No.

IN THE

Supreme Court of the United States

PATRICK BAEHR; CHRISTINE BAEHR, PETITIONERS

v.

THE CREIG NORTHROP TEAM, P.C.; CREIGHTON EDWARD NORTHROP, III; LINDELL C. EAGAN; LAKEVIEW TITLE COMPANY, INC.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

I. Whether plaintiffs pursuing claims under the Real Estate Settlement Procedures Act ("RESPA") must present evidence of an overcharge for services tainted by illegal kickbacks to establish concrete harm for Article III standing, despite that Congress identified kickbacks as an abusive practice that tends to increase prices and denies impartial and fair competition among settlement services providers for consumers.

II. Whether plaintiffs pursuing RESPA claims can prove an overcharge to establish concrete harm for Article III standing by evidence of a fiduciary relationship with a party who received kickbacks, which establishes prohibited, undisclosed compensation and the denial of impartial advice and advocacy of a fiduciary.

PARTIES TO THE PROCEEDING

The Petitioners and class representatives, Patrick and Christine Baehr, were the Plaintiffs before the District Court and the Plaintiffs-Appellants in the Court of Appeals for the Fourth Circuit. The Baehrs represent a certified class with 1,088 members. The Petitioners are not a corporation, nor are any of the other class members. Therefore, a corporate disclosure statement is not required under Supreme Court Rule 29.6.

The Respondents in this matter are The Creig Northrop Team, P.C. (the "Northrop Team"), Creighton Edward Northrop, III (collectively with the Northrop Team, the "Northrop Respondents"), Lakeview Title Company, Inc. ("Lakeview") and Lindell C. Eagen (collectively with Lakeview, the "Lakeview Respondents") (all collectively, the "Respondents"). These parties were the Defendants-Appellees below.

RELATED PROCEEDINGS

Baehr v. Creig Northrop Team, P.C., No. RDB-13-0933, U.S. District Court for the District of Maryland. Judgment entered on December 7, 2018.

Baehr v. Creig Northrop Team, P.C., No. 19-1024, U.S. Court of Appeals for the Fourth Circuit. Judgment entered on March 13, 2020.

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PETITION FOR A WRIT OF CERTIORARI

Petitioners Patrick and Christine Baehr, on behalf of themselves and a class of 1,088 homebuyers, respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fourth Circuit in this case.

OPINIONS BELOW

The opinion of the Court of Appeals (Pet'rs' App., 1a–28a) is reported at 953 F.3d 244. The opinion of the District Court granting the Defendants' Joint Motion for Summary Judgment (Pet'rs' App., 29a–67a) is unreported, but is available at 2018 WL 6434502.

JURISDICTION

The District Court for the District of Maryland had jurisdiction under 28 U.S.C. § 1331. The Court of Appeals for the Fourth Circuit had jurisdiction under 28 U.S.C. § 1291.

The judgment of the Court of Appeals for the Fourth Circuit was entered on March 13, 2020. Following the entry of judgment, the Plaintiffs filed a timely Petition for Rehearing and Rehearing *En Banc* pursuant to Fed. R. App. P. 35, 40. The Fourth Circuit Court of Appeals issued an order denying that petition on May 12, 2020 (Pet'rs' App., 68a–69a). This Court's jurisdiction rests on 28 U.S.C. § 1254(1).

CONSTITUTIONAL, STATUTORY, AND REGULATORY PROVISIONS INVOLVED

Article III, Section 2 of the U.S. Constitution provides that the "judicial Power shall extend to all Cases, in Law and Equity, arising under . . . the Laws of the United States . . . ."

The pertinent provisions of the Real Estate Settlement Procedures Act, 12 U.S.C. § 2601 *et seq.*, are reproduced in Pet'rs' App., 70a–77a.

The pertinent provision of Regulation X, 12 C.F.R. § 1024.15, is reproduced at Pet'rs' App., 77a–82a.

The pertinent provision of the Maryland Business Occupations and Professions Code, Md. Code, Bus. Occ. & Prof. § 17-101, is reproduced at Pet'rs' App., 82a–86a.

The pertinent provisions of the Maryland Insurance Code, Md. Code, Ins. § 11-401 *et seq.*, are reproduced at Pet'rs' App., 86a–90a.

STATEMENT OF THE CASE

The Petitioners represent over 1,000 class members in this certified class action who purchased real estate settlement services tainted by secret, illegal kickbacks paid by the Lakeview Respondents to the Northrop Respondents. The Fourth Circuit held that illegal kickbacks do not cause concrete harm, and thus do not provide Article III standing to consumers, unless a plaintiff produces evidence of an overcharge for the services tainted by a kickback. This was the first time a court of appeals required a plaintiff to make such a showing. In contrast, three other courts of appeals—the Third, Sixth, and Ninth Circuits—have held that consumers do not need to provide evidence of an overcharge to maintain a RESPA action based on illegal kickbacks.

This Court acknowledged the fundamental importance of the issue presented in this case when it delivered its decision in *Spokeo, Inc. v. Robins*, 136 S. Ct. 1540 (2016). The *Spokeo* Court held that a procedural violation of a statutorily authorized right, absent any additional harm, does not automatically satisfy the requirement of a concrete injury for purposes of Article III standing. *Id.* at 1549. However, this Court also held that in some circumstances, a procedural violation of a statutorily authorized right can constitute a concrete injury when there exists a risk of real harm. *Id.*

This case presents a similar issue under RESPA, 12 U.S.C. § 2601 *et seq.* The Petitioners did not allege a bare procedural violation of a statutorily authorized right. In fact, the Petitioners alleged that they and the other class members were harmed by the denial of impartial and fair competition among settlement service providers—*i.e.*, depriving them of their right established under RESPA to a kickback-free real estate transaction. Furthermore, the Petitioners alleged they hired the Northrop Respondents as their real estate agents, which created a fiduciary relationship. The illegal receipt of undisclosed compensation and the denial of impartial advice and advocacy thus provided a separate, unique harm to the

Petitioners and all other class members—an overcharge.

To be sure, illegal kickbacks are inherently injurious to consumers. Congress recognized kickbacks as an abusive practice that tends to unnecessarily increase the cost of settlement service fees under RESPA Sections 2601(a), (b)(2). In this case, the Northrop Respondents secretly received 50% of the title premium for all referrals made to the Lakeview Respondents. For example, the Northrop Respondents received a $1,495.00 kickback for referring the Petitioners to the Lakeview Respondents from title insurance costing $2,990. The kickbacks were disguised as payments under sham agreements between the Respondents. In total, the Lakeview Respondents paid $603,070.00 in kickbacks to the Northrop Respondents for referring the 1,088 class members. J.A. at 706–07.[1]

Whether consumers victimized by illegal kickback schemes have Article III standing when they do not provide evidence of an ordinary overcharge (*i.e.*, excluding the fiduciary-based overcharge) is a common question under RESPA. This is especially true because title insurance premium rates are approved by state regulators, thus all but unassailable under the filed rate doctrine. The Fourth Circuit's holding is in direct contradiction with three other courts of appeals on this issue—the Third, Sixth, and Ninth Circuits. Further, the Fourth Circuit's holding restricts congressional authority to provide a cause of action based on the

[1] Citations herein to "J.A.__" refer to the contents of the Joint Appendix filed by the parties on appeal to the Fourth Circuit.

violation of a statutorily authorized right. Unless this Court corrects the Fourth Circuit's misapplication of *Spokeo*, Congress will have unconstitutional limitations on its authority, and the requirements to establish Article III standing under RESPA will lack uniformity among the circuits.

Whether consumers can prove an overcharge by evidence of a fiduciary relationship with a party who received prohibited, undisclosed compensation and violated the fiduciary duty of impartial advice and advocacy is a separate issue in this case. Here, the Fourth Circuit avoided this question by improperly weighing evidence and failing to view evidence in the light most favorable to the Petitioners, as the non-moving party. In doing so, the Fourth Circuit erroneously concluded that no fiduciary relationship existed between the Petitioners and the Northrop Respondents. This holding was outside the court's power because the existence and scope of a fiduciary relationship is an issue to be decided by a jury. As such, this Court's intervention is also warranted to answer an important question of federal law that has not been, but should be, settled by this Court.

A. RESPA Section 2607(a)

RESPA prohibits unearned fees and kickbacks. RESPA Section 2607(a) states as follows:

> No person shall give and no person shall 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.

12 U.S.C. § 2607(a). RESPA provides a remedy for consumers who are subject to illegal kickback schemes. *Id.* § 2607(d)(2). The statutory provision authorizes damages "equal to three times the amount of any charge paid for such settlement service." *Id.* Under this same section, there is no requirement that the consumer must allege or prove an overcharge to receive treble damages. *Id.* In fact, the word "overcharge" is never mentioned in this provision. *Id.*

B. Factual Background and Proceedings Below

The Petitioners and each of the 1,088 class members alleged they hired each of the Northrop Respondents to represent them in the purchase of their new home. J.A. at 32. Under Maryland law, real estate agents are fiduciaries and have an obligation to act in the best interest of their clients. *Wilkens Square, LLLP v. W.C. Pinkard & Co.*, 189 Md. App. 256, 267 (2009) *aff'd*, 419 Md. 173 (2011) ("A real estate broker stands in a fiduciary relationship to his client."); Md. Code, Bus. Occ. & Prof. § 17-101(l)(2) (defining real estate brokerage services as "assisting another person to locate or obtain for purchase or lease any residential real estate."). In opposition to the Respondents' summary judgment motion, the Petitioners submitted affidavits to confirm they hired each of the Northrop Respondents. J.A. at 693, 697. They also submitted testimony of Respondent Creig Northrop confirming that he owed a duty to act in the best interest of the Petitioners and all 1,088 class members as clients of the Northrop Team. J.A. at 681.

Initially, the Respondents concealed their kickback scheme with payments to Carla Northrop, Mr. Northrop's wife, via a sham no-show job with Lakeview.[2] Under this sham agreement, Carla Northrop received compensation from Lakeview, which was calculated as 50% of the title premium for transactions involving referrals from the Northrop Team. J.A. at 616. For instance, in 2007, Carla Northrop received "wages" from Lakeview totaling $148,959.45, making her Lakeview's highest paid "employee." J.A. at 649–54. During that same year, Carla Northrop's actual job was with the Northrop Team, where she held the title of Vice President, appeared for work daily, and earned $238,115.50 in annual wages. J.A. at 656.

Carla Northrop's sham employment agreement was merely a vehicle for Lakeview to bribe the Northrop Respondents in return for client referrals. These illicit business dealings are well documented in secret spreadsheets that show the kickbacks were

[2] To be sure, the employment agreement was a sham. Carla Northrop did not have a Lakeview office, a Lakeview email address, or a Lakeview telephone number. J.A. at 625–26, 633–34. She never appeared on Lakeview's website, and she did not appear for work at Lakeview's office. J.A. at 645.

categorized as "commissions" for the Northrop Team referrals. J.A. at 709–14, 722–74.

Respondent Lindell Eagan took over Lakeview in April 2007 and was concerned about the illicit nature of Carla Northrop's sham employment agreement.[3] J.A. at 821. Thus, the Northrops and Lindell Eagan negotiated a sham marketing agreement to replace Carla Northrop's no-show job as a new vehicle to conceal the illegal kickbacks. J.A. at 658–71, 676.

On its face, the sham marketing agreement required Lakeview to pay the Northrop Team a fixed fee of $6,000.00 per month for marketing. J.A. at 671. To be sure, the marketing agreement was a sham. The Northrop Team was not required to provide any specific marketing under the agreement, other than posting a link on its website to Lakeview's website. J.A. at 658–71. But the Northrop Team did not post that link until after this lawsuit was filed, six years after the agreement took effect. J.A. at 683. The Respondents never tracked the marketing that was supposedly provided. J.A. at 687. To the extent that any "marketing" was provided, that "marketing" had no relation to the payments being made by Lakeview, and the same "marketing" was provided to other companies for free.

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[3] James Eagan, Lindell's late husband, previously negotiated the sham employment agreement with the Northrops before Lindell Eagan became involved in Lakeview's business. J.A. at 616.

In actuality, the Respondents continued to use secret spreadsheets to calculate the "commission" for each referral and listed the Northrop Team agent who referred the transaction to Lakeview. J.A. at 709–14, 719, 722–74. The Lakeview Respondents maintained the secret spreadsheets and sent them to the Northrop Respondents at the Northrop's home address, rather than a Northrop Team office, to maintain secrecy. J.A. at 717–18. The Northrop Respondents would compare the spreadsheets with their own records to make sure they received every illegal kickback. When there were any discrepancies, they reported them to the Lakeview Respondents. J.A. at 688.

The secret spreadsheets show that the Lakeview Respondents paid $12,000 to the Northrop Respondents in some months, representing double the monthly payments of $6,000 due under the marketing agreement. J.A. at 706–07, 712–14. These increased payments were not related to any increase in the amount of marketing provided (which was almost non-existent, in any event). Instead, the secret spreadsheets show that the increased payments were based on increased referrals. J.A. at 722–74. Indeed, Lakeview's bookkeeper admitted that the increased payments were based on increased referrals:

> Q: They were entitled to $6,000 and wasn't it more likely than not that Ms. Eagan agreed to pay more than $6,000 because the commissions as calculated from the reports you provided were outpacing the amount that they were paying for the $6,000?
>
> . . . .
>
> THE WITNESS: Yes.

J.A. at 629. The Respondents' email correspondence further demonstrates that the payments tracked in the secret spreadsheets were kickbacks concealed under the sham marketing agreement as payments for "marketing." For instance, in August 2008, the Northrop Team's bookkeeper wrote to Creig Northrop:

> There was nothing owed from last month. I thought there were cases that were not paid, but they were cases that we were on the listing side only.
> So all has been paid at this point with a balance due to you just under $15,000.00.

J.A. at 788. But through 2008, the Lakeview Respondents had made all of the $6,000 payments due to the Northrop Respondents under the terms of the marketing agreement. J.A. at 706–07, 712. Thus, no "balance" was due to the Northrop Team for any "marketing"; instead, the "balance" was due for kickbacks stemming from an increased number of referrals. J.A. at 746–57.

The spreadsheets reveal the true nature of the Respondents' scheme. They are literally titled "Northrop Commission." The Northrop Commission spreadsheets show that the payments to the Northrop Respondents fluctuated, even though the marketing agreement provided that the payments were to remain at $6,000.00 per month. For instance, the spreadsheet for 2010 shows that starting in January, the amount paid was $9,000.00. The amount then increased to $12,000.00 in April 2010, and decreased to $9,000.00 in August 2010 as follows:

NORTHROP COMMISSION 2010

Pay	Mon th	Commission	Amount		Balance +/-
Date		Earned	Paid		$0.00
02/10/10	Jan 10	$2,578.05	$9,000.00		-$6,421.95
03/10/10	Feb 10	$6,480.34	$9,000.00		-$8,941.61
04/10/10	Mar 10	$10,085.42	$9,000.00		-$7,856.19
05/10/10	Apr 10	$14,263.46	$12,000.00		-$5,592.73
06/10/10	May 10	$13,442.21	$12,000.00		-$4,150.52
07/10/10	Jun 10	$9,800.72	$12,000.00		-$6,349.80
08/10/10	Jul 10	$6,053.90	$12,000.00		-$12,295.90
09/10/10	Aug 10	$7,631.14	$9,000.00		-$13,664.76
10/10/10	Sep 10	$7,476.66	$9,000.00		-$15,188.10
11/10/10	Oct 10	$10,431.63	$9,000.00		-$13,756.47
12/10/10	Nov 10	$10,933.86	$9,000.00		-$11,822.61
01/10/11	Dec 10	$11,253.32	$9,000.00		-$9,569.29
		$110,430.71	$120,000.00	0.0	

J.A. at 714.

In the Petitioners' own transaction, they were charged $3,465.00 in settlement service fees by Lakeview. J.A. at 795. The settlement services were broken down on the Petitioners' HUD-1 Settlement Statement as follows:

Title Examination to the Lakeview Title Company: $375.00

Title Insurance Binder to the Lakeview Title Company: $50.00

Title Insurance to the Chicago Title Insurance Company: $2,990.00[4]

Recording Services to the Lakeview Title Company: $50.00

J.A. at 795. Under the sham marketing agreement, the Northrop Team collected $1,495.00, 50% of the title insurance premium, as a referral "commission," which was not disclosed to the Petitioners. J.A. at 797.

Of note, the title insurance premium in the Petitioners' transaction was based on a rate filed with the State of Maryland, as required by law. Md. Code, Ins. §§ 11-403, 11-404, 11-407. In Maryland, like in other states, title insurance premiums must be filed and approved by the relevant insurance administration, and

[4] Chicago Title Insurance Company was the title insurance underwriter in Petitioners' transaction. The title insurance premium was collected by Lakeview and split with Chicago Title Insurance Company.

title insurers cannot deviate from filed and approved rates. *Id.* § 11-407(b).

In March 2013, the Petitioners filed this class action, alleging a multi-million-dollar kickback scheme. The District Court had jurisdiction over this case pursuant to 28 U.S.C. § 1331. In January 2014, the United States District Court for the District of Maryland certified a class that consists of 1,088 members as follows:

> All Maryland residents who retained Long & Foster Real Estate, Inc., Creighton Northrop, III, and the Creig Northrop Team, P.C. to represent them in the purchase of a primary residence between January 1, 2008 to the present and settled on the purchase of their primary residence at Lakeview Title Company, Inc.

Baehr v. Creig Northrop Team, P.C., No. WDQ-13-0933, 2014 WL 346635 at *11 (D. Md. Jan. 29, 2014). After discovery was substantially completed in December 2018, the District Court granted the Respondents' Motion for Summary Judgement. Pet'rs' App., 61a.

The District Court rejected the Petitioners' contention that they were injured by being deprived of impartial and fair competition among settlement services providers because they "chose to follow the referral to Lakeview Title, were satisfied with the services they received, and paid a reasonable fee." Pet'rs' App., 51a. The court emphasized that the Petitioners did not provide evidence of an overcharge or that an affiliated business arrangement existed between the Respondents. Pet'rs' App., 46a–51a. In addition, the court also rejected the Petitioners' argument that they were deprived of the impartial advice and advocacy of their fiduciaries because "finding a settlement service was not a service the Plaintiffs actively solicited or bargained for" and their real estate agent "indicated that a relationship of some nature existed between The Northrop Team and Lakeview[.]" Pet'rs' App., 51a–52a Thus, the District Court held that there was no genuine dispute of material fact on these issues and that the award of summary judgment was warranted because "the Plaintiffs assert only 'a bare procedural violation, divorced from any concrete harm' and do not satisfy the injury-in-fact requirement of Article III standing." Pet'rs' App., 52a.

On appeal, the Fourth Circuit held that the Petitioners lacked Article III standing because they did not provide evidence that their settlement costs were increased due to the Respondents' kickback scheme. Pet'rs' App., 17a. The Fourth Circuit rejected rulings from other circuits that a plaintiff does not need to provide evidence of an overcharge in addition to an illegal kickback scheme to maintain a RESPA action. Pet'rs' App., 18a–20a. This holding established the Fourth Circuit as the first and only court of appeals to hold that illegal kickback schemes do not harm consumers absent evidence of an overcharge. Furthermore, the Fourth Circuit held that the Petitioners failed to establish that either of the Northrop Respondents were their fiduciaries in the purchase of their home. Pet'rs' App., 22a–23a. In doing so, the Fourth Circuit rejected express allegations in the operative complaint that the Petitioners and every class member retained each of the Northrop Respondents as follows:

> In or about June 2008, Plaintiffs engaged Long & Foster, Creig Northrop, and the Northrop Team to represent them in the purchase of a new home.

J.A. at 32. Further, the Fourth Circuit rejected the sworn testimony of the Petitioners that they retained the Northrop Respondents to represent them in their real estate transaction as follows:

> In April 2008, my husband Patrick and I hired Creig Northrop, the Creig Northrop Team, P.C. . . . to represent us in connection with purchasing 2809 Belle Hollow Court, Glenwood, Maryland 21738.

J.A. at 697.

REASONS FOR GRANTING THE PETITION

This Petition offers the Court an opportunity to clarify an important legal standard—the requirements for Article III standing for private plaintiffs to maintain a RESPA action—and to resolve a conflict between the circuits. Further, this Petition provides the Court an opportunity to address the boundaries of congressional authority when identifying abusive business practices that give rise to concrete injuries under the Article III injury-in-fact analysis.

I. Fourth Circuit's Decision Creates Circuit Split for Standing in RESPA Actions

The Fourth Circuit's decision creates a lack of uniformity among the circuits. The Fourth Circuit held that "the deprivation of impartial and fair competition between settlement services providers is not the harm that Congress enacted [Section] 2607(a) of RESPA to prevent[.]" Pet'rs' App., 17a. That holding is at odds with the holdings from three other circuits—the Third, Sixth and Ninth Circuits. These circuits hold that RESPA kickback claims, absent evidence of an overcharge, satisfy the requirements for Article III standing. Further, the Fourth Circuit created even more confusion and conflict by attempting to distinguish this case from the other circuits' precedent concerning the safe harbor provision of RESPA. Specifically, the Fourth Circuit ruled that this case did not involve a defective affiliated business arrangement ("ABA"). RESPA provides a safe harbor from anti-kickback claims for ABAs that meet strict requirements. The Fourth Circuit's reasoning is illogical in this respect. These issues establish the need for this Court's guidance on Article III standing in RESPA actions.

A. Fourth Circuit is Only Circuit to Require Evidence of Overcharge for RESPA Actions Based on Kickbacks

The decisions of other circuits that consumers whose transactions are subject to kickbacks have standing, absent evidence of an overcharge, does not run afoul of *Spokeo*. *See Edwards v. First Am. Corp.*, 610 F.3d 514, 517–18 (9th Cir. 2010), abrogation recognized on other grounds, *Frank v. Gaos*, 139 S. Ct. 1041, 1046 (2019); *Alston v. Countrywide Fin. Corp.*, 585 F.3d 753, 760–61 (3d Cir. 2009); *In re Carter*, 553 F.3d 979, 986 (6th Cir. 2009).

For example, the Sixth Circuit has held that an allegation of an illegal kickback unaccompanied by evidence of an overcharge is sufficiently concrete to establish an injury-in-fact. *See Carter*, 553 F.3d at 988–89. In *Carter*, the Sixth Circuit held that "[RESPA] creat[es] an individual right to receive referral services untainted by kickbacks . . . ." *Id.* at 989. This holding is still good law post-*Spokeo*, which stated that "the violation of a procedural right granted by statute can be sufficient in some circumstances to constitute injury in fact." *Spokeo*, 136 S. Ct. at 1549.

Like the Sixth Circuit, the Third Circuit has held that evidence of an overcharge is unnecessary to establish a concrete harm in a RESPA action alleging illegal kickbacks. *Alston*, 585 F.3d at 762–63. In *Alston*, the plaintiffs did not allege they were overcharged, but alleged that they were harmed by the deprivation of "competition and choice" among settlement services providers. *Id.* at 757. The Third Circuit held that RESPA Section 2607(a) does not imply that a "plaintiff must allege that he or she paid more than he or she otherwise would have paid [(*i.e.*, an overcharge)]" to maintain a RESPA action. *Id.* at 759. Further, the Third Circuit stated as follows:

> [Because] the provision of statutory damages [in RESPA is] based on the entire payment, not on an overcharge, [there] is a certain indication that Congress did not intend to require an

> overcharge to recover under section 8 of RESPA.

Id. at 760. The Third Circuit ultimately held that the plaintiffs satisfied the injury-in-fact element of Article III standing without providing evidence of an overcharge because they did not receive a "kickback-free real estate settlement." *Id.* at 762–63. This holding is in line with *Spokeo's* ruling that a violation of a statutorily authorized right can cause concrete injury if the violation presents a risk of real harm. *Spokeo*, 136 S. Ct. at 1549.

The Ninth Circuit also held that evidence of an overcharge is unnecessary when alleging a violation of RESPA Section 2607(a). *Edwards*, 610 F.3d at 517–18. The Ninth Circuit stated as follows:

> A person who is charged for a settlement service involved in a violation is entitled to three times the amount of *any* charge paid. The use of the term "any" demonstrates that charges are neither restricted to a particular type of charge, such as an overcharge, nor limited to a specific part of the settlement service. Further, the term "overcharge" does not exist anywhere within the text of the statute.

Id. at 517. However, the Fourth Circuit refused to consider *Edwards* based on the inaccurate assertion that the Supreme Court abrogated this holding. *See* Pet'rs' App., 18a.

This Court's abrogation of *Edwards* was stated as follows:

> Our decision in *Spokeo* abrogated the ruling in *Edwards* that the violation of a statutory right automatically satisfies the injury-in-fact requirement whenever a statute authorizes a person to sue to vindicate that right.

Gaos, 139 S. Ct. at 1046. The abrogation of *Edwards* was narrow and preserved *Edwards'* core holding. *Id.* Specifically, this Court only abrogated *Edwards'* categorical claim that violations of statutory rights automatically satisfy the injury in-fact requirement for Article III standing. *Id.* However, this Court did not rule or opine that violation of RESPA's statutory right to kickback-free settlements does not, without more, satisfy the requirement to establish a concrete injury for Article III standing.

The Fourth Circuit incorrectly applied this Court's reiteration of the *Spokeo* holding in *Gaos* as follows:

> [T]he Supreme Court explicitly recognized that *Spokeo* abrogated *Edwards'* conclusion that a violation of § 2607(a) is a concrete injury regardless of an overcharge.

Pet'rs' App., 18a. To the contrary, *Edwards'* abrogation does not mandate that the Petitioners and all plaintiffs similarly situated must provide evidence of an overcharge to maintain a RESPA Section 2607(a) action, as the Fourth Circuit inaccurately suggests. To be sure, this Court has never held that the deprivation of impartial and fair competition among settlement services providers, absent evidence of an overcharge, is not a concrete injury for purposes of Article III standing. And this case presents the opportunity to affirm that it does establish standing.

B. Fourth Circuit's Opinion Creates Conflict Concerning Congressional Judgment Behind RESPA

When analyzing whether there is a sufficiently concrete injury arising from an intangible harm, congressional judgement should be considered. *Spokeo*, 136 S. Ct. at 1549. The *Spokeo* Court stated as follows:

> [B]ecause Congress is well positioned to identify intangible harms that meet minimum Article III requirements, its judgement is also instructive and important.

Id. Therefore, the *Spokeo* Court instructs all federal courts to consider congressional judgment as it relates to intangible harms arising under RESPA's anti-kickback provision. *Id.* In this case, the illicit business dealings secretly conducted by the Respondents represent the precise type of harm Congress identified under RESPA Section 2607(a), regardless of the purported "reasonableness" of the settlement service fees.

i. Kickbacks Are Inherently Harmful

Congress enacted RESPA because it found significant reforms were needed in the real estate settlement process. 12 U.S.C. § 2601(a). RESPA sought to protect consumers by ensuring they "are provided with greater and more timely information on the nature and costs of the settlement process <u>and are</u>

<u>protected from unnecessarily high settlement charges caused by certain abusive practices</u> . . . ." *Id.* (emphasis added).

Congress recognized the abusive nature of kickbacks, which deprive consumers of impartial and fair competition among settlement services providers. RESPA "prohibits kickbacks given or received with the referral of settlement service business . . . [to] eliminate one of the most unconscionable abusive practices that characterize, in one way or another, a large number of settlement transactions in the Nation." 120 Cong. Rec. H11591 (1974) (statement of Rep. Barrett). Further, the impact of kickbacks on the most fundamental principle of a market economy—competition—was stated as follows:

> The buyer seldom decides who will provide settlement service[s] for him. If there is a choice, he will usually depend on the advice of his broker, escrow agent, or settlement attorney.
>
> The competition that exists in this industry, therefore, is not based on price, because the ultimate consumer has a small voice in that decision. Although this industry is very competitive in many areas, the competitive forces that do exist manifest themselves in an elaborate system of referral fees, kickbacks, rebates, commissions and the like. These practices are widely employed and have replaced effective price competition.

Real Estate Settlement Costs, FHA Mortgage Foreclosures, Housing Abandonment, & Site Selection

Policies: Hearings on H.R. 13337 Before the Subcomm. on Hous. of the Comm. on Banking & Currency, 92d Cong. 15–16 (1972).

Congress even emphasized the abusive nature of kickbacks, regardless of whether the kickback was disclosed to the consumers or was a reasonable amount to be paid for referrals. To that end, Congress took the following action:

> In the Real Estate Settlement Procedures Act of 1973, the limitation of the anti-kickback provision that kickbacks would not be prohibited if the payments were reasonable, made in good faith and disclosed to the home buyer has been deleted.

Real Estate Settlement Costs: Hearings on H.R. 9989, H.R. 11183, H.R. 11460, and H.R. 12066 Before the Subcomm. on Hous. of the Comm. on Banking & Currency, 93d Cong. 49 (1974) (statement of Rep. Stephens, Jr., author of H.R. 9989). Hence, any person who accepts a kickback—regardless of whether it is disclosed or a "reasonable" payment—has violated RESPA's anti-kickback provision. *Id.*

Important organizations joined Congress in its findings that kickbacks are severely harmful to consumers. Notably, the National Association of Realtors ("NAR") explicitly endorsed Congress' findings. *See Oversight on the Real Estate Settlement Procedures Act of 1974: Hearings on S. 2327 and S. 2349 Before the Subcomm. on Banking, Hous. & Urban Affairs*, 94th Cong. 317 (1975) [hereinafter *Oversight on RESPA*]; *see also Hearings on the Real Estate*

Settlement Procedures Act of 1974: Hearings on H.R. 5352, S. 2327, H.R. 10283 Before the Subcomm. on Hous. & Cmty. Dev. of the Comm. on Banking, Currency & Hous., 94th Cong. 273–74 (1975) [hereinafter *Hearings on RESPA*]. In a statement submitted to Congress, the President of the NAR explained the impact of kickbacks on fees charged as follows:

> In the usual non-broker referral, described frequently in the legislative history of Section 8, the home buyer is referred by one person providing a settlement service to another, with the referral occurring before the second person comes in contact with the buyer and establishes his fee. Thus the fee of the second party can be set to cover both his own fee and a "kickback" to the referring party.

Oversight on RESPA, 94th Cong. 317 (1975). The NAR also stated that "the focus is on the fact these payments can be added to the fee which would otherwise be charged, because that fee is set after the referral has occurred. The payment therefore, [sic] inflates the settlement bill to the consumer." *Id.* at 332. Thus, the NAR found that consumers are often unknowingly subjected to kickback schemes, allowing settlement services providers to unnecessarily inflate their fees. *Id.*

The Credit Union National Association, Inc. also embraced the commonly held understanding that kickbacks are injurious to consumers in its official statement to Congress. *Hearings on RESPA*, 94th Cong. 343–44 (1975) ("The consumer, whether it is the home buyer or the seller, ultimately and unfairly pays for kickbacks[.]"). As such, Congress and industry experts alike recognized and accepted the axiomatic proposition that kickbacks are inherently harmful because they force consumers to pay more than they would in a transaction without kickbacks. Furthermore, once the consumer is committed to a purchase price, they have "no basis for judging whether a particular fee or charge is reasonable, particularly when the amount of the fee or charge is small relative to the total purchase price of the house." S. Rep. No. 93-866, at 6566 (1974).[5] Therefore, Congress drafted and passed RESPA Section 2607(a) to explicitly prohibit kickbacks regardless of the "reasonableness" of the settlement service fees.

ii. Kickbacks Always Present Material Risk of Harm to Consumers

Plaintiffs can satisfy the first element of Article III standing—injury-in-fact—by showing that they suffered an actual or imminent invasion of a legally protected interest which is concrete and particularized. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992). The requirements for concreteness and particularization are distinct. *Spokeo*, 136 S. Ct. at 1548. The *Spokeo* Court established that a particularized injury "must affect the plaintiff in a personal and individual way[,]" whereas a concrete

[5] The Petitioners purchase price for their home was $835,000.00. J.A. at 794. In comparison, the settlement services fee was $3,465.00. J.A. at 795.

injury must be "*de facto*; that is, it must actually exist." *Id.* (internal quotations omitted).

This Court has held that concrete injuries can result from either tangible or intangible harms. *Id.* at 1549. In terms of intangible harms, "Congress may 'elevat[e] to the status of legally cognizable injuries concrete, *de facto* injuries that were previously inadequate at law.'" *Id.* (quoting *Lujan*, 504 U.S. at 578). In the same breath, this Court stated as follows:

> Congress' role in identifying and elevating intangible harms does not mean that a plaintiff automatically satisfies the injury-in-fact requirement whenever a statute grants a person a statutory right and purports to authorize that person to sue to vindicate that right.

Id. This means that a plaintiff cannot allege a bare procedural violation divorced from any concrete harm and automatically satisfy the injury-in-fact requirement. *Id.* (citing *Summers v. Earth Island Institute*, 555 U.S. 488, 496 (2009)). However, this Court was clear that it did not preclude the potential for plaintiffs to satisfy the injury-in-fact requirement based on the procedural violation of a statutorily authorized right. *Id.* In that respect, the *Spokeo* Court stated as follows:

> Just as the common law permitted suit in such instances, the violation of a procedural right granted by statute can be sufficient in some circumstances to constitute injury in fact. In other words, a plaintiff in such a case need not

> allege any *additional* harm beyond the one Congress identified.

Id. On remand, the Ninth Circuit reiterated that procedural violations of a statutorily authorized right, absent an allegation of additional harm, can provide Article III standing in some instances. *Robins v. Spokeo, Inc.*, 867 F.3d 1108, 1113 (9th Cir. 2017). The Ninth Circuit, citing the Second Circuit's interpretation of *Spokeo*, held as follows:

> *Spokeo II* "instruct[s] that an alleged procedural violation [of a statute] can by itself manifest concrete injury where Congress conferred the procedural right to protect a plaintiff's concrete interests and where the procedural violation presents 'a risk of real harm' to that concrete interest."

Id. (quoting *Strubel v. Comenity Bank*, 842 F.3d 181, 190 (2d Cir. 2016)).

In this case, the Fourth Circuit ignored this method of establishing Article III standing that remains viable post-*Spokeo.* Instead, the Fourth Circuit was focused on the lack of any evidence of an overcharge and the supposed "reasonableness" of the settlement service fees in the Petitioners' transaction. Pet'rs' App., 14a–17a. As such, the Fourth Circuit failed to recognize that a procedural violation of a statutorily authorized right can constitute a concrete injury if there is a "risk of real harm" to the interests Congress identified and sought to protect. *Spokeo*, 136 S. Ct. at 1549 (citing *Federal Election Comm'n v. Akins*, 524 U.S. 11, 20–25 (1998) (affirming failure to provide voters access to information made public by Congress constitutes injury-in-fact); *Public Citizen v. Dep't of Justice*, 491 U.S. 440, 449 (1989) (holding denial of advocacy organizations' request for information subject to disclosure under Federal Advisory Committee Act provides sufficiently distinct injury for standing)).

Moreover, there is a key distinction between this case and *Spokeo* that the Fourth Circuit failed to recognize. This Court highlighted that bare procedural violations of the Fair Credit Reporting Act do not inherently present a material risk of harm. *Spokeo*, 136 S. Ct. at 1550 ("It is difficult to imagine how the dissemination of an incorrect zip code, without more, could work any concrete harm."). In contrast, kickback schemes—like the one in this case—always present a material risk of harm to consumers because they are an abusive practice that deprive consumers of impartial and fair competition among settlement services providers and tend to unnecessarily increase settlement costs. *See* Dep't of Hous. & Urban Dev. & Veterans' Admin., Mortgage Settlement Costs 3, 15–16 (1972); 120 Cong. Rec. H11591 (statement of Rep. Barrett); 12 U.S.C. 2601(a).

C. Kickback Claims Have Close Relationship to Unjust Enrichment

Unjust enrichment has a close relationship to both the denial of kickback-free real estate transactions and the deprival of impartial and fair competition among settlement services providers. Notably, the *Spokeo* Court stated that history, in addition to congressional judgment, is instructive "[i]n determining whether an intangible harm constitutes injury in fact." *Spokeo*, 136 S. Ct. at 1549. In this respect, the *Spokeo* Court stated as follows:

> Because the doctrine of standing derives from the case-or-controversy requirement, and because that requirement in turn is grounded in historical practice, <u>it is instructive to consider whether an alleged intangible harm has a close relationship to a harm that has traditionally been regarded as providing a basis for a lawsuit in English or American courts.</u>

Id. (emphasis added). In this case, the Petitioners alleged intangible harms that have a close relationship to unjust enrichment, providing grounds for injury-in-fact in accordance with the *Spokeo* Court's holding.

At common law, any person who is unjustly enriched at the expense of another is subject to liability in restitution. Restatement (Third) of Restitution and Unjust Enrichment § 1 (Am. Law Inst. 2011). The "consecrated formula 'at the expense of another' can also mean 'in violation of the other's legally protected rights,' without the need to show that the claimant has suffered a loss." *Id.* § 1 cmt. a. A person interferes with a claimant's legally protected interests when they violate "another legal duty or prohibition . . . if the conduct constitutes an actionable wrong to the claimant." *Id.* § 44(2). Anyone "who obtains a benefit by conscious interference with a claimant's legally protected interests . . . is liable in restitution as necessary to prevent unjust enrichment[.]" *Id* § 44(1). In addition, a person is not permitted to profit from their own wrong, as the Northrop Respondents did in this case. *Id.* § 3.

Thus, claims brought for violation of RESPA's anti-kickback provision have a close relationship to common law actions because interference with legally protected interests—*i.e.*, the right to kickback-free settlements under RESPA and impartial and fair competition among settlement services providers—permits plaintiffs to sue for restitution under a theory of unjust enrichment. In addition, under Maryland law, unjust enrichment occurs when a plaintiff confers a benefit on the defendant which the defendant knows or appreciates. *Hill v. Cross Country Settlements, LLC*, 402 Md. 281, 295 (2007). The benefit conferred must also be of such a nature that it would be inequitable to allow the defendant to retain it. *Id.*

In its opinion, the Fourth Circuit recognized that "the unjust enrichment cause of action is ensconced in our legal traditions." Pet'rs' App., at 23a. However, the Fourth Circuit rejected the Petitioners' allegation that the Northrop Respondents were unjustly enriched by holding as follows:

> [I]n an action for unjust enrichment, a plaintiff need only establish that the defendant's gain was 'without adequate legal basis.' The plaintiff need not show that she suffered any harm from the defendant's gain.
>
> On this record, the [Petitioners] have not demonstrated that the benefit purportedly obtained by the Northrop [Respondents]—that

> is, a kickback—worked any harm other than the alleged violation of RESPA.

Pet'rs' App., 28a (quoting Restatement (Third) of Restitution and Unjust Enrichment § 1 cmt. b (Am. Law Inst. 2011) (citations omitted)).

Contrary to the Fourth Circuit's holding, the Petitioners established the Northrop Respondents were unjustly enriched by submitting evidence to establish all three elements of unjust enrichment under Maryland law. First, the Petitioners submitted evidence that they paid $3,465.00 to Lakeview, $1,495.00 of which was funneled to the Northrop Respondents as undisclosed compensation through an illegal kickback. J.A. at 795, 797. Second, it is indisputable that the Northrop Respondents knew and appreciated the benefit conferred upon them based on the secret spreadsheets sent to the Northrop's home address, which they would check for accuracy to ensure they received every illegal payment in full. J.A. at 688, 709–14, 717–19, 722–74. Third, the Petitioners also demonstrated that the kickbacks provided the Northrop Respondents with an inequitable benefit because they were not entitled to retain such undisclosed compensation. J.A. at 695, 699, 797.

Instead of returning the kickbacks to the Petitioners in the form of a discount or rebate, the Northrop Respondents forced the Petitioners to pay more than they should have by retaining undisclosed compensation. Consequently, the Northrop Respondents were unjustly enriched to the tune of $603,070.00 in total. J.A. at 706–07. Thus, under *Spokeo*, the Petitioners alleged an intangible harm with a close relationship to a harm that has traditionally been regarded as providing a basis for lawsuit in American courts—*i.e.*, unjust enrichment. As such, the Petitioners and the 1,088 class members suffered an injury that is sufficiently concrete for purposes of Article III standing.

D. Fourth Circuit Created More Conflict by Distinguishing ABA Precedent

The Fourth Circuit erred when it attempted to draw a distinction between this case and the factual circumstances of *Alston* and *Carter*. *See* Pet'rs' App., 18a–19a. The Fourth Circuit reasoned that this case is distinguishable because *Alston* and *Carter* involved situations where the defendants had an ABA. Pet'rs' App., 19a. In fact, the lack of an ABA between the Respondents strengthens the case for finding the Petitioners suffered a concrete harm, because the Respondents have no protection under RESPA's safe harbor provision for ABAs.

Under RESPA, an ABA is defined as follows:

> [A]n arrangement in which (A) a person who is in a position to refer business incident to or a part of a real estate settlement service involving a federally related mortgage loan, or an associate of such person, 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 persons directly or indirectly refers such business to that provider or affirmatively influences the selection of that provider[.]

12 U.S.C. § 2602(7). RESPA's corresponding regulations define "affiliate relationship" as follows:

> [T]he relationship among business entities where one entity has effective control over the other by virtue of a partnership or other agreement or is under common control with the other by a third entity or where an entity is a corporation related to another corporation as parent to subsidiary by an identity of stock ownership.

12 C.F.R. § 1024.15(c). Thus, an ABA refers to a relationship of ownership or control between the referring party and the settlement services provider. *Id.* RESPA includes a safe harbor provision that permits the use of ABAs if certain conditions are met. *See* 12 U.S.C. § 2607(c). The ABA must be disclosed to the customer, the customer must not be required to use any particular settlement services provider, and the referring party must receive only a return on its ownership interest in the ABA. *Id.*

In this case, the Respondents did not have an ABA or an affiliate relationship, and they made no efforts to establish either of these lawful business relationships. Without an ABA, the Respondents have no protection from liability under RESPA's safe harbor provision for their illegal kickback scheme. The case for finding concrete harm is thus strengthened because this is not a case alleging technical non-compliance with RESPA's safe harbor requirements.

E. Fourth Circuit's Holding Permits Illegal Kickbacks for Referrals for Title Insurance Premiums

Under the filed rate doctrine, a rate filed with a governing agency—like Lakeview's rate for the Petitioners' title insurance premium in this case—are "unassailable in judicial proceedings brought by ratepayers." *Alston*, 585 F.3d at 763 (citing *Wegoland Ltd. v. NYNEX Corp.*, 27 F.3d 17, 18 (2d Cir. 1994)). The Fourth Circuit's holding will nullify much of RESPA's protections because plaintiffs cannot prove that title insurance premiums were unreasonable.

The Petitioners were charged $2,990.00 for their title insurance premium by the Lakeview Respondents, $1,495.00 of which was funneled to the Northrop Respondents as a kickback. J.A. at 795, 797. Title insurance premiums are sold in Maryland (like elsewhere) at fixed rates that must be filed with and approved by the Maryland Insurance Administration ("MIA"). Md. Code, Ins. §§ 11-401(a), 11-403(a)(1), 11-404, 11-407(a)–(b). Once approved by the MIA, the title insurer cannot deviate from established rates and premiums or provide a rebate or discount to the insured. *Id.* § 11-407(b).

The Fourth Circuit holds the Petitioners, and others similarly situated, to an unrealistic standard to maintain a RESPA action based on illegal kickbacks. Under the Fourth Circuit's holding, consumers must now provide evidence of an overcharge when the charge for the premium in question is controlled by statute and approved by a government agency. The Fourth Circuit stated as follows:

> To the extent that the fees charged by the Lakeview Title Company were reasonable, the [Petitioners] do not contend that they were harmed by being overcharged for settlement services. Instead, the [Petitioners] contend that they were harmed by being deprived of impartial and fair competition between settlement services providers. . . . [T]he deprivation of impartial and fair competition between settlement services providers — untethered from any evidence that the deprivation thereof increased settlement costs — is not a concrete injury under RESPA.

Pet'rs' App., 17a. The Fourth Circuit's holding, if unchecked, will permit kickback schemes so long as the rates charged to consumers are filed and approved and thus cannot be deemed unreasonable. This would defeat the purpose behind RESPA Sections 2601(a) and 2607(a), which is to prohibit abusive practices, like kickbacks, that do not require evidence of an overcharge.

II. Fourth Circuit Erred in Rejecting Fiduciary-Based Harm

Even if evidence of an overcharge is required to maintain a RESPA action based on illegal kickbacks, the Fourth Circuit erred by rejecting allegations and evidence of fiduciary-based harm put forward by the Petitioners. In other words, if more than the denial of impartial and fair competition among settlement services providers is needed to establish a concrete harm in a RESPA action based on kickbacks, the Petitioners successfully alleged and established such a harm. By accepting kickbacks for referrals, the Northrop Respondents caused the Petitioners and all 1,088 class members to suffer two injuries. They were overcharged because they did not receive a discount or rebate in the amount of the kickbacks, and by paying for a service—the impartial advice and advocacy of their fiduciaries, the Northrop Respondents—which they did not receive.

A. Petitioners Established Fiduciary Relationships

The Fourth Circuit accurately stated that they were to employ a de novo standard of review while reviewing the District Court's award of summary judgment. Pet'rs' App., 11a. While reviewing a motion for summary judgment, "the judge's function is not himself to weigh the evidence and determine the truth of the matter but to determine whether there is a genuine issue for trial." *Anderson v. Liberty Lobby*, 477 U.S. 242, 249 (1986); *see also* Fed. R. Civ. P. 56(a). Thus, courts are not to hold a mini-trial on factual issues at the summary judgment stage, instead the judge is to determine "whether . . . there are any genuine factual issues that properly can be resolved only by a finder of fact because they may reasonably be resolved in favor of either party." *Anderson*, 477 U.S. at 250. What is more, the "evidence of the non-movant is to be believed, and all justifiable inferences are to be drawn in his favor." *Id.* at 255 (citing *Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 158–59 (1970)). Yet, the Fourth Circuit failed to properly apply this standard by rejecting factual allegations the Petitioners supported with sufficient evidence as the non-moving party.

The Fourth Circuit stated that the Petitioners' contention regarding the existence of a fiduciary relationship rested solely on "their boilerplate recitation that, under Maryland law, a real estate broker 'stands in a fiduciary relationship' to her client." Pet'rs' App., 21a. That is simply not true.

In the operative complaint, the Petitioners alleged the existence of a fiduciary relationship between themselves and the Northrop Respondents. J.A. at 32 ("In or about June 2008, Plaintiffs engaged Long & Foster, Creig Northrop, and the Northrop Team to represent them in the purchase of a new home."). In opposition to the Respondents' Motion for Summary Judgment, the Petitioners confirmed they hired each of the Northrop Respondents by submitting affidavits to support their allegations. J.A. at 693, 697. Further, the Petitioners presented Respondent Creig Northrop's testimony that the Northrop Team was obligated to look out for the "best interest" of all its clients (*i.e.*, a fiduciary standard) with regard to real estate services. J.A. at 681. Conversely, the Northrop Respondents did not even dispute they were fiduciaries in the District Court and provided no evidence to the contrary on appeal.

Despite clear evidence that the Northrop Team was a fiduciary of the Petitioners and all class members, the Fourth Circuit held the Petitioners failed to establish they had a fiduciary relationship with the Northrop Respondents. Pet'rs' App., 21a-23a. Determining issues of fact—*i.e.*, whether there existed a fiduciary relationship—are to be decided by a jury. However, the Fourth Circuit effectively held a mini-trial on a key factual issue in this case and reached a conclusion in direct conflict with evidence put forth by the Petitioners.

Thus, the Fourth Circuit erred in holding that no fiduciary relationship existed between the Petitioners and the Northrop Respondents. Importantly, that fiduciary relationship gave rise to fiduciary duties owed to the Petitioners, which the Northrop Respondents violated by receiving an illegal kickback. Those violations, in turn, gave rise to harm in the form of an overcharge, constituting a sufficiently concrete injury under the Article III standing analysis.

B. Petitioners and Class Members Suffered Concrete Harm of Being Overcharged

The Petitioners have standing to bring their RESPA kickback claims because they suffered an injury that everyone agrees is concrete and particularized—an overcharge. Although the Petitioners did not offer evidence that the fees charged by the Lakeview Respondents for title insurance were above market rates, they still paid more than they should have because their fiduciaries, the Northrop Respondents, received undisclosed compensation in the form of kickbacks. In addition, the Petitioners and all class members were overcharged because they paid the Northrop Respondents for services they never received.

i. Overcharges Based on Lack of Rebate or Discount

Fiduciaries are not permitted to use their position with their principals to secretly and illegally generate additional fees for themselves. As fiduciaries of the Petitioners and class members, the Northrop Respondents were required to disclose all material information related to their real estate transactions, and they could not receive additional, secret benefits from those relationships. *See Crandon v. United States*, 494 U.S. 152, 158 (1990) ("[A]n agent who secretly profits from a breach of a fiduciary obligation to his principal must disgorge his ill-gotten gains."); *Holzman v. Fiola Blum, Inc.*, 125 Md. App. 602, 628 (1999) ("[I]f a broker breaches his or her fiduciary duty, acts in bad faith, or in another opprobrious manner, he or she may forfeit the right to compensation."); *Homa v. Friendly Mobile Manor, Inc.*, 93 Md. App. 337, 352 (1992) ("[A]n agent hired to sell property on behalf of a principal owes a fiduciary duty to the principal and . . . when the agent breaches that duty, the agent may forfeit his right to compensation.").

In this case, the Northrop Respondents received undisclosed compensation in the form of kickbacks. To confirm they suffered harm in the form of an overcharge, the Petitioners made the following statement in their affidavits:

> We were also harmed because we were entitled to receive as a discount the amounts that were given back to the Northrop Team as kickbacks. That is, the Northrop Team received 50% of what we paid in title insurance premium back, and that amount should have been passed on to us as a discount because the Northrop Team never disclosed to us that they would be receiving half of the premium that we paid to Lakeview.

J.A. at 695, 699.

Similarly, it is undisputed that the Northrop Respondents received compensation from the Lakeview Respondents stemming from the premiums paid by each class member. Writ large, the Respondents' kickback scheme amounted to a total of $603,070.00. As their fiduciaries, the Northrop Respondents were not permitted to retain this undisclosed compensation. Instead, they were required to disgorge such ill-gotten gains by returning it to the Petitioners and all class members in the form of a discount or rebate. Thus, the Petitioners and all class members were overcharged based on the Northrop Respondents' receipt and retention of prohibited, undisclosed compensation at their expense, constituting a concrete injury under the Article III standing analysis.

ii. Overcharge Based on Denial of Impartial Advice and Advocacy

Because their fiduciaries accepted kickbacks, the Petitioners and each class member also suffered the concrete injury of paying for a service—the impartial advice and advocacy of their fiduciaries, the Northrop Respondents—that they did not receive. As fiduciaries, the Northrop Respondents were required to act in the best interests of the Petitioners and each class member. But the Northrop Respondents did not do so. Instead, they acted in their own interests when they referred the Petitioners and class members to Lakeview in return for illegal kickbacks. To confirm they suffered this injury, the Petitioners submitted affidavits where they stated as follows:

> We were also harmed because we relied on our real estate professionals to give us a professional recommendation that was in our best interests. The fees we paid the Northrop Team were to represent our best interests in the sale and purchase of our home, and we were harmed because we did not get what we paid for—*i.e.*, the Defendants did not represent our best interests but rather referred us to Lakeview in order to receive kickbacks.

J.A. at 695, 698.

Moreover, the Northrop Respondents' referrals of the Petitioners and class members to the Lakeview Respondents were part of a fiduciary relationship because they used the fiduciary relationship of trust to successfully refer them. The Northrop Respondents also took it upon themselves to make the referrals, thus voluntarily bringing their services within the scope of the fiduciary relationship.

The illicit business dealings of the Northrop Respondents were to the direct detriment of the Petitioners and each of the 1,088 class members. Hence, they paid for a service that they did not receive—impartial advice and advocacy—and were thus overcharged, which constitutes a concrete injury for purposes of Article III standing.

However, the Fourth Circuit held the Northrop Respondents did not enter a fiduciary relationship with the Petitioners, dodging the important question of fiduciary-based harms. Therefore, this case provides an opportunity to settle an important question of federal law that has not been, but should be, settled by this Court: whether plaintiffs can establish a concrete harm based on evidence of a fiduciary relationship with a party who received prohibited, undisclosed compensation and violated their duty to provide impartial advice and advocacy.

CONCLUSION

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted.

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