Scandalous Practices: What do Rick Pitino and Marketing Services Agreements Have in Common?

By Michael G. Barone, Esq.

A few weeks ago, the sports world was shocked as it learned that the FBI had conducted an investigation into the payment of large sums of money to high school college basketball recruits in exchange for their commitment to attend a specific university. While this is something which has gone on in college sports for many years, it was surprising that the allegations involved Rick Pitino, one of the greatest college basketball coaches of all time, and representatives of Adidas, which is a large sponsor of many collegiate basketball programs. It is alleged in court records that Pitino and several others (including Adidas representatives) conspired to pay the family of a highly recruited high school basketball player $100,000 for his commitment to play basketball at Louisville. The recruiting money was initially paid to an AAU basketball program, which then paid the money to the family of the high school basketball player.

As I was reading about the alleged funneling of funds from Adidas to the AAU program, and the alleged payment of the money from the AAU program to the family (which very well could have been disguised as payments for services), it reminded me of the issues involving Marketing Services Agreements (MSAs) today. Isn't the payment of money by mortgage lenders to realtors and other service providers for services which are not actually rendered what the CFPB and state regulators try to ensure is not occurring when examining relationships between realtors/service providers and lenders?

So, just as every collegiate basketball program should re-examine their recruiting procedures in light of the recent FBI investigation and arrests, mortgage lenders should also constantly review their MSA programs to ensure they are in line with the influx of regulatory guidance (whether through CFPB consent orders or otherwise) regarding MSAs.

The current regulatory environment has made it much more difficult for mortgage lenders and realtors (or any other service provider in a MSA relationship) to operate. Mortgage

lenders and service providers interested in entering into, or continuing, MSA relationships must act prudently and maintain MSA programs that monitor all aspects of the MSA relationship.

Implementing the below recommendations will help an MSA program meet regulatory scrutiny:

- MSAs should only be entered into after careful evaluation of the structure of the relationship.
- MSAs should be entered into between companies, rather than individuals, such as loan originators and/or real estate agents.
- MSAs cannot be a proxy for illegal referral or kickback payments.
- MSA arrangements should be in writing, with all material terms adequately documented.
- MSAs cannot require exclusivity as part of the arrangement.
- MSAs should not indicate that the relationship is that of a "preferred" relationship and should not require an endorsement or recommendation of a particular settlement service provider.
- Services to be performed under a MSA must be clearly articulated and documented within a written agreement between the parties.
- Services should be geared towards marketing and advertising.
- MSAs should not include payment for direct access to the service provider or for directly soliciting consumers.
- A qualified and independent third party should determine the fair market value for the proposed services.
- MSAs should be set up as flat fee arrangements for services rendered and never based on production or volume amounts.
- A party should not pay or receive a fee above the fair market value for the services offered, as it could be a potential violation of Section 8 of RESPA.
- Prior to making any payments, the parties must verify that the services contracted for have actually been performed and proof that the services rendered is archived for future reference. If any of the services are not rendered, a regulator may determine that all or a

portion of the fee paid as part of the MSA is a referral fee in violation of Section 8 of RESPA. Therefore, a mortgage lender must ensure that it only pays for services actually rendered.

- Revising the fee paid for marketing services must be for objective reasons and cannot be related to production or volume.
- A written disclosure to consumers of the MSA relationship is highly encouraged.

Failure to strictly adhere to these suggestions may result in a regulator claiming that you are funneling money to a referral source or paying for services that are not actually rendered. These allegations are substantively similar to those being made against Rick Pitino and Adidas, albeit pursuant to a different fact pattern and situation.

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Michael is a partner in the law firm of Abrams Garfinkel Margolis Bergson, LLP, which has offices in New York and California. He oversees the firm's mortgage compliance department and is a member of the firm's real estate and banking departments. Michael also serves as the Executive Director of Compliance and General Counsel to Mortgage Quality Management & Research, LLC ("MQMR"), the premier provider of risk management and compliance services for mortgage originators and servicers. Michael oversees all compliance and regulatory guidance for MQMR's clients. Michael has more than 20 years of experience representing nationally recognized mortgage lenders and brokers on all types of Federal and State compliance, transactional, and litigation matters including RESPA, Regulation Z, Regulation B, the Truth in Lending Act, the Dodd Frank Act, loan officer compensation, high cost limitations, and state licensing. Michael earned his law degree from Hofstra University School of Law, where he served as the Notes and Comments Editor of the Hofstra Labor and Employment Law Journal. Michael is a frequent speaker on compliance-related topics at mortgage industry and association meetings.