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⁶ See *id.*

⁹ See *Cahnmann*, 133 F.3d at 488.

⁷ See *Cahnmann v. Sprint*, 133 F.3d 484, 487 (7th Cir. 1998).

¹⁰ See *id.* at 489.

⁸ See *Cahnmann v. Sprint Corp.*, 961 F.Supp. 1229, 1232 (N.D. Ill. 1997).



“Do you really get what you pay for?” - Compensation of Mortgage Brokers Restricted by the Eleventh Circuit

by Robert Kurinsky

Few individuals who take out mortgage loans receive the lowest interest rate available. While that may be expected, the disbursement of the excess interest is restricted by federal law. Specifically, the Real Estate Settlement Procedures Act (“RESPA”) prohibits lenders from providing mortgage brokers with kickbacks or referral fees. However, payments in exchange for either goods or services are not prohibited by RESPA. In *Culpepper v. Inland Mortgage Corp.*, 1998 WL 5591 (1998), the United States Court of Appeals of the Eleventh

Circuit ruled that a contractual payment by a lender to a mortgage broker for the origination of a loan above the lender’s minimum interest rate was a prohibited referral fee. In rendering this decision, the court reversed the district court decision granting Inland’s motion for summary judgment.

Class Action Suit Creates Case of First Impression by Alleging a Yield Spread Premium to be a Violation of RESPA

The appellants, John and Patricia Culpepper, were

the named plaintiffs in a class action suit against the appellee, Inland Mortgage Corporation (“Inland”), for an alleged violation of RESPA §2607(a). That section of RESPA specifically prohibits the payment of referral fees in the provision of brokerage services. The Culpeppers went to a mortgage broker, Premiere Mortgage Company (“Premiere”), and obtained a federally insured loan. However, Premiere did not fund the Culpeppers’ mortgage loan. Instead, Premiere only provided the service of matching the

Culpeppers with their lender, Inland, in exchange for the Culpeppers' payment of an origination fee. To provide this service, Premiere obtained daily rate sheets from Inland which demonstrated the "par" rates on various loans. These "par" rates are, essentially, the lowest interest rates available to borrowers. Despite a 7.25% par rate, Premiere quoted the Culpeppers an interest rate of 7.50%. This action was critical because the service agreement between Inland and Premiere provided for a "yield spread premium" payment from Inland to Premiere for any loans originated above the par rate. This payment was based solely on the amount and interest rate of the loan. As the Culpeppers' loan was funded at a rate higher than the par rate, Premiere received a yield spread premium payment from Inland, and the Culpeppers filed a resulting claim alleging a violation of RESPA.

No circuit court had ever decided whether or not the payment of a yield spread premium violated RESPA; however, various district court decisions resolved the issue with

conflicting results. For example, one district court stated that a yield spread premium could constitute a prohibited referral fee under RESPA, while another held it to be a legal payment in exchange for services. In referring to these contrasting decisions, the court addressed the following issues for the first time: (1) Whether a yield spread premium constitutes a referral fee prohibited by RESPA; (2) Whether a yield spread premium constitutes a payment for goods or services that are exempt under RESPA's referral fee prohibition.

Yield Spread Premium Held to Constitute a Referral Fee under RESPA

In determining whether or not the yield spread premium paid by Inland to Premiere constituted a referral fee as defined by RESPA, the court first examined the legislative history of RESPA. RESPA was enacted in 1974 to eliminate unnecessary and abusive financing costs associated with buying a home. According to a 1992 amendment to RESPA, the funding and origination of

mortgage loans are covered by the Act. Specifically, in summing up the legislative history, the court decided that RESPA is violated if "(1) a payment of a thing of value is (2) made pursuant to an agreement to refer settlement business and (3) a referral actually occurs." *Culpepper*, 1998 WL 5591, *3 (11th Cir.(Ala.)). The court next applied this checklist to the facts of the case.

The court determined that Inland's payment of the yield spread premium constituted a referral fee under RESPA §2607(a) based on the following findings: (1) the dealings between Inland, Premiere, and the Culpeppers involved the "settlement" of a federally insured loan covered by RESPA; (2) Inland paid a "thing of value" to Premiere in the form of cash; (3) the cash payment was made "pursuant to an agreement" between Inland and Premiere; and (4) a "referral actually occurred" when Premiere allowed Inland to fund the Culpeppers' loan. *Id.* As the yield spread premium was determined to be a referral fee, the court held that Inland's

actions violated RESPA. However, RESPA provides for the exemption of settlement service payments between funders and brokers when either goods or services are exchanged, and Inland argued that its disbursement fell under this exemption.

Yield Spread Premium Held not to be Payment for Goods or Services under RESPA

Parties making settlement service fee payments in exchange for goods or services are exempt from referral fee violations under RESPA. The District Court held Inland's yield spread premium to be a payment for a good, the good being the loan itself. However, the court overruled this conclusion. In overruling its decision, the court held that since Inland, not Premiere, funded the loan at the outset, the loan was never owned by Premiere. Therefore, Premiere could not have sold the loan to Inland. Further, the court rejected Inland's argument that the intangible asset of Premiere's right to select a mortgage lender was indicative of ownership under RESPA. The court agreed that Premiere

possessed that right; however, Premiere's exercise of that right in exchange for payment is specifically the type of behavior that RESPA's referral fee provision sought to prohibit. Thus, the court held that a transfer of goods ownership did not occur between Inland and Premiere. As a result, the yield spread premium was not subject to the "goods" referral fee exemption under RESPA. However, Inland argued in the alternative that the yield spread premium was subject to the service exemption.

Inland argued on two fronts that the yield spread premium was subject to RESPA's "service" exemption. First, Inland argued that the yield spread premium was a payment to Premiere in exchange for services which Premiere provided to the Culpeppers. The court agreed that Premiere provided a valuable service to the Culpeppers by locating a mortgage financier, but disagreed that the service was related to the yield spread premium payment. The court noted that the Culpeppers paid an origination fee to Premiere

in exchange for brokerage services. Further, the yield spread premium was based on the funding rate of the Culpeppers' mortgage loan, not on the level or quality of service provided. As a result, the court held the yield spread premium not to be a payment for Premiere's brokerage service provided to the Culpeppers.

Second, Inland argued that Premiere's provision of services to Inland constituted a RESPA "services" referral fee exemption. The court also rejected this argument by again stating that the yield spread premium possessed no relation to the level or quality of service provided by Premiere to Inland. Instead, the court restated the fact that the yield spread premium was solely based on the funding rate of the Culpeppers' mortgage loan. More specifically, the payment of a yield spread premium was only made on loans originated above the par rate, and these originations required the exact same level of service as loans originated below the par rate. The court applied this rationale in holding that Inland's disbursement of the yield spread premium provided

Premiere with compensation for nothing other than the referral of an above par loan. As RESPA specifically prohibits payment for referral services, the court held that referral services cannot be subject to the services exemption. The decision that the disbursement of a yield spread premium was neither a payment for a good nor a service resulted in the court concluding that Inland could not be exempted from RESPA's referral fee prohibiting provision.

**Court Rejects
Application of RESPA
Market Value Test to
Determine the Existence
of Referral Fee Payments
in Certain Situations**

The court also rejected, as inappropriate, the test

used by the district court which led to the dismissal of the Culpeppers' claim. The district court applied a market value test, as outlined in RESPA, to determine if the yield spread premium was a valid payment for a good or service. The test provides that a payment for a good or service that greatly exceeds market value constitutes the presence of a referral fee. However, the Eleventh Circuit held this test to be misapplied because the test is only applicable if the controversy surrounds a payment for a good or service. The court ruled that the transaction between Inland and Premiere passed neither the good nor the service threshold tests, and therefore the market value test did not apply.

**Class Action Request to
be Reconsidered**

The district court dismissed, without prejudice, the Culpeppers' request to have their claim certified as a class action after it granted Inland's request for summary judgment. Because of its reversal of the district court's decision, the Eleventh Circuit held the class action request to be reinstated and addressed on remand. In conclusion, the Eleventh Circuit reversed the district court's decision and held that the payment of a yield spread premium by a lender to a mortgage broker constituted a violation of the Real Estate Settlement Procedures Act anti-referral fee provision, §2607(a). 

