

July 11, 2007

Eleventh Circuit Court of Appeals Issues Decision in Famous YSP Case, *Culpepper v. Irwin Mortgage*

In a long anticipated ruling, the 11th Circuit Court of Appeals issued its fourth—and presumably final—decision in an 11-year-old landmark RESPA Section 8/yield spread premium (YSP) case, *Culpepper v. Irwin Mortgage Corp.* In what is now referred to as *Culpepper IV*, the 11th Circuit resolved all issues in favor of Briggs' client, Irwin Mortgage, affirming decertification of the plaintiff's class and entry of summary judgment on the class representatives' claims.

The *Culpepper* plaintiffs represented a class of Irwin Mortgage borrowers and asserted that wholesale mortgage lender paid compensation to mortgage brokers—known in the industry as “yield spread premiums”—constituted illegal kickbacks in violation of Section 8 of the Real Estate Settlement Procedures Act (RESPA). This latest court ruling reverts Irwin Mortgage back to where it stood after the district court's initial ruling more than a decade ago (where summary judgment was awarded and no class was certified).

Historical Perspective

The tortured procedural history of *Culpepper* is a microcosm of RESPA Section 8/YSP class action litigation. It is the first and last appellate case of its kind, one of hundreds of class action lawsuits that once plagued the mortgage lending industry.

- In *Culpepper I*, the 11th Circuit reversed summary judgment in favor of Irwin Mortgage, concluding that YSPs were not payments for goods under RESPA.
- In *Culpepper II*, although denying a petition for rehearing, the 11th Circuit clarified and limited the *Culpepper I* holding. Subsequently, the U.S. Department of Housing and Urban Development (HUD) issued a 1999 policy statement, which set forth a two-part test on the legality of lender payments to mortgage brokers under RESPA. Under HUD's test, the court must first determine: (1) whether the broker provided compensable goods, facilities or services and then (2) if the broker's total compensation from all sources, including any YSP, was “reasonable.”
- Notwithstanding the 1999 policy statement, the 11th Circuit in *Culpepper III* affirmed class certification, finding HUD's 1999 policy statement to be ambiguous and concluding that there must be some proof that broker services were directly tied to YSP payments. In response to *Culpepper III*, HUD issued a second policy statement in 2001, which clarified its prior two-part test and rejected the 11th Circuit's test in *Culpepper III*. Subsequently, in *Heimmermann v. First Union*, the 11th Circuit applied

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HUD's test and overruled the holding of *Culpepper III*. Similar conclusions were reached by the 11th Circuit in *McBride v. Reliastar* (also represented by Briggs and Morgan) and *Hirsh v. Bank of America*. Ironically, although all four of these YSP cases were argued before the same 11th Circuit panel on the same day, *Culpepper III* was the only opinion for which the HUD-mandated test was not applied.

Culpepper IV

In *Culpepper IV*, applying HUD's 2001 test, the 11th Circuit affirmed summary judgment in favor of Irwin Mortgage on the RESPA Section 8 claims of the individual named plaintiffs. The 11th Circuit rejected the plaintiffs' argument that the law of the case doctrine precluded the Court from reconsidering its prior holding in *Culpepper III*, based upon the change in controlling agency authority and manifest injustice exceptions to the law of the case doctrine. The Court also rejected the appellants' arguments that YSPs were *per se* unreasonable under either of appellants' theories that: (1) federal regulation limited loan origination fees on FHA loans to one percent or (2) upfront closing costs were not reduced. Finally, the Court rejected the appellants' argument that alleged prior admissions of "buying loans" precluded summary judgment. Instead, the 11th Circuit agreed with the district court that the borrowers failed to satisfy their burden of proof under HUD's two-part test.

The 11th Circuit also affirmed and concluded that the district court did not abuse its discretion in finding class certification improper and decertifying the class. This result is consistent with HUD's 2001 policy statement and the *Heimmermann* decision, as the legality of lender paid compensation to a mortgage broker can only be assessed in light of the particular facts and circumstances of an individual borrower's loan transaction.

Consistency in Rulings

The *Culpepper IV* decision definitively aligns the 11th Circuit with its sister circuits on the proper legal test for determining the legality of lender paid broker compensation under RESPA Section 8.

In *Culpepper IV*, Irwin Mortgage was represented by Robert J. Pratte, Mark G. Schroeder and Brent R. Lindahl. Over the years, a large number of Briggs and Morgan attorneys and paraprofessionals have assisted with this representation. Briggs also previously represented wholesale lenders in YSP matters in the 2nd and 7th Circuits, received seminal rulings in the 8th and 9th Circuits, and was selected as national co-counsel for the industry's leading trade organization, the Mortgage Bankers Association (MBA). For further information concerning the significance of *Culpepper IV*, please contact one of the above attorneys or another member of Briggs' Mortgage Banking Practice Group.

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