F.3d 734, 746 (5th Cir. 1996) (observing that “[c]lass certification magnifies and strengthens the number of unmeritorious claims”).

Amicus NCLC argues that the District Court had a duty to decide whether the ABAs at issue were “sham” entities irrespective of whether it considered HUD’s Statement of Policy. (*See* NCLC Br. 9.) Thus, NCLC contends that courts must disregard “sham” business entities based on well recognized principles, such as the “alter ego doctrine,” that “abound in federal law.” (*Id.* at 15.) Judicially-developed corporate law is one thing, but application by a court or jury of a set of ambiguous questions and subjective factors set forth by HUD, with no baseline against which to judge the responses, is another. Regardless, even resort to corporate law principles used in federal case law would not justify reversal. Plaintiffs would need to demonstrate, and they have not, that the entities in question lack separate corporate status under the law. *See United States v. Bestfoods*, 524 U.S. 51, 61-62 (1998) (respecting corporate structure and refusing to hold parent corporation liable as operator of a polluting facility owned or operated by a subsidiary; the exercise of control (including the election of directors, the making of by-laws, the duplication of officers and directors, and other conduct incident to the status of shareholders), which is attendant to the ownership of stock by stockholders, will not create liability for the parent).¹⁴

¹⁴ Importantly, the Court then stated:
CERCLA is thus like many another congressional enactment in giving no indication that the entire corpus of state corporation law is to be replaced simply because a plaintiff’s cause of action is based upon a

III. THE DISTRICT COURT CORRECTLY RULED THAT THE GUIDELINES ARE NOT ENTITLED TO DEFERENCE.

HUD and the Plaintiff *Amici* suggest that the Guidelines clear up an ambiguity in the Section 8(c) exemptions relating to the need for and qualities of a bona fide provider. Yet neither the statute nor the regulations impose or define a requirement that a settlement service provider be “bona fide.” Rather, they only contemplate a bona fide requirement in the far narrower contexts of payments for services performed and dividend payments between affiliated entities.¹⁵ NCLC argues that HUD’s Policy Statement supposedly amplified an example that HUD had previously given to illustrate the abuse of ABAs. (NCLC Br. 8 n.4.)

However, the underlying example was *not* directed at referrals by Real Estate

federal statute . . . and the failure of the statute to speak to a matter as fundamental as the liability implications of corporate ownership demands application of the rule that in order to abrogate a common-law principle, the statute must speak directly to the question addressed by the common law.

Id. at 63 (emphasis added) (internal quotations and citations omitted).

¹⁵ See 12 U.S.C. §§ 2607(c)(2) and (c)(4)(C) (setting forth exemptions from Section 8 liability for, *inter alia*, the payment of “a bona fide salary or compensation or other payment for goods or facilities actually furnished or for services actually performed,” as well as returns on ownership interest between affiliated entities); see also Regulation X, 24 C.F.R. pt. §§ 3500.14(g)(1)(iv), 3500.15(b)(3)(i) (discussing “bona fide dividends, and capital or equity distributions, related to ownership interest or franchise relationship” and “bona fide business loans, advances, and capital or equity contributions”).

Broker A to Title Agent B or to B's payment of dividends to A.¹⁶ Ultimately, there is no statutory ambiguity for HUD to interpret here. *See Terrell v. United States*, 564 F.3d 442, 450 (6th Cir. 2009) (when the statute is unambiguous, the agency's interpretation deserves no consideration at all).

In any event, HUD itself recognizes that "an agency's interpretation of a statute in an informal medium such as a policy statement generally does not warrant *Chevron* deference." (HUD Br. 31.) *See also Chao v. Occupational Safety & Health Review Comm'n*, 540 F.3d 519, 523, 526-27 (6th Cir. 2008); *Krzalic v. Republic Title Co.*, 314 F.3d 875, 881 (7th Cir. 2002) (observing, with respect to a different HUD policy statement, that to be entitled to deference an agency pronouncement must be "something more formal, more deliberate, than a simple announcement," as opposed to "simply appear[ing] in the Federal Register"). HUD argues that this principle is not absolute and that deference depends upon such factors as the nature and import of the question, the agency's expertise, and the consideration given to the question by the agency. (HUD Br. 32.)

¹⁶ Rather, the example focused solely on the fact that B did *no* title work itself and instead contracted all the work to Third Party C, who split the fee with B. HUD's analysis of this fact scenario was that the ABA exemption "does not provide exemption between an affiliated entity, B, and a third party, C." *See* 24 C.F.R. pt. 3500, App. B, Illus. 10. Moreover, HUD noted that even if B and C had an affiliate relationship, splitting C's fee with B would be a violation of Section 8 and would not be a return on ownership that the ABA exemption would permit.

Even assuming, *arguendo*, that the factors cited by HUD were applicable, deference would not be warranted here. Most importantly, while HUD's expertise may be germane to its own enforcement of the Guidelines, here and in other private class actions, the task of interpreting and applying them is being left to a court or jury. Put another way, the Guidelines do not constitute "a body of experience and informed judgment to which *courts and litigants* may properly resort for guidance." *Bragdon v. Abbott*, 524 U.S. 624, 642 (1998) (emphasis added) (internal quotation and citation omitted).

Furthermore, no measure of deference is due to the Guidelines under the less exacting *Skidmore* standard, applicable to certain non-controlling administrative rulings or interpretations. *See Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944). *Skidmore* looks to certain factors, including "the thoroughness evident in [the ruling's] consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade, if lacking power to control." *United States v. Mead Corp.*, 533 U.S. 218, 228 (2001) (quoting *Skidmore*, 323 U.S. at 140). Overall, the weight of *Skidmore* deference accorded depends on the agency's inherent "power to persuade." *Christensen v. Harris County*, 529 U.S. 576, 587 (2000).

Here, there is no showing that the Guidelines were the product of careful consideration by HUD over a long period or that any such consideration was

directed at the creation of new standards to be enforced by private litigants, as opposed to the establishment of subjective criteria that could aid HUD enforcement efforts. In addition, given that several of the questions set forth in the Guidelines simply do not lead to any consistent or logical conclusions on their own terms, *see, e.g.*, Questions 6 and 7, discussed *supra* note 12, deference of any kind is simply not warranted.

IV. THE RULE OF LENITY SUPPORTS THE DISTRICT COURT'S AWARD OF SUMMARY JUDGMENT.

HUD criticizes the District Court for giving “undue weight” to RESPA’s potential criminal penalties (HUD Br. 27), but ignores, as do Plaintiffs and their *Amici*, the rule of lenity, which would apply in the event that the Court found ambiguity in RESPA or its regulations concerning a “bona fide provider” requirement. The rule of lenity calls for construing an ambiguous statute or rule of law in favor of the party potentially subject to liability. *See United States v. Thompson/Center Arms Co.*, 504 U.S. 505, 525 (1992) (“The main function of the rule of lenity is to protect citizens from the unfair application of ambiguous punitive statutes. Obviously, citizens should not be subject to punishment without fair notice that their conduct is prohibited by law.”).

Indeed, in *United States v. Graham Mortgage Corp.*, 740 F.2d 414, 417, 423 (6th Cir. 1984), this Court applied the rule of lenity against a vague and ambiguous HUD-drafted RESPA regulation to ensure that providers knew exactly what

conduct was prohibited.¹⁷ Although *Graham Mortgage* involved a criminal prosecution and this case presents a civil class action (*albeit* one seeking millions of dollars), the Supreme Court has made clear that the rule of lenity applies equally in civil cases, where, as here, the standards for civil and criminal liability are the same such that the course of conduct being challenged civilly could also result in criminal liability. *See, e.g., Clark v. Martinez*, 543 U.S. 371, 380 (2005) (applying the rule of lenity in non-criminal cases); *Leocal v. Ashcroft*, 543 U.S. 1, 12 n.8 (2004) (if a statute has criminal applications, “the rule of lenity applies” to the Court’s interpretation “[b]ecause we must interpret the statute consistently, whether we encounter its application in a criminal or noncriminal context”); *Thompson/Center*, 504 U.S. at 518-19.¹⁸

¹⁷ At the time of the *Graham Mortgage* decision, RESPA did not enumerate the making of a mortgage loan in its definition of settlement services, although Congress subsequently amended RESPA to so provide. *See Wooten v. Quicken Loans, Inc.*, 626 F.3d 1187, 1193-4 (11th Cir. 2010).

¹⁸ Amicus NCLC also attempts to obfuscate the issues in this case by suggesting the District Court improperly addressed the challenge to the application of the Guidelines as a “facial challenge,” which, they assert, would require a finding that the Guidelines are “impermissibly vague in all [their] applications.” (NCLC Br. 27 (citation and quotation marks omitted).) Even if this is the correct standard, the argument is unavailing here. The cases cited by NCLC do not address the rule of lenity and, importantly, they rejected a party’s ability to rely on a facial challenge to statutes which may be vague in some instances, but were clearly violated by the parties challenging them. *See, e.g., Holder v. Humanitarian Law Project*, 130 S. Ct. 2705, 2719 (2010) (“[A] plaintiff who engages in some conduct that is *clearly* proscribed cannot complain of the vagueness of the law as

Amicus NCLC's attempt to rely on *United States v. U.S. Gypsum Co.*, 438 U.S. 422, 436 n.13, 443 n.14 (1978) (*see* NCLC Br. 29), to suggest the Court could avoid considering the application of the HUD Guidelines in criminal cases is unavailing. In *Gypsum*, the Court found that it was appropriate to construe the criminal offenses defined by the Sherman Act as including an element of intent rather than applying the rule of lenity. *Id.* at 441-442. In the RESPA context, however, it is clear that criminal sanctions are based on strict liability. *See supra* note 4. Indeed, the district court in *Graham Mortgage* expressly rejected reliance on *Gypsum* with respect to RESPA Section 8. *See United States v. Graham Mortg. Corp.*, 564 F. Supp. 1239, 1244 (E.D. Mich. 1983), *rev'd on other grounds*, 740 F.2d 414 (6th Cir. 1984) (finding that defendants' reliance on *Gypsum*, in arguing for a *mens rea* requirement, was misplaced given the legislative history behind RESPA Section 8).

CONCLUSION

For the foregoing reasons, the District Court's judgment should be affirmed.

applied to the conduct of others.”) (emphasis added) (quotation omitted); *Vill. of Hoffman Estates v. Flipside, Hoffman Estates, Inc.*, 455 U.S. 489, 500-02 (1982) (holding that the statute's language clearly covered some of the defendant's conduct); *see also id.* at 498-499 (stating that a scienter requirement may mitigate a law's vagueness). Here, given the vagueness of the Guidelines, it is not clear at all that there is a violation “as applied” to the Defendants' conduct and, as noted above, RESPA has no intent requirement for either criminal or civil enforcement.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

Pursuant to Fed. R. App. 29(d), 32(a)(7)(C), and 6th Cir. R. 32, I certify that this brief complies with the type-volume limitations of Fed. R. App. P. 32 (a)(5)(A), and (6) and (7)(B), because it was prepared using Times New Roman proportional font, 14-point and it contains 6,812 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

s/ Jay N. Varon

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CERTIFICATE OF SERVICE

In compliance with Fed. R. Civ. P. Rule 25 and L.R. 25, I hereby certify that on this 26th day of April 2011, I electronically filed the foregoing *Brief Of The American Escrow Association, Consumer Mortgage Coalition, Mortgage Bankers Association, National Association of Realtors®*, *Realty Alliance and Real Estate Services Providers Council, Inc. (RESPRO®)* as *Amici Curiae* in Support of *Appellee Chicago Title Insurance Company* and in Support of *Affirmance* with the Clerk of the Court for the United States Court of Appeals for the Sixth Circuit and served on the counsel listed below through the ECF system.

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