

THE CFPB: KNOCKED DOWN BUT NOT OUT!

By John Dolgetta, Esq.

On January 31, 2017, the Consumer Financial Protection Bureau (“CFPB”) filed major consent orders (“Consent Orders”) against Prospect Mortgage, LLC (“Prospect”), a major U.S. lender, and three other parties, including two real estate brokerage firms in California (i.e., RGC Services, Inc. d/b/a ReMax Gold Coast (“ReMax Gold Coast”) and Willamette Legacy, LLC d/b/a Keller Williams Mid-Willamette “KW Mid-Willamette”) and a mortgage servicer in Connecticut (i.e., Planet Home Lending, LLC (“Planet”). The consent order entered into with Prospect (the “Prospect Consent Order”) (see <http://bit.ly/2knzzq6>) calls for the payment of a civil penalty of \$3,500,000. The other parties were required to pay an additional \$495,000.

These Consent Orders were issued despite the October 11, 2016 decision issued by the United States Court of Appeals for the District of Columbia Circuit in *PHH Corporation, et al v. Consumer Financial Protection Bureau (No. 15-1177 D.C. Cir. 2016)* (“PHH Corporation”) which dealt a blow to the authority of the CFPB and held that marketing services agreements (MSAs) by and among settlement service providers (i.e., lenders, mortgage brokers, mortgage servicers, real estate agents, brokers and brokerage firms, and attorneys) were not illegal on their face. This decision was the subject of an article appearing in the November, 2016 issue of Real Estate In-Depth (see <http://bit.ly/2kfPR3u>).

RESPA: The CFPB Continues To Forge Ahead In Enforcement Efforts

It is clear that CFPB Director Richard Cordray, notwithstanding the decision issued in PHH Corporation, continues to investigate and institute enforcement actions against settlement service providers under the Real Estate Settlement Procedures Act (“RESPA”). Director Cordray made it clear after the issuance of the decision in PHH Corporation that he did not agree with it and that the CFPB would forge ahead in accordance with its CFPB Compliance Bulletin 2015-05 issued in October, 2015 (“CFPB 2015 Bulletin”) (see <http://bit.ly/1G00b6r>).

It is important to note that, while the Consent Orders are fully enforceable, they did not require the parties to admit to any wrongdoing. Nevertheless, the Consent Orders are clear evidence that the CFPB’s enforcement action is severe and that it is taking RESPA violations seriously. These Consent Orders detail important facts and provide critical guidance of which all settlement service providers should be aware.

Review of the Prospect Consent Order

In the Prospect Consent Order, the CFPB indicates that it had reviewed Prospect’s “...marketing services agreements, lead agreements, desk license agreements, and co-marketing arrangements with real estate brokers and servicers and has identified the following law violations:

(1) Prospect entered into hundreds of such agreements that it used to funnel payments to brokers and others in exchange for mortgage referrals.

(2) Prospect's partners to these agreements then took various steps to steer consumers to Prospect, often with Prospect's encouragement. For example, some of Prospect's partners:

(a) required all consumers to apply for and obtain Preapprovals (as defined below), with Prospect before allowing them to submit an offer on a property;

(b) paid their agents cash or a cash equivalent bonus, each time the agent steered a consumer to Prospect;

(c) selectively imposed economic measures to coerce consumers into using Prospect, such as fees that would be waived if the consumer used Prospect, or credits that would be given only if the consumer used Prospect; and

(d) directly referred consumers to Prospect."

The above actions should be clearly avoided by all parties.

The Use of Lead Agreements by Prospect to Pay for Referrals

Prospect entered into formal lead agreements with several hundred parties, most of which were real estate brokers. This may lead to future consent orders being issued against those other parties as well. Prospect would pay each person or firm for every lead and would then reach out to the prospective buyer to market its loan products. These agreements also included exclusivity provisions which prohibited the agent from sharing the prospective buyers' information with Prospect's competitors and discouraged the real estate agent from promoting other lenders to such prospective buyers.

In addition, real estate brokers, in an attempt to increase leads, provided their agents with incentives to steer buyers to Prospect. Some brokers would pay their agents each time the agent referred someone over to a loan officer at Prospect. Paragraph 16 of the Prospect Consent Order provides one such example where Prospect "...paid one broker anywhere from \$25 to \$500 per lead...." The broker then would simply pay agents cash at monthly meetings for each such referral.

In other instances, listing agents who received these lead fees or payments from Prospect would insert specific instructions in the agent-only MLS fields, which are not visible to the general public, and "...[t]hese instructions required the buyers' agents to inform their buyers that they needed to obtain Preapproval[s] specifically with one of Respondent's loan officers before submitting offers on the sellers' properties if they wanted their offers to be considered by the sellers. [Prospect] called this being 'written in' to a property listing." (See Paragraph 41 of the Prospect Consent Order). Brokers and agents also required prospective buyers, who had already

obtained a preapproval from another lender, to obtain one from Prospect as well or their purchase offer would not be considered.

Use of Third Party Websites to Pay for Referrals

Prospect and the other respondents engaged in other questionable practices as well. The Prospect Consent Order pointed out that Prospect stopped utilizing MSAs and lead agreements in 2015. Prior to the issuance of the CFPB 2015 Bulletin, both Wells Fargo Bank, N.A. and Prospect Mortgage, LLC publicly announced that they would discontinue all of their MSAs. However, Prospect continued to utilize “co-marketing” agreements thereafter, which the CFPB points out was “...another means for it to continue to pay for referrals.”

Additional violations included (i) Prospect paying for a real estate agent’s marketing expenses on third party websites, the payment of which was based on referrals, (ii) providing credits to the buyer which were conditional upon using Prospect for financing, and (iii) having consumers agree to per diem penalties for not using Prospect if there was a delay in a closing date.

The Restrictions Imposed on Prospect by the CFPB

While MSAs, in light of the PHH Corporation decision, are still considered to be legal, provided certain conditions are met, the Prospect Consent Order (see Paragraph 64) strictly prohibits Prospect (and the other respondents) from entering into MSAs or other arrangements altogether. The Order broadly requires that “[Prospect] and its officers, agents, servants, employees, and attorneys who have actual notice of this Consent Order, whether acting directly or indirectly, *must not now or at any time in the future* [Emphasis added]:

- a. agree to purchase or pay for any service that is connected or related in any way to receiving referrals of real estate settlement service business;
- b. enter into marketing service agreements, lead agreements, or co-marketing arrangements with any real estate broker, agent or servicer;
- c. enter into any desk license agreement with any broker, agent, or servicer that includes any requirement or understanding that the counterparty will endorse the use of Respondent’s mortgage settlement services, or do anything else to affirmatively influence prospective home buyers to use the Respondent’s mortgage settlement services; and
- d. give or accept any fee, kickback, or thing of value pursuant to any agreement or understanding, oral or otherwise, that business incident to or a part of a real estate settlement service involving a federally related mortgage loan shall be referred to any person in violation of Section 8 of RESPA [citations omitted].”

Regardless of the PHH Corporation decision, the CFPB's position is that any MSA or other such arrangement is illegal and it will continue to crack down on violators. It should be noted that the PHH Corporation decision was generally hailed as a win for the industry and it reigned in Director Cordray's and the CFPB's authority. The Court did not hold that the MSA or other arrangement was illegal, but rather set forth a theory that such referral arrangements are valid as long as the referral fees or bona fide services exchanged are based on fair market value.

The ReMax Gold Coast and KW Willamette Consent Orders

The consent orders filed against ReMax Gold Coast (see <http://bit.ly/2k0gYMG>) (the "ReMax Gold Coast Order") and KW Willamette (see <http://bit.ly/2kkoJOs>) (the "KW Willamette Order") reveal further actions engaged in by the parties which the CFPB deemed to be violations of REPSA.

The KW Willamette Order detailed that the MSA entered into with Prospect required the payment of \$4,250 per month. However, it was found that the amount of the monthly fee was adjusted based on the number of referrals made to Prospect in any one month. Prospect also had the right to terminate the MSA if a sufficient number of referrals were not made.

The KW Willamette Order pointed out that Prospect actually placed a loan officer right into the brokers' office in order to review and evaluate whether the MSA was being effectively promoted. Pressure was placed on the broker and agents to increase the number of referrals and to steer clients to Prospect. This led to the broker paying its agents separate fees or providing agents with credits, which the agents could use to pay fees normally charged by the broker to the agent (e.g., errors and omissions coverage, office supplies, etc.), for each referral the agent made to Prospect.

The CFPB pointed out additional problematic behavior including: (i) monthly payments to the brokers through desk license agreements, (ii) requirements of the broker to endorse the lender as a "preferred mortgage lender," (iii) the lender's Board of Directors analyzing the value of these desk licensing agreements based on the number of referrals rather than fair market value of the rental, (iv) inviting only employees and loan officers of the "preferred lender" to be a presenter or speaker at agent training sessions provided by the broker and not inviting any other lenders.

The CFPB is Out There and Extreme Caution Should be Exercised

In light of the actions undertaken by Director Cordray and the CFPB, all settlement service providers need to exercise extreme caution when considering whether or not to enter into an MSA or other arrangement. The key takeaway from the Consent Orders issued by the CFPB is that many of the arrangements and actions described therein were clearly violative of RESPA. It is clear, that payment of referrals is illegal and therefore, no payment or thing of value should ever be exchanged for referrals. Referrals should simply be made based on the quality of the service to be provided by the individual or entity to which a client is being referred. Referrals are a critical and integral part of any successful business, however, once a payment or thing of

value is exchanged simply for the referral, a settlement service provider is deemed to have violated RESPA.

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