NEW YORK LAW SCHOOL

NYLS Law Review
Vols. 22-63 (1976-2019)

Volume 53
Issue 3 *Corporation Counsel: A History of the New York City Law Department*

Article 20

January 2008

Cohen v. JPMorgan Chase & Co.

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New York Law School Class of 2010

VOLUME 53 | 2008/09

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"Foreclosure mills," as the term has been coined by lawyers who often represent homeowners, are law firms and service companies that manage loan default and foreclosure cases for lenders and servicers.[1] Recently, foreclosure mills have come under increased scrutiny because of the number of cases they take and the fees they charge.[2] These companies are often paid based on the number of completed cases they process, leading many to cut corners in default cases. As a result, foreclosure actions are often initiated before the lender has properly compiled and completed all necessary paperwork.[3] Foreclosure companies charge fees that are often used to generate necessary revenue in foreclosures, but the legitimacy of these fees has been called into question.[4] Similar to the fees charged by foreclosure mills, loan origination and servicing fees provide a comparably important source of income for mortgage lenders.[5] In 1974, in response to concern about excessive fees being charged to mortgage applicants, Congress passed the Real Estate Settlement Procedures Act ("RESPA").[6] While recognizing that some fees are legitimate, RESPA eliminates kickbacks and referral fees that unnecessarily increase the costs of loans but leaves untouched other justifiable fees associated with mortgages.[7]

In *Cohen v. JPMorgan Chase & Co.*, the Second Circuit found, in direct opposition to decisions by other circuit courts, that certain fees not specifically enumerated in RESPA were nonetheless prohibited.[8] In *Cohen*, the issue was whether the language in RESPA section 8(b)[9] prohibits the collection by a *single* mortgage provider of fees

1. *See* Gretchen Morgenson & Jonathan D. Glater, *Foreclosure Machine Thrives on Woes*, N.Y. Times, Mar. 30, 2008, at BU1 [hereinafter *Foreclosure Machine*].

2. *See generally* Amir Efrati, *Judges Tackle 'Foreclosure Mills'*, Wall St. J., Nov. 30, 2007, at B6; *Foreclosure Machine*, *supra* note 1; Gretchen Morgenson, *Fighting for a Home*, N.Y. Times, Mar. 4, 2008, at C1 [hereinafter *Fighting*].

3. *See Foreclosure Machine*, *supra* note 1. When loans have been sold many times, or packaged into securitization trusts, it can be unclear who the actual holder of the promissory note may be. The entity filing the foreclosure suit must be the holder of the loan; suits have been dismissed by judges when the plaintiff could not show it had the right to foreclose. *See* Efrati, *supra* note 2; *Foreclosure Machine*, *supra* note 1; *Fighting*, *supra* note 2.

4. *See Foreclosure Machine*, *supra* note 1. The estimated income generated by foreclosure service companies is staggering—possibly as much as $11.6 million per year by one Texan firm. Defaulting borrowers often rely upon the lenders' calculations and do not question the validity of these fees. *Id.*

5. *See* Robin Paul Malloy, *The Secondary Mortgage Market a Catalyst for Change in Real Estate Transactions*, 39 Sw. L.J. 991, 1016 (1989).

6. *See* Real Estate Settlement Procedures Act, 12 U.S.C. § 2601 (2006). In the early 1970s, a joint study undertaken by the Secretary of Housing and Urban Development and the Administrator of Veterans Affairs brought to the limelight abusive practices in the mortgage settlement process that resulted in higher settlement costs to borrowers. Because most home buyers did not understand the settlement process and its related costs, lenders were charging fees without providing any benefit to the borrower and borrowers were unable to shop around for lower settlement costs. *See* S. Rep. No. 93-866 (1974), *reprinted in* 1974 U.S.C.C.A.N. 6546.

7. *See* Boulware v. Crossland Mortgage Corp., 291 F.3d 261, 264 (4th Cir. 2002).

8. 498 F.3d 111 (2d Cir. 2007). In its opinion, the Second Circuit considered and rejected the opinions of the Fourth, Seventh, and Eighth Circuits. *Id.* at 115; *see also* Haug v. Bank of Am., N.A., 317 F.3d 832 (8th Cir. 2003); *Boulware*, 291 F.3d 261; Krzalic v. Republic Title Co., 314 F.3d 875 (7th Cir. 2002).

9. *See* Real Estate Settlement Procedures Act § 2607(b). RESPA section 8(b) is part of section 2607, which is titled "Prohibition against kickbacks and unearned fees."

for which no services were rendered, or whether the statute only prohibits the collection of such fees when they are divided between two or more entities.[10] RESPA section 8(b) states:

> Splitting charges—No 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.

The Second Circuit concluded that RESPA section 8(b) strictly prohibits all unearned fees even when they are not split with a third party.[11] This case comment contends that the Second Circuit improperly disregarded precedent, found ambiguity where none exists, and improperly deferred to the Department of Housing and Urban Development's ("HUD") interpretation of RESPA section 8(b).[12] The plain language of the statute clearly indicates Congress's intent that, in order to constitute a violation of RESPA section 8(b), unearned fees must be split between two or more mortgage lenders.

Plaintiff Sylvia Cohen ("Cohen") refinanced her residential mortgage loan with defendants JPMorgan Chase & Co. and JPMorgan Chase Bank (collectively, "Chase") in September 2003.[13] The settlement statement provided at closing by Chase included numerous fees for services rendered in connection with the refinancing.[14] Included in these fees was a $225 fee labeled only as a "post-closing fee" on the settlement statement.[15] At the closing in September, the defendant did

10. *Cohen*, 498 F.3d at 115. Prior to Congress's passage of RESPA, abusive practices were common in the lending process, resulting often in unnecessarily high closing costs. One such practice included kickbacks and referral fees that were shared between service providers in mortgage loan transactions. Because borrowers were not provided with timely and complete information regarding the nature of closing costs, they were unable to shop the market for more affordable mortgage services. Congress's intent in passing RESPA was to inform and protect consumers involved in the settlement process for residential real estate. *See* 12 U.S.C. § 2601 (2006); S. Rep. No. 93-866 (1974), *reprinted in* 1974 U.S.C.C.A.N. 6546.

11. *Cohen*, 498 F.3d at 124–25.

12. HUD, a federal agency created by the Department of Housing and Urban Development Act, is responsible for national policy and programs addressing the country's housing and urban development needs. *See* 42 U.S.C. § 3531 (2006). Under RESPA, the Secretary of HUD is given the power to make any interpretations necessary to achieve the purposes of the statute. 12. U.S.C. § 2617 (2006). As such, on October 18, 2001, HUD issued a statement (the "Policy Statement") regarding its interpretation of RESPA section 8(b). In its Policy Statement, HUD declared that its long-standing interpretation of the prohibitions in section 8(b) is that a single settlement service provider, by charging the borrower a fee for which no services are provided and not splitting such fee with any other entity or person, violates the provisions of RESPA section 8(b) because the RESPA regulations simply prohibit the charging of unearned fees. *See* 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. 53052–01 (Oct. 18, 2001).

13. *Cohen*, 498 F.3d at 113.

14. *Id.* at 114.

15. *Id.*

not disclose the purpose of the fee, except that it was for future services.[16] Cohen and the defendant disagreed as to whether any services were provided for this fee.[17] Cohen later learned that the fee was collected by defendant to offset the future costs of repackaging Cohen's mortgage loan with other mortgage loans to be sold on the secondary market.[18]

Cohen filed a claim against Chase on September 22, 2004 on behalf of both herself and a putative class of persons who had also paid similar closing fees for which they claimed no services were rendered.[19] In her suit, Cohen alleged, *inter alia*, that Chase had violated section 8(b) of RESPA by charging the post-closing fee without providing any related services.[20] Chase filed a motion to dismiss[21] and the district court granted the defendant's motion for failure to state a claim of a violation under RESPA section 8(b).[22] Relying on *Kruse v. Wells Fargo Home Mortgage, Inc.*,[23] the court held that the post-closing fee paid by Cohen was a "quintessential overcharge" assessed for no service at all and, as an overcharge, was not prohibited under RESPA section 8(b).[24]

In *Kruse*, the Second Circuit considered whether "overcharges" (charges that arise out of services provided by the lender but that are considerably higher than the actual cost to the lender) violated RESPA section 8(b) when they were paid to a single service provider as opposed to being split among more than one.[25] After considering both the meaning of the statute and HUD's Policy Statement, the court in *Kruse* held that RESPA section 8(b) does not apply to overcharges paid to a single lender.[26] The trial court in *Cohen* concluded that *Kruse* was controlling precedent

16. *See* Cohen v. JPMorgan Chase & Co., No. CV-04-4098, 2006 WL 20596, at *1 (E.D.N.Y. Jan. 4, 2006).

17. *Cohen*, 498 F.3d at 114.

18. *Cohen*, 2006 WL 20596, at *3.

19. *See Cohen*, 498 F.3d at 114.

20. *See id.* at 113.

21. *See Cohen*, 2006 WL 20596, at *1. *See generally* Fed. R. Civ. P. 12. The Federal Rules of Civil Procedure govern the procedure of all civil suits pending in the United States District Courts. Fed. R. Civ. P. 1. Rule 12 sets out a number of defenses that are available in every civil suit. In the present case, defendant Chase made a motion under Rule 12(b)(6) for a failure to state a claim upon which relief can be granted. Fed. R. Civ. P. 12. Under this rule, if a plaintiff cannot make a prima facie showing of a claim which warrants the granting of relief, the case cannot be heard or considered by the court and must be dismissed. *See id.*; 5B Charles Alan Wright & Arthur R. Miller, Federal Practice and Procedure § 1356 (3d ed. 2008).

22. *Cohen,* 2006 WL 20596, at *1.

23. 383 F.3d 49 (2d Cir. 2004).

24. Cohen v. JPMorgan Chase & Co., No. CV-04-4098, 2005 WL 5870856, at *3 (E.D.N.Y. Mar. 16, 2005).

25. *See Kruse*, 383 F.3d at 55–56.

26. *Id.* at 56. The HUD Policy Statement proclaimed that charging unreasonably high prices for services provided is prohibited by RESPA section 8(b). The *Kruse* court rejected this interpretation because the statutory language does not authorize courts to determine what portion of a charge is reasonable and

and the post-closing fee was a "quintessential overcharge" because it was paid in exchange for no services.[27] The court in *Cohen* also refused to give *Chevron* deference to HUD's Policy Statement, concluding that the language of RESPA is unambiguous with respect to its requirement of a third party.[28] On January 4, 2006, the district court denied Cohen's motion for reconsideration and, as a result, dismissed Cohen's claim.[29]

On appeal, the United States Court of Appeals for the Second Circuit reviewed Cohen's claim under RESPA section 8(b) de novo.[30] The court distinguished *Kruse*, determined that RESPA section 8(b) is ambiguous, and finally, gave deference to the HUD interpretation of the statute as contained in its Policy Statement.[31] Based on this analysis, the Second Circuit reversed the trial court decision and remanded the case for further proceedings.[32]

The Second Circuit distinguished *Kruse* by classifying the overcharges in *Kruse* and the unearned fees in *Cohen* as two distinct types of charges.[33] It also determined

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what portion is unreasonable; the court determined that the statute "clearly and unambiguously" did not apply to overcharges. *Id.*

27. *Cohen*, 2006 WL 20596, at *2.

28. *Id.* In its *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984) opinion, the United States Supreme Court laid out the rules for when a court must defer to an agency interpretation of a congressional statute. *See id.* at 842–44. If the plain language of the statute or the intent of Congress when passing the statute is clear, a court must construe such statute accordingly. The Court, being the final authority on statutory construction, may reject an agency interpretation in this situation. However, if the plain language or the intent of the statute is unclear and ambiguous, the court must consider whether the agency's interpretation of such is "based on a permissible construction of the statute." The agency's interpretation does not necessarily have to be the only plausible interpretation that could have been adopted. *Id.* This deference to an agency interpretation has been termed "*Chevron* deference" and the corresponding analysis of the statute has been termed "*Chevron* analysis" by both the trial court and the court of appeals in *Cohen* and will be discussed in more detail later in this case comment.

29. *Cohen*, 2006 WL 20596, at *1.

30. *Cohen*, 498 F.3d at 114. The issue on appeal was based entirely on a question of law for two reasons—the dismissal was granted by the trial court pursuant to FED. R. CIV. P. 12(b)(6) and the central question in the case is one of statutory interpretation. *Id.* at 114–15. Trial court decisions based on questions of law are not given deference on appeal and are reviewed de novo. *See generally* Pierce v. Underwood, 487 U.S. 552, 558–59 (1988) (stating the proposition that a judicial decision based on a question of law is reviewable de novo by a higher court).

31. *Cohen*, 498 F.3d at 113.

32. *Id.*

33. *Id.* at 115. The court in *Kruse* considered the meaning of RESPA section 8(b) in connection with markups and overcharges. *Kruse*, 383 F.3d at 53. According to the *Kruse* court, overcharges included charges for services provided by a lender that were increased to a cost substantially higher than the actual cost to such lender. *Id.* Markups were defined by the court as when a lender outsources a service in connection with the mortgage loan and subsequently charges the borrower a higher fee than the actual cost. *Id.* In *Kruse*, the plaintiffs had allegedly paid markups and overcharges to a single settlement service provider in connection with their residential mortgage loans. *Id.* The Second Circuit looked at both the plain language of the statute and the legislative history of the bill and concluded that, with respect to overcharges, it was clear that RESPA section 8(b) was not meant to be a "price-control

that Cohen's claim did not rely on the same Policy Statement provisions that were considered in *Kruse*.[34] Cohen argued that the *Kruse* decision effectively established that lenders are prohibited from charging unearned fees,[35] while Chase, on the other hand, argued that *Kruse* prohibited markups because the "piggy-back[ing] [of] an unearned fee onto the charge of a third-party service provider . . . effectively constitutes a divided charge."[36] The Second Circuit, however, rejected both of these arguments. The court instead declared that the holding in *Kruse* (that RESPA section 8(b) is not a price control statute) does not apply to the issue of whether section 8(b) only prohibits unearned fees when such fees are shared among more than one lender or service provider.[37]

The next step in the Second Circuit's reasoning was to consider the deference rule set out in *Chevron*.[38] Applying what it termed the "*Chevron* analysis" to RESPA section 8(b), the court first looked to whether Congress's intent was clearly set forth in the statutory text of RESPA.[39] Under *Chevron*, if the statutory text can plausibly be interpreted in multiple divergent ways, the language is considered ambiguous and unclear.[40] In the instant case, the Second Circuit analyzed the RESPA section 8(b) statutory phrase "any portion, split or percentage of any charge."[41] The court reached one plausible interpretation of the phrase by reference to the dictionary definitions of

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mechanism" and as such, deference to HUD's Policy Statement was not required. *Id.* at 57. The *Kruse* court also determined that the language of and the Congressional intent behind RESPA Section 8(b) were ambiguous with respect to markups. *Id.* at 58. However, when the *Kruse* court considered the HUD Policy Statement with respect to markups, it determined that deference was due. *Id.* at 61. By application of the Policy Statement, the court in *Kruse* held that lenders could not mark up their settlement fees for services provided by third-party vendors. *Id.* at 62.

34. *Cohen*, 498 F.3d at 115.

35. *Id.*

36. *Id.*

37. *Id.* at 116.

38. *Id. Chevron* was decided by the United States Supreme Court in 1984. The issue before the Court was whether the Environmental Protection Agency promulgated a reasonable construction of an ambiguous term contained in the Clean Air Act Amendments of 1977. *Chevron*, 467 U.S. at 840. Central to the decision in *Chevron* was the interpretation of the statutory term "stationary source." *Id.* This term was not explicitly defined in the relevant part of the statute and was not clearly addressed in the legislative history of the statute. *Id.* at 841. Because of this ambiguity, the Court turned to an existing administrative interpretation, stating that a court may only impose its own construction on a statute in the absence of such an administrative interpretation. *Id.* at 843. In order to rely on an administrative interpretation of a statute, a court must decide whether such interpretation is based on a "permissible construction of the statute." *Id.* According to the Court, while the judiciary should give considerable weight to an agency's interpretation of a statute that it is entrusted to administer, it must rely on such an interpretation only if the interpretation at issue is not clearly contrary to Congress's intent in passing the statute. *Id.* at 843 n.9. The Court noted that the agency interpretation does not need to be the only possible construction of the statute. *Id.* at 843 n.11.

39. *Cohen*, 498 F.3d at 116.

40. *Id.* at 117.

41. *Id.*

"portion," "split," and "percentage."[42] Each of the definitions considered by the court described the terms as something that is divided and less than whole, resulting in the court's conclusion that the use of the three terms together in RESPA section 8(b) could signal a prohibition only of divided unearned fees.[43]

The Second Circuit next evaluated the phrase "portion, split, or percentage" in conjunction with the surrounding words of section 8(b), focusing on Congress's inclusion of the word "any."[44] Looking to interpretations of other statutes in various cases, the court concluded that the use of "any" as a modifier tends to mean that Congress intended the statute to be interpreted broadly.[45] While Congress's inclusion of the words "portion, split, or percentage" could indicate a reference to a divided fee, the court determined that the word "any" expanded the reach of this phrase to include whole fees as well.[46] Because the court was able to reach multiple interpretations of the statutory text, it concluded that the text of RESPA section 8(b) was ambiguous and further investigation into the statutory meaning was warranted.[47]

In the next step of the *Chevron* analysis, the Second Circuit analyzed RESPA's congressional history and reasoned that it did not clearly establish Congress's intent.[48] After deciding that the structure, purpose, and legislative history provided no clues to resolve the textual ambiguity, the court turned to HUD's interpretation as set forth in the Policy Statement.[49] The court held that the Policy Statement reasonably interprets RESPA section 8(b) as prohibiting all unearned fees, whether held by a single lender or split among multiple entities.[50] The court therefore adopted HUD's interpretation as controlling in this case because there was no evidence that Congress specifically rejected this interpretation.[51] The Second Circuit subsequently remanded Cohen's claim for further proceedings.[52]

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42. *Id.* (citing WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 1768 (2002)).

43. *Id.*

44. *Id.*

45. *See id.* at 117–18. Other cases weighed by the Second Circuit included *United States v. Gonzales*, 520 U.S. 1 (1997) (holding that the word "any" has an expansive meaning); *Massachusetts v. EPA*, 549 U.S. 497 (2007) (holding that the repeated use of the word "any" expanded the statutory language to include all airborne compounds); and *Ruggiero v. County of Orange*, 467 F.3d 170 (2d Cir. 2006) (noting that Congress expanded statutory language when the word "any" preceded a list). *Id.*

46. *Id.* at 120.

47. *See id.* at 119.

48. *See id.* at 121; S. REP. No. 93-866 (1974), *reprinted in* 1974 U.S.C.C.A.N. 6546. The Senate report discusses the intent of the RESPA section at issue and articulates such intent as "prohibit[ing] a company . . . that renders a settlement service from giving or rebating any portion of the charge to any other person except in return for the services actually performed." S. REP. No. 93-866, at 6551.

49. *Cohen*, 498 F.3d at 124–25.

50. *Id.*

51. *See id.* at 125–26.

52. *Id.* at 127.

The Second Circuit's conclusion in *Cohen* is erroneous for a number of reasons. The court not only rejected the trial court's application of precedent but also came to a conclusion clearly at odds with a number of other circuit courts, which have all held that an unearned fee is a violation of the statute only when such fee is split between at least two lenders or settlement providers.[53] The court misinterpreted both the plain language of RESPA section 8(b) and the legislative intent behind the statute. In misapplying *Chevron*, the court in *Cohen* deferred to the HUD Policy Statement in a situation where the statutory language is clear and unambiguous. Under *Cohen*, a residential mortgage borrower in the Second Circuit can now bring a claim against a single mortgage lender or mortgage service provider in connection with any unearned fee charged at closing.[54]

The court acknowledged in its opinion that its rejection of a statutory interpretation requiring both a culpable giver and a culpable receiver sharing an unearned fee is at odds with past decisions of the Fourth, Seventh, and Eighth Circuits.[55] In *Boulware* v. *Crossland Mortgage Corp.*, the Fourth Circuit considered the meaning of RESPA section 8(b) with respect to alleged overcharges by the defendant.[56] The court in *Boulware* found it unnecessary to look past the plain language of the statute. It held that, while RESPA section 8(b) applies to an overcharge or an unearned fee, it was intended to prohibit only the sharing of such fees rather than a "unilateral overcharge" by a single lender.[57] The court explained its holding by addressing the phrase "no person shall give and no person shall accept" in RESPA section 8(b), which, according to the court, makes no logical sense absent a fee-splitting situation.[58] Without two or more lenders splitting the fee, this phrase would necessarily have to include the borrower as either a culpable giver or receiver, and Congress did not intend to make consumers potentially liable under the provisions of a statute designed to protect them.[59]

The Seventh Circuit considered a similar issue in *Krzalic v. Republic Title Co.*[60] In *Krzalic*, the plaintiffs alleged a violation of RESPA section 8(b) because the

53. *See id.* at 115; *Boulware*, 291 F.3d 261; *Haug*, 317 F.3d 832; *Krzalic*, 314 F.3d 875. The courts in each of these three cases held that RESPA section 8(b) applies only when an unearned fee is split between two or more entities.

54. *See Cohen*, 498 F.3d at 126.

55. *Id.* at 115. The court does not support this rejection with clear legal analysis. As discussed in detail herein, the court correctly states that statutory construction requires analysis of the entire provision as a whole, yet then refuses to consider the interpretive value of the phrase "no person shall give and no person shall accept" in relation to the remainder of the statutory provision. *Id.*

56. *See Boulware*, 291 F.3d 261. In *Boulware*, the defendant purchased a copy of the plaintiff's credit report from a third party. Plaintiff alleged that the defendant charged her at least $50 over the cost of the report, but did not allege that any portion of such overcharge was paid to the credit reporting agency or any other third party. *Id.* at 264.

57. *Id.* at 265.

58. *Id.*

59. *See id.*

60. *See Krzalic*, 314 F.3d 875.

defendant charged them $50 for recording their mortgage when the recording in fact only cost the defendant $36.[61] The court in *Krzalic* refused to consider the Policy Statement because the RESPA provision is clear on its face.[62] The court determined the plain language of RESPA section 8(b) applies only in "a situation in which A charges B (the borrower) a fee of some sort, collects it, and then either splits it with C or gives C a portion or percentage . . . of it."[63]

The Eighth Circuit also looked at the meaning of RESPA section 8(b) in connection with overcharges in *Haug v. Bank of America*.[64] The issue in *Haug* was whether overcharges paid by the plaintiff in connection with her mortgage loan constituted a violation of RESPA section 8(b) notwithstanding the fact that the defendant did not share such fees with a third party.[65] The court looked at the statutory language to determine the existence of ambiguities and found without question that section 8(b) is "an anti-kickback provision that unambiguously requires at least two parties to share a settlement fee in order to violate the statute."[66] Because the statutory language was clear on its face, the court refused to apply a *Chevron* analysis and gave no weight to the HUD Policy Statement.[67]

RESPA was enacted by Congress in 1974 to protect borrowers from "unnecessarily high settlement charges" and to eliminate fees that unnecessarily increase the costs of settlement services.[68] The language of section 8(b) specifically prohibits the sharing of any "portion, split, or percentage of any charge" for which no services were rendered to the borrower.[69] A review of the legislative materials and history of this statute reveals that this section of RESPA was passed in response to a development in the lending industry of paying unearned fees to "persons who [were] in a position to refer settlement business" as a means of securing future transactions and referrals, thus increasing the settlement costs to the borrower without providing any additional benefits.[70] The court's decision in *Cohen* stands alone with regard to whether the

61. *See id.* at 877.

62. *See generally id.* (stating that when statutory meaning is clear, the court must preserve the legislature's language and may not impose its own interpretation of the statute).

63. *Id.* at 879. The court went on to discuss whether the Policy Statement warranted *Chevron* analysis, but as the court had already decided that statutory language was clear and unambiguous, this discussion was not relevant to the court's holding. *Id.*

64. *See Haug*, 317 F.3d 832.

65. *See id.* at 835.

66. *Id.* at 836.

67. *See id.* at 840.

68. *Cohen*, 498 F.3d at 122.

69. 12 U.S.C. § 2607(b) (2006).

70. *See* S. Rep. No. 93-866 (1974), *reprinted in* 1974 U.S.C.C.A.N. 6546, 6551. The legislature also intended RESPA to lower the costs of the settlement process for borrowers by requiring earlier disclosure of settlement fees, allowing a borrower to "shop around" for the lowest possible settlement costs. S. Rep. No. 93-866, at 6548.

provision applies to a single lender charging an unearned fee and is contrary to the legislative history.

The *Cohen* court reached its conclusion by focusing on Congress's twofold use of a single word—"any."[71] After evaluating the phrase "portion, split, or percentage," the court noted that these terms are commonly used to refer to things that have been divided between at least two entities or people.[72] The court concluded that the addition of the word "any" could reasonably be viewed as an expansion of the statutory language to include undivided unearned fees.[73] Yet even though the court correctly stated that the words of the statute must be evaluated in light of the entire statutory language, the court did not consider the meaning of the immediately preceding phrase "no person shall give and no person shall accept."[74] The court merely stated that *Kruse* had rejected an interpretation that required at least two culpable parties.[75] But a careful reading of *Kruse* shows that the court did not clearly reject this construction. The *Kruse* court determined that, with respect to overcharges, the words of the statute are not ambiguous and two culpable parties are required before a violation can exist under section 8(b).[76] Only with respect to markups did the *Kruse* court decide that the words of the statute were ambiguous.[77] With respect to markups only, the *Kruse* court chose to defer to the HUD Policy Statement as a definitive interpretive source.[78] The *Cohen* court, therefore, incorrectly found that *Kruse* rejected a construction requiring two culpable parties. Had the *Cohen* court considered section 8(b) as a whole, it would have been clear to the court that the statute unambiguously refers only to unearned fees which are divided among at least two parties.

The phrase "no person shall give and no person shall accept" has been evaluated by a number of different courts in connection with similar issues, and they have all held that RESPA section 8(b) prohibits the splitting of a fee between two or more

71. *See Cohen*, 498 F.3d at 117. The Second Circuit claimed to evaluate the statutory language as a whole, yet gave no weight to the phrase "[n]o person shall give and no person shall accept . . . ." This portion of the statute was dismissed by the court with very little discussion. *Id.* at 120.

72. *Id.* at 117.

73. *See id.* at 117–18.

74. *See id.* at 120. The Second Circuit did not consider the entire statute even though it clearly stated that "statutory language must be read in context since a phrase gathers meaning from the words around it." *Id.* at 117 (citing General Dynamics Land Sys. Inc. v. Cline, 540 U.S. 581, 596 (2004)).

75. *See id.* at 120.

76. *See Kruse*, 383 F.3d at 56.

77. *See id.* at 58. Under *Kruse*, an overcharge is the amount by which the charge for a service provided by the lender exceeds what is reasonable for that service. *Id.* at 56. A markup, on the other hand, is a fee charged by the lender for services provided by a third party vendor, but increased over the lender's actual cost, resulting in profit for the lender. *Id.* at 57.

78. *See id.* at 59.

parties if it was collected absent performance of actual services for such fee.[79] In *Boulware*, the Fourth Circuit provided a clear and helpful analogy to explain how this phase applies to an exchange between two or more entities rather than a unilateral act.[80] The court illustrated that if the provision applied to a fee charged by a single lender, then the borrower herself would be the only party left in the transaction who could be the giver referenced in the statute.[81] In light of the fact that the statute was intended to protect consumers, it would be illogical that the consumer could be considered the giver and hence be potentially liable for the civil penalties and criminal sanctions authorized under RESPA section 8(b).[82] The plaintiff and HUD (as amicus curiae) argued unsuccessfully before the *Boulware* court that the government would not prosecute the consumers it was trying to protect and could not provide proof that the government is bound by such a promise.[83]

Finally, it is important to note that the court in *Cohen* mistakenly claimed to be interpreting RESPA section 8(b) in the same way the Eleventh Circuit did in *Sosa v. Chase Manhattan Mortgage Corp.*[84] Contrary to the Second Circuit's contention, the court in *Sosa* did not hold that RESPA section 8(b) can apply where there is an unearned fee charged by a single lender.[85] In fact, the *Sosa* court dismissed the plaintiff's case for failure to state a claim because the plaintiff was unable to show that the fee paid was absent services rendered by the defendant.[86] According to the court, the portion of a charge did not have to be *both* given and taken, and therefore, RESPA section 8(b) could apply to situations where there was only one culpable party.[87] It is important to note, however, that this discussion did not constitute the holding of the court as the case was dismissed on other grounds. The analysis by the court in *Sosa* constitutes nothing more than dictum.

Considered in light of the foregoing, it is evident that the provisions of RESPA section 8(b) are not violated in a situation, like the one in *Cohen*, where only one lender is involved. RESPA section 8(b) is clear and unambiguous on its face. Statutory construction by the Second Circuit should have gone no further than to read the statute and interpret the plain meaning of its words. A full discussion under

79. *See generally Boulware*, 291 F.3d 261; *Haug*, 317 F.3d 832; *Krzalic*, 314 F.3d 875. The disputed fees in each of these cases involved either an overcharge or a markup for services rendered, while the fee in the instant case is alleged to be an unearned fee for no services rendered. This distinction, however, is irrelevant in interpreting the statute. In each case, the main concern is that a fee, whether the whole or a portion, was paid by a borrower for no additional services rendered.

80. *See Boulware*, 291 F.3d at 265–66.

81. *See id.* at 265.

82. *See id.*

83. *See id.*

84. *See Cohen*, 498 F.3d at 115 (discussing the decision in Sosa v. Chase Manhattan Mortgage Corp., 348 F.3d 979 (11th Cir. 2003)).

85. *See generally Sosa*, 348 F.3d 979.

86. *Id.* at 984.

87. *Id.* at 982.

the *Chevron* analysis was unnecessary and unwarranted. The court is the final authority on statutory construction, and because the plain meaning of the words of the statute are clear, the HUD Policy Statement should not have been adopted by the Second Circuit.