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Cover Page Footnote

I want to thank Ronald Kessler for his assistance in providing me with the articles he wrote for the Washington Post in 1972, which helped give rise to the Real Estate Settlement Procedures Act.

A PRODUCT OF COMPROMISE: OR WHY NON-PECUNIARY DAMAGES SHOULD NOT BE RECOVERABLE UNDER SECTION 2605 OF THE REAL ESTATE SETTLEMENT PROCEDURES ACT

George S. Mahaffey Jr.[*]

I. INTRODUCTION

Imagine if you will, the following: A and B are married and have rented an apartment for five years. Intrigued by low interest rates and incentive programs for first time home purchasers, A and B make plans to purchase a small single family home. They contact C Mortgage Company and obtain a residential mortgage loan in January of 2000. WhileC initially financed the mortgage, the loan servicing was transferred to D Mortgage Servicing, Inc. in January of 2002. Assume that C apprised A and B of the transfer in writing on January 7, 2002. Assume further that A and B previously forwarded their December 2001 mortgage payment to C.

On January 23, 2002, D sends a letter to A and B informing them that their December 2001 mortgage payment for $1500 was past due and unpaid. On January 29, 2002, A and B notify D in writing that the December 2001 payment was in fact made to C and that the January 2002 payment was made to D. On March 1, 2002, D sends a letter to A and B informing them of various late charges and that their mortgage is now in default.[1] A and B then promptly send a letter to D wherein they dispute the late charges and enclose a copy of the December 2001 check, sent to C. D responds that such matters can only be resolved between A, B, and C and that it is not D's duty to rectify any misunderstandings between said parties. Thereafter a flurry of correspondence takes place between A, B, C, and D, each blaming the other for the problems taking place and ends with D sending final notices of default and late charges to A and B.

Assume that in June of 2002, A and B file suit against C and D in federal court alleging, *inter alia*, violations of § 2605 of the Real Estate Settlement Procedures Act[2] ("RESPA"). In their complaint, A and B allege that C and D violated § 2605(e)(2)(A) and § 2605(e)(3) of RESPA, and seek damages for, *inter alia*, emotional distress allegedly caused by the conduct

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[1] Assume that D contends that A and B never sent the January 29, 2002 letter.

[2] 12 U.S.C. § 2601 (2000) ("RESPA").

of C and D. In proffering their argument, A and B allege that their emotional distress claims constitute "actual damages" under § 2605(f) of RESPA.[3]

A and B's claims for emotional damages seem rather straightforward and uncomplicated, right? After all, if C and D did violate a federal statute, one might hastily surmise that non-pecuniary damages should be recoverable. Unfortunately, while the issue of damages appears uncomplicated at first blush, a number of courts have had a most difficult time ascertaining the meaning of "actual damages" under § 2605(f) of RESPA; indeed courts have split on the issue of whether injuries for non-pecuniary damages are recoverable under RESPA.[4] As will be discussed in this Article, the split in opinion seems to stem from each court's divergent interpretation of the purpose and goals of RESPA as well as other "remedial, consumer-protection" statutes. The split in opinion may also stem from the failure of these courts to construe RESPA as a product of legislative compromise.

This Article will argue that non-pecuniary damages[5] should not be recoverable under RESPA. It posits that while a clear-cut definition for the term "actual damages" has proven elusive under various theories of statutory interpretation, it is the very essence of RESPA that counsels against the broad construction that has so often been employed with regard to the statute's actual damages provision as set forth in § 2605(f). Part II will examine the history and purpose of RESPA along with the Truth in Lending Act, the Equal Credit Opportunity Act, and the Fair Credit Reporting Act, three other "remedial, consumer-protection" statutes with which RESPA has often been compared. Part III will review the case law to demonstrate the judicial split over the issue of the recoverability of emotional distress damages under § 2605(f) of RESPA. In analyzing the case law, it becomes evident that courts allowing for the recovery of emotional distress damages have relied heavily on the so-called remedial purpose canon as an aid in the interpretation of § 2605(f).

Part IV will analyze various methods of statutory interpretation with regard to RESPA. In addition to the various methods used to interpret statutes, this section will also analyze the remedial purpose canon as an aid in the interpretation of § 2605 of RESPA. Part V will argue against allowing recovery of emotional distress damages under § 2605(f) of RESPA. Because the legislative history of RESPA shows the statute to be the product of

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[3] This hypothetical is based on an amalgam of cases. *See infra* nn. 61-112 and accompanying text.

[4] *See infra* nn. 61-112 and accompanying text (discussing cases disfavoring and favoring recovery of non-pecuniary damages under § 2605).

[5] I use the term "non-pecuniary damages" in this Article to refer to damages alleged for emotional or mental distress.

legislative compromise, this Article takes the stance that it is improper to employ the remedial purpose canon in an effort to broadly construe the actual damages provision in § 2605(f). Moreover, because RESPA does not concern itself with the protection of "dignitary interests," it is improper to broadly construe the statute in order to award non-pecuniary damages. Without the benefit of a liberal interpretation, it then becomes apparent that "actual damages" under § 2605(f) of RESPA should not encompass non-pecuniary damages. Part VI contains a proposed three-part analysis to employ when attempting to construe the "actual damages" provisions in those statutes (such as RESPA) that fail to explicitly define the term. Part VI will continue by employing this analysis with regard to RESPA in order to demonstrate how it might help in construing the actual damages provision in § 2605(f) of RESPA. Part VII will conclude with some closing remarks.

II. FEDERAL MORTGAGE LENDING LAWS

A. The Consumer Credit Protection Act and the Evolution of Consumer Lending

After the end of the Second World War, restrictions on credit were lifted and the modern era of consumer credit and lending was born.[6] During this post-war period, the derisive term "consumptive debt" was replaced with the more pleasant term "consumer debt," as a whole generation of Americans became all too familiar with credit cards and other new innovations in lending and debt management. As the Federal Government gradually lifted restrictions, consumers became beholden to the burgeoning and soon to be monolithic debt management industry. The post-war growth in consumer arrearage and the maturation of the debt trade soon gave rise to heightened congressional concern over the protection of the consumer vis-à-vis the consumer credit industry. Concerns were raised about the protection of the consumer such that several pieces of legislation were soon proposed to "safeguard" the consumer from unscrupulous individuals and practices.[7] In its zeal to address matters of consumer spending, Congress overlooked several areas of importance, including those relating to consumer lending and borrowing in the real property arena. These areas had been largely

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[6] *See* Lendol Calder, *The Meaning of Consumer Credit in the United States*, 20 Am. Bankr. Inst. J. 52, 52 (2002).

[7] *See id.*

unregulated during the post-war period.[8] During the early and mid-1960s, however, the federal government became increasingly concerned with these and other matters pertaining to consumer debt, borrowing, and lending. Specifically, the government became concerned with the increasing costs distributed to the consumer by lenders, the rampant discrimination faced by many in the consumer lending arena, and the confusion over the language set forth in borrowing materials. Beginning in the mid to late-1960s, Congress was deluged with consumer complaints about the rising cost and confusing nature of real property settlement expenses.[9] As a result of these and other problems, Congress enacted the Consumer Credit Protection Act[10] ("CCPA") in 1968. The CCPA was in fact the first legislation passed to protect consumers.[11] While the CCPA and later the Truth in Lending Act[12] ("TILA") did not specifically address the rise in settlement costs, Congress addressed the matter in the Emergency Home Finance Act of 1970.[13] Thereafter, Congress earnestly began to enact a number of additional statutes to protect the consumer.

1. The Truth in Lending Act

The Truth in Lending Act took effect on July 1, 1969 with a simple purpose, principally "to assure a meaningful disclosure of credit terms so that the consumer will be able to compare more readily the various credit terms available to him and avoid the uninformed use of credit."[14] As some have noted, TILA, rather than being a "consumer-protection statute," was seen primarily as a "disclosure statute," requiring that consumer creditors disclose salient terms of credit transactions in uniform terminology so that consumers can shop credit terms and compare apples to apples.[15] Previously, creditors were free to disclose credit terms that often varied from creditor to creditor and from transaction to transaction. TILA also provided certain substantive provisions, such as rescission rights for certain mortgage loans

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[8] *See id.*

[9] *See* H.R. Subcomm. on Hous. of the Comm. on Banking and Currency, *Real Estate Settlement Costs: Hearings on H.R. 9989*, 93rd Cong. 11460 (Dec. 4, 1973).

[10] Pub. L. No. 90-321, 82 Stat. 146 (1968).

[11] *See* Michael Darrow, *The Real Estate Settlement Procedures Act of 1974, As Amended in 1975*, 5 U. Balt. L. Rev. 383, 384 (1976).

[12] 15 U.S.C. § 1601 (2000). TILA was in fact Title I of the CCPA.

[13] Pub. L. No. 91-351, 84 Stat. 450 (1970).

[14] 15 U.S.C. § 1601.

[15] Kenneth R. Redden & James McClellan, *Federal Regulation of Consumer-Creditor Relations*, § 1.1, 7 (Michie Co. 1982) (noting that TILA is "primarily a disclosure statute").

and certain restrictions on high rate mortgages under the Home Owners Equity Protection Act.

2. The Equal Credit Opportunity Act

Congress enacted the Equal Credit Opportunity Act ("ECOA") in 1975 as an amendment to the CCPA to limit the ability of lenders to deny credit to certain protected persons and classes.[16] Specifically, ECOA applies to denials of credit when (1) the applicant seeks "to defer payment of debt," (2) the applicant seeks "to incur debts and defer its payment," or (3) the applicant seeks to purchase goods, other property, or services, and defer payment of the purchase price.[17] In terms of the breadth of the statute, the ECOA as enacted prohibited discrimination on the basis of race, color, religion, national origin, sex, marital status, or age.[18]

3. The Fair Credit Reporting Act

Congress enacted the Fair Credit Reporting Act[19] ("FCRA") to protect consumers in their dealings with credit reporting agencies. Specifically, FCRA protects consumers by requiring credit bureaus to furnish accurate and complete information to businesses when they evaluate applications for credit, insurance, or jobs.[20] The FCRA was enacted because Congress wanted "to insure that consumer reporting agencies exercise their grave responsibilities with fairness, impartiality, and a respect for the consumer's right to privacy."[21]

4. Purpose Behind the Acts

While the emphasis in each law was unique, the goal of each was the same, namely protection of the consumer from discrimination and other alleged abusive practices. TILA, for instance, was concerned with protecting

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[16] 15 U.S.C. § 1691(a)-(f) (2000).

[17] *Id.* § 1691(a)-(d).

[18] *Id.* § 1691(a); *see* Redden & McClellan, *supra* n. 15, at 238 (noting that "[o]ne of the primary purposes of the E.C.O.A. was to allow married women to open credit accounts and to create their own credit histories").

[19] 15 U.S.C. § 1681 (2000).

[20] *See id.*

[21] *Id.* § 1681(a)(4).

consumers from inaccurate and unfair billing.[22] TILA was also concerned with requiring creditors, *inter alia*, to make certain disclosures including: the amount of money financed to a consumer, the amount and number of individual payments to be made by the consumer, and the annual percentage rate at issue.[23] On the other hand, Congress enacted FCRA to limit the "purposes for which consumer credit information may be used" and to grant "consumers the ability to review and object to the contents of credit reports."[24] In a similar vein, the original purpose behind RESPA was to keep the putative home purchaser fully apprised of all settlement costs.[25]

B. History and Purpose of the Real Estate Settlement and Procedures Act

As early as the 1950s, Congress became concerned with the increase in settlement costs to the putative home purchaser.[26] In 1954, Congress enacted the National Housing Act,[27] but it did little to directly address the increasing settlement costs that were preventing many consumers from realizing their dreams of purchasing a home. In the early 1970s, Washington Post reporter Ronald Kessler wrote a series of articles concerning the disparity in settlement costs in Maryland, Virginia, and the District of Columbia.[28] These articles and a rash of consumer complaints eventually spurred Congress to pass legislation to address the multitude of concerns over settlement costs.

In order to directly address the issue of rising settlement costs, Senator William Proxmire helped enact § 701 of the Emergency Home Finance Act of 1970, the predecessor to RESPA.[29] As enacted, § 701 empowered the

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[22] *See id.* § 1601(a).

[23] *See id.* §§ 1631(a)-(b), 1638(a).

[24] R. Glen Ayers, Jr., *Beyond Truth-In-Lending Federal Regulation Of Debt Collection*, 16 St. Mary's L.J. 329, 339-40 (1985) (referencing 15 U.S.C.A. § 1681(b) (West 1982 & Supp. 1984)).

[25] *See infra* nn. 33-38 and accompanying text.

[26] Paul Barron, *Federal Regulation of Real Estate* § 2.01[1] (2d. rev. ed. Warren, Gorham & Lamont 1983).

[27] Pub. L. No. 83-560, 68 Stat. 590 (1954).

[28] *See* Ronald Kessler, *The Settlement Squeeze: Kickbacks Victimize Home Buyers*, Wash. Post A1 (Jan. 9, 1972). In his four part series of articles, Mr. Kessler exposed the kickbacks and payoffs that were part of the settlement process in the late 1960s and early 1970s, noting that "[t]he most common arrangements in the Washington area were found to be kickbacks and other hidden payments given by lawyers and by title insurance companies. They are paid to developers, lenders, real estate brokers, and builders in cash or in free or cut-rate services. The one who pays for all the arrangements is the home buyer." *Id.* at ¶ 6. It was precisely these types of activities that RESPA was supposed to address. It is interesting to note that it was these same groups whose lobbying efforts would eventually lead to the 1975 amendments to what is commonly referred to as RESPA I, amendments that were viewed by many as quite helpful to those groups whose alleged violations RESPA I was enacted to remedy.

[29] *See supra* n. 13.

Secretary of Housing and Urban Development ("HUD") and the Administrator of Veterans Affairs to conduct an analysis and undertake a study of, *inter alia*, the amount of settlement costs on certain government insured loans.[30] This study was published in 1972 and was important inasmuch as it addressed several areas of concern with regard to settlement costs.[31] The impact of the study was that the federal government was prodded to promulgate legislation to govern settlement fees and costs.[32] After much debate and discussion, two bills were offered, Senate Bill 3164 and its counterpart, House Bill 9989.[33] In 1974, Senate Bill 3164 was signed into law, and RESPA was born.[34]

RESPA, in its initial form, became effective on June 20, 1975.[35] Section 2601 of RESPA set forth the purpose of the statute as enacted, noting that one of the reasons for the enactment was that:

> [C]ongress finds that significant reforms in the real estate settlement process are needed to insure that consumers throughout the Nation are provided with greater and more timely information on the nature and costs of the settlement process and are protected from unnecessarily high settlement charges caused by certain abusive practices that have developed in some areas of the country.[36]

In enacting RESPA in 1974, Congress had several specific goals in mind, including the following: (1) providing for more effective advance disclosures to buyers and sellers concerning settlement costs; (2) eliminating unnecessary settlement referral fees; (3) reducing the amount of money placed in escrow accounts by purchasers; and (4) reforming local land title

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[30] Carol V. Clark, *Padrick's RESPA, TILA, HOEPA, and ECOA In Real Estate Transactions* § 1-3, 4 (4th ed. Harrison Co. 2001).

[31] *Id.*

[32] *Id.*; *see* Sen. Rpt. 93-866 (May 22, 1974) (reprinted in 1974 U.S.C.C.A.N. 6546, 6547).

[33] *Id.* As we shall see, the distinctions between the two bills will be important to the issue of emotional distress damages under § 2605 of RESPA.

[34] *See* Clark, *supra* n. 30, at §§ 1-3, 5; Sen. Rpt. No. 93-866 (reprinted in 1974 U.S.C.C.A.N. at 6547-48) (noting that in 1973 and 1974 two different approaches were proposed to deal with the problem of settlement costs. One approach, favored by Senator William Proxmire, had the federal government regulating closing costs directly. The other approach, favored by Senator William Brock and eventually adopted in Senate Bill 3164, proposed the regulation of the "underlying business relationships and procedures of which the costs are a function." In taking the second approach, it was hoped that the putative home purchaser would be benefited by the regulation of unreasonably inflated settlement costs.).

[35] While RESPA was approved on December 22, 1974, it did not become effective until 180 days thereafter. *See* Darrow, *supra* n. 11, at 384 n. 15.

[36] 12 U.S.C. § 2601(a) (1975).

record keeping.[37] As the Chairman of the Subcommittee on Housing and Community Opportunity succinctly stated, RESPA "was intended to prohibit abuse by realtors who referred potential borrowers or home purchasers to certain lenders and settlement services."[38]

While championed by many in Congress and the judiciary as an example of a remedial, consumer-protection statute, RESPA faced heavy criticism almost from the first day it was enacted.[39] The criticism focused on the fact that many putative home purchasers felt that RESPA harmed rather than protected them. They also felt RESPA was a failure in that it did not lower settlement costs and did not benefit the consumer via its new disclosure requirements.[40] As a result of the heavy criticism, Congress amended RESPA in 1975[41] and enacted the new version of RESPA, the so-called RESPA II, in January of 1976.[42] As we shall see later in this Article, this new version was also criticized by many inside and outside Congress as a capitulation to the real estate and title company lobbies.[43] While the purpose and language of the amended version of RESPA will be addressed later in this Article, suffice it to say, RESPA's legislative and enactment history show it to be a product of compromise, a classic struggle between industry

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[37] *Id.* § 2601(b)(1)-(4); *see* Anna Beth Ferguson, *Predatory Lending: Practices, Remedies and Lack of Adequate Protection for Ohio Consumers*, 48 Clev. St. L. Rev. 607, 621 (2000); *see generally* Diana Stoppello, *Federal Regulation of Home Mortgage Settlement Costs: RESPA and Its Alternatives*, 63 Minn. L. Rev. 367 (1979) (providing an excellent overview of the then-existing settlement process that RESPA was allegedly enacted to address).

[38] H.R. Comm. on Banking and Financial Services, *Reform of the Real Estate Settlement Procedures Act (RESPA) and the Truth In Lending Act (TILA)*, 105th Cong. 38 (Sept. 16, 1998) (statement of Rep. Rick Lazio R-NY); *see* Ferguson, *supra* n. 37, at 621 (noting that the Congress intended RESPA to require "that lenders provide borrowers with a 'good faith estimate' of settlement costs and a statement regarding whether the lender plans on transferring the loan to another finance company"); *see e.g.* Charles G. Field, *RESPA In A Nutshell*, 11 Real Prop., Prob. & Trust. J. 447, 448 (1976) (reprinting statements made by Charles Field that "RESPA was passed to take the surprise out of the settlement process. . . . By passing RESPA, the Congress intended that the consumer be given sufficient information at an early enough time to permit shopping in the marketplace for the best settlement services . . . .").

[39] Barron, *supra* n. 26 at § 2.01[1] (noting that "[s]ubstantial opposition to RESPA began to build even before it became effective"); *see* Darrow, *supra* n. 11, at 385; H.R. Rep. No. 94-667 (Nov. 14, 1975) (reprinted in 1975 U.S.C.C.A.N. 2448, 2449); 121 Cong. Rec. 30431 (1975) (statement of Rep. Fithian).

[40] *See* Darrow, *supra* n. 11, at 385.

[41] *See* Sen. 2327, 94th Cong. (1975) (suspending §§ 4, 6, and 7 of RESPA I).

[42] Pub. L. No. 94-205, 89 Stat. 1157 (1976). For an excellent overview of the changes in RESPA II, *see* Darrow, *supra* n. 11, at 387-88; *see generally* Field, *supra* n. 38.

[43] H.R. Rep. 94-667, at 17-18 (reprinted in 1975 U.S.C.C.A.N. at 2458). In his dissenting views, Rep. Sullivan notes that RESPA II does away with all of the consumer protections envisioned in RESPA I, noting "this bill has been written to take away protections now in the law for consumers and twist the law into an industry statute." *Id.* at 21. *See* Stoppello, *supra* n. 37, at 368-69 (noting that six months after the passage of RESPA I, an "intensive lobbying campaign by mortgage lenders, real estate brokers, and title insurance companies" was begun in an effort to undo certain portions of RESPA I).

and those calling for increased protection of the consumer.[44] In addition to the amendments in 1975, RESPA was amended in 1983 and again in 1990. The 1990 amendments provide the primary basis for the matters addressed in this Article.

In 1990, RESPA was amended to include § 2605[45] as part of the Cranston-Gonzalez National Affordable Housing Act ("NAHA").[46] At the time of enactment, the overriding objective of the NAHA was to "extend and strengthen partnerships among all levels of government and the private sector" necessary for the "production and operation of housing affordable to low-income and moderate-income [American] families" over the upcoming decades.[47]

C. *Section 2605(f) and the 1990 Cranston-Gonzalez Amendments to Real Estate Settlement and Procedures Act*

In 1987, Congress began a thorough review of the nation's housing needs.[48] After a three-year period of study, Senate Bill 566, also known as the National Affordable Housing Act, was proposed. Included in the voluminous NAHA were certain provisions that amended RESPA. Specifically, near the very end of the act, the House, in an amendment, proposed a series of provisions that would govern the notice that must be given to a borrower when their mortgage servicing is transferred. These provisions, enacted as §§ 941 and 942 of the NAHA, added language to RESPA concerning notice requirements when mortgage servicing was transferred. These provisions would become the present day § 2605 of RESPA as amended in 1990.[49]

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[44] *See* Field, *supra* n. 38; Stoppello, *supra* n. 37, at 369 (noting that RESPA II essentially repealed the consumer heart of RESPA I).

[45] 12 U.S.C. § 2605 (2000). As enacted in 1974, RESPA had a previous § 2605 relating to advanced itemized disclosure of settlement costs by the lender and attendant liability of the lender for failure to comply, but that section was repealed in 1976. *See id.* (noting that the prior § 2605 was repealed by the Act on January 2, 1976).

[46] Pub. L. No. 101-625, 104 Stat. 4405 (1991) (codified as amended at 12 U.S.C. § 2605 (1991)).

[47] *Id.* at § 103.

[48] Specifically, on August 12, 1987, the Committee on Banking, Housing, and Urban Affairs, at the behest of Senator Alan Cranston and Senator Alfonse D'Amato, invited a plethora of organizations to propose changes in the then-current housing legislation.

[49] *See* Laurence E. Platt & Phillip L. Schulman, *A Practical Guide to the Real Estate Settlement Procedures Act* 3-1, 3-11 (Warren, Gorham & Lamont 1996) (providing an excellent overview of the implementation of § 941 of the NAHA (present day § 2605 of RESPA)); 24 C.F.R. pt. 3500 (2002); *Real Estate Settlement Procedures Act, Section 6 Transfer of Servicing of Mortgage Loans*, 56 Fed. Reg.

Under the new § 2605, certain disclosure obligations arose with relation to the transfer of mortgage loan servicing.[50] The plain language of § 2605 reads in relevant part:

> If any servicer of a federally related mortgage loan receives a qualified written request from the borrower (or an agent of the borrower) for information relating to the servicing of such loan, the servicer shall provide a written response acknowledging receipt of the correspondence within 20 days (excluding legal public holidays, Saturdays, and Sundays) unless the action requested is taken within such period.[51]

Under § 2605, every servicer of a federally related mortgage loan must notify the borrower in writing of any assignment, sale, or transfer of the servicing of the respective loan.[52] If under this section, a borrower sends a qualified written request to the loan servicer and the servicer fails to respond or to respond as required under the statute, the borrower can seek damages pursuant to § 2605(f). Section 2605(f)(1), providing for damages and costs, reads:

> [An individual who] fails to comply with any provision of this section shall be liable to the borrower for each such failure [for] . . . an amount equal to the sum of (A) any actual damages to the borrower as a result of the failure; and (B) any additional damages, as the court may allow, in the case of a pattern or practice of noncompliance with the requirements of this section, in an amount not to exceed $ 1,000.[53]

Simply put, § 2605 of RESPA set "forth procedures regarding the transfer of mortgage servicing for any federally-related mortgage loan,"[54] including the requirement that responses must be given to written inquiries from borrowers concerning the transfer of any loan servicing.[55] Under § 2605, a borrower must be given notice of the transfer of the servicing of his or her respective mortgage.[56] Included within § 2605, is a provision that allows for the recovery of certain damages, including statutory damages and

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19506, 19506 (Apr. 26, 1991) (noting that § 941 of the Cranston-Gonzalez NAHA "amended RESPA by adding a new section 6").

[50] *See* Platt & Schulman, *supra* n. 49, at 3-11.

[51] 12 U.S.C. § 2605(e)(1)(A).

[52] *See* Platt & Schulman, *supra* n. 49, at 3-33.

[53] 12 U.S.C. § 2605(f)(1).

[54] 56 Fed. Reg. at 19506 (codified at 24 C.F.R. pt. 3500).

[55] *See* Michael T. Maurer, *Using RESPA to Remedy Erroneous ARM Adjustments*, 49 Consumer Fin. L. Q. Rpt. 115 (1995).

[56] 12 U.S.C. § 2605(e)(1).

actual damages.[57] It is the term "actual damages" in § 2605(f) that has proven to be exceedingly difficult to define and with which this Article is concerned.

While the language of § 2605(f) would appear to be rather uncomplicated, courts are deeply divided over whether the term "actual damages" encompasses only pecuniary loss, or both pecuniary and non-pecuniary loss.[58] The difficulty courts have had in construing actual damages is important, for it directly impacts the issue of whether a putative plaintiff may recover non-pecuniary damages under § 2605(f). As is set forth below, the reason for the split in opinion seems to lie in each court's respective interpretation of RESPA generally and § 2605(f) more specifically.

III. DIVISION IN THE COURTS: CASE LAW INTERPRETING THE DAMAGES PROVISION OF SECTION 2605(F) OF RESPA

In construing whether emotional distress or other non-pecuniary damages are actual damages under RESPA or RESPA-like statutes,[59] courts are almost evenly divided.[60] Since 1993, there have been seven decisions of import with regard to RESPA and its actual damages provision. Four courts held that emotional distress damages were actual damages, two courts determined that they were not, and a final court was unable to come to a definitive conclusion but intimated that non-pecuniary, emotional distress damages were not actual damages.

A. Cases Disfavoring the Recovery of Non-Pecuniary Damages Under Section 2605

In *In re Tomasevic*,[61] the United States District Court for the Middle District of Florida analyzed a debtor's claim for damages against a bank for alleged violations of § 2605 of RESPA.[62] Although it did recognize decisions concluding otherwise (which will be discussed later), the court seemed satisfied that the term "actual damages" did not encompass non-pecuniary

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[57] *Id.* § 2605(f).

[58] *See infra* nn. 61-112 and accompanying text.

[59] *See infra* nn. 81-86 and accompanying text.

[60] *See supra* nn. 49-59 and accompanying text (discussing § 2605 of RESPA); *infra* nn. 61-99 and accompanying text.

[61] 273 B.R. 682 (Bankr. M.D. Fla. 2002).

[62] *Id.*

damages, noting "[a]ctual damages are limited to economic pecuniary injury."[63] While not providing a detailed analysis of the issue, *Tomasevic* is useful in that it is a recent case holding that emotional distress damages probably are not recoverable as "actual damages" under § 2605(f) of RESPA.

In *Cortez v. Keystone Bank, Inc.*,[64] the United States District Court for the Eastern District of Pennsylvania analyzed the plaintiffs' claim that the defendant bank had failed to respond to a written request concerning an allegedly improper interest charge assessment to a home equity line of credit.[65] In finding that the plaintiffs had presented a viable cause of action under RESPA, the *Cortez* court turned to the issue of actual damages under § 2605(f).[66] Like *Tomasevic*, the *Cortez* court did not provide a detailed analysis of § 2605(f). The court, however, did construe RESPA's actual damages provision in holding that "[a]ctual damages encompass compensation for any pecuniary loss . . . ."[67] While the court did not specifically analyze whether emotional damages were recoverable, implicit in the holding is that they may not be, inasmuch as they are non-pecuniary damages. While detractors will certainly emphasize the court's lack of specific analysis regarding non-pecuniary damages, the decision is nonetheless important because the court specifically stated that actual damages under § 2605 encompass pecuniary loss rather than non-pecuniary loss.

In contrast, the United States District Court for the Western District of New York decision in *Katz v. Dime Savings Bank*[68] thoroughly analyzed RESPA's provision for actual damages with regard to claims for non-pecuniary loss and is the seminal case holding that emotional distress damages are not actual damages under RESPA.[69] The plaintiff in *Katz* sought non-pecuniary damages for the defendant's alleged violations of § 2605 of RESPA.[70] Inasmuch as the actual damages provision of § 2605 did not expressly provide for non-pecuniary damages, the court analyzed the plaintiff's argument that actual damages should include "all types of

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[63] *Id.* at 687 (citing *Katz v. Dime Savings Bank*, 992 F. Supp. 250, 256 (W.D.N.Y. 1997)).

[64] 2000 WL 536666 (E.D. Pa. May 2, 2000). Because the *Cortez* court hinted that "actual damages" might be limited to pecuniary damages, I have included the decision in the section of cases disfavoring the recovery of emotional distress damages.

[65] *Id.* at *10.

[66] *Id.* at **11-12.

[67] *Id.* at *12.

[68] 992 F. Supp. 250 (W.D.N.Y. 1997).

[69] *See id.* (relying on 12 U.S.C. § 2605).

[70] *Id.* at 254.

damages, including emotional distress and personal injury" damages.[71] The *Katz* court disagreed with the plaintiff's argument.

Key to the court's analysis was the determination that § 2605 was not a consumer protection statute and was therefore unlike statutes such as TILA and the Fair Debt Collection Practices Act[72] ("FDCPA"), which had been interpreted as allowing for the recovery of non-pecuniary damages.[73] While acknowledging the remedial purpose canon of construction, the *Katz* court rejected its broad interpretation with regard to RESPA, arguing instead that § 2605 "is not a consumer protection statute" and should not be broadly interpreted.[74] Instead, the court noted that the design of § 2605 of RESPA was to "facilitate home ownership."[75] Moreover, the court noted that the damage provision in § 2605 was designed to remedy pecuniary harms and neither the plain language nor the legislative history of § 2605 stated that it was to apply to non-pecuniary, emotional distress damages.[76] Unfortunately, the import of the *Katz* holding is somewhat diminished in that the court arrived at the correct conclusion for the wrong reason.

The court's reasoning in *Katz* was primarily incorrect in that from the plain language of the statute, it was evident that Congress enacted RESPA to protect the putative home purchaser/consumer. While this does not mean that RESPA should have been (or indeed should be) read so broadly as to permit the recovery of emotional distress damages, the court nonetheless was in error in failing to recognize RESPA as a consumer protection statute. Regardless of the *Katz* court's failure to recognize RESPA as a consumer protection statute, the court did correctly hold that emotional distress damages should not be recoverable as actual damages. Indeed, as this Article argues, it is the fact that RESPA is a product of legislative compromise that weighs against the broad interpretation that several courts have employed in allowing for the recovery of emotional distress damages under § 2605(f).

B. Cases Favoring the Recovery of Non-Pecuniary Damages Under Section 2605

While not specifically addressing RESPA's damages provision, the United States District Court for the Northern District of Illinois, in *Hrubec*

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[71] *Id.* at 255.

[72] 15 U.S.C. § 1692 (1998).

[73] *Katz*, 992 F. Supp. at 255.

[74] *Id.* at 255-56.

[75] *Id.* at 256.

[76] *Id.*

v. National Railroad Passenger Corp.,[77] addressed the claims of taxpayers for emotional distress arising out of the unauthorized disclosure of certain federal tax return information.[78] In addressing the taxpayers' arguments for damages, the court analyzed whether emotional distress damages were actual damages under 26 U.S.C. § 7431(a).[79]

In beginning its analysis, the court noted that the issue of whether "actual damages" included emotional distress damages was one of first impression in the jurisdiction.[80] In ascertaining what actual damages meant under the statute, the *Hrubec* court noted that without case law or legislative history to provide guidance, it would have to determine what interests Congress sought to protect in enacting the statute.[81] The court in *Hrubec* determined that the statute protected an interest in privacy and noted that it could then ascertain the type of relief contemplated for a violation of that right or interest.[82] The court then analyzed what type of damages were generally available to alleviate invasions of privacy.[83] The court stated that actual damages in other statutes had been construed to include emotional distress damages.[84] In addition to statutory authority, the court also found that emotional distress damages were generally recoverable in instances of invasions of privacy.[85] Because emotional distress damages were normally recoverable for the violation of the very rights protected by § 7431, the court in *Hrubec* determined that they were actual damages under the statute.[86]

In specifically addressing "actual damages" under RESPA, the United States District Court for the Middle District of Alabama repudiated the *Katz* holding in *Rawlings v. Dovenmuehle Mortgage, Inc.*[87] The plaintiffs in *Rawlings*, like the plaintiff in *Katz*, claimed that the provision in § 2605 of

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[77] 829 F. Supp. 1502 (N.D. Ill. 1993). This case is reviewed and included in this section of the Article because it has often been cited as support by those courts that have allowed the recovery of non-pecuniary damages under § 2605 of RESPA and is illustrative of why many courts have allowed the recovery of non-pecuniary damages when the respective statute at issue is concerned with the protection of "dignitary interests" rather than "economic interests."

[78] *Id.*

[79] *Id.* at 1504. Section 7431(a)(2) of Title 26 of the U.S. Code permits recovery against non-governmental persons who "knowingly, or by reason of negligence, disclose any return or return information . . . in violation of any provision of [26 U.S.C.A. §] 6103." 26 U.S.C.A. § 7431(a)(2) (1989).

[80] *Hrubec*, 829 F. Supp. at 1504.

[81] *Id.* (citing *Carey v. Piphus*, 435 U.S. 247, 259 (1978)).

[82] *Id.*

[83] *Id.* at 1505.

[84] *Id.* (citing, *inter alia*, the Equal Credit Opportunity Act, 15 U.S.C. § 1691(e); Fair Credit Reporting Act, 15 U.S.C. § 1681(n); the Fair Housing Act, 42 U.S.C. § 3612(c) (2000); and 42 U.S.C. § 1983) (2000)).

[85] *Id.* at 1506.

[86] *Id.*

[87] 64 F. Supp. 2d 1156 (M.D. Ala. 1999).

RESPA for actual damages should be read broadly to include damages for "mental anguish."[88] At the outset of its analysis, the court stated the issue to be one of first impression in the Eleventh Circuit.[89] The term actual damages did not have a "plain meaning."[90] In interpreting the legislative history of RESPA, the *Rawlings* court relied heavily on the remedial purpose canon in noting that, "Congress intended RESPA to be a remedial consumer-protection statute."[91] Because the court viewed RESPA as a "remedial consumer-protection statute," it found that it was required to construe the provisions of the statute liberally.[92] In construing § 2601 and § 2605 liberally, the *Rawlings* court found that actual damages should encompass damages for mental anguish.[93]

The decision is interesting for several reasons. In arriving at its conclusion, the court made mention of the legislative history of RESPA, but failed to thoroughly analyze or even make mention of the compromises that surrounded the statute's enactment. In so doing, the *Rawlings* court invoked the remedial purpose canon but failed to acknowledge RESPA as a product of compromise and the effect this compromise has, on the broad interpretation, called for under the remedial purpose canon. This is important because it directly affects the issue of whether non-pecuniary damages should be recoverable under the statute.

Johnstone v. Bank of America[94] presents the flipside of *Katz*. In *Johnstone*, a consumer plaintiff sued, *inter alia*, a bank for alleged violations of RESPA.[95] Included in the complaint was the plaintiff's claim for damages for "mental anguish."[96] In construing whether "actual damages" under § 2605 included claims for mental anguish, the court noted the issue to

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[88] *Id.* at 1163.

[89] *Id.* at 1164.

[90] *Id.* at 1165.

[91] *Id.* In arriving at this conclusion, the court examined the stated purpose of 12 U.S.C. § 2601 and found that RESPA was enacted to address three problem areas including (1) those abusive practices that had resulted in increased settlement costs to consumers, (2) the lack of clarity concerning the settlement process itself, and (3) the rampant complexities and inefficiencies regarding the recordation of land titles on public records. *Id.* at 1165-66. In analyzing these three areas, the *Rawlings* court concluded that the statute was a "remedial, consumer-protection" statute. *Id.* at 1166.

[92] *Id.* (citing *Ellis v. Gen. Motors Acceptance Corp.*, 160 F.3d 703, 707 (11th Cir. 1998)).

[93] *Id.* The court also relied on the fact that other so-called remedial, consumer-protection statutes such as FCRA and FDCPA also construed their "actual damages" provisions as encompassing damages for emotional distress of mental anguish. *Id.* While the court noted that mental anguish damages should be allowed, it found under the facts of the case that an issue of fact existed as to whether the plaintiffs suffered any actual mental anguish. *Id.* at 1167.

[94] 173 F. Supp. 2d 809 (N.D. Ill. 2001).

[95] *Id.*

[96] *Id.* at 812.

be one of first impression in the circuit.[97] In determining that actual damages encompassed claims for emotional/mental distress, the court relied on a number of factors. Primary importance was placed on the court's view of RESPA as a "remedial consumer statute."[98] Because the court viewed RESPA as a consumer-protection statute, the court construed it broadly and compared it to what it viewed as similar types of statutes, including FCRA, the 1974 Privacy Act, the ECOA, and the Fair Housing Act.[99] These "similar" consumer-protection statutes, allowed recovery for emotional/mental distress.[100] Because RESPA was a remedial statute and protected "private (dignitary) information" like FCRA, the ECOA, and the Privacy Act, the *Johnstone* court reasoned that its actual damages provision must be construed broadly enough to encompass non-pecuniary, emotional distress damages.

The bank in *Johnstone* argued that without economic damages, non-economic damages could not be recovered under § 2605 of RESPA.[101] The district court disagreed with this argument, finding *Katz* inapposite and holding that inasmuch as the plaintiffs had suffered economic loss, they could recover emotional distress damages.[102]

The *Johnstone* decision is problematic for a number of reasons. In arriving at its conclusion, the court placed great emphasis on the protection of "individuals private information."[103] The court then made known its view that RESPA was concerned with protecting the private information of consumers.[104] Because violation of privacy usually gives rise to claims of damages for emotional/mental distress or anguish, the court reasoned that a violation of RESPA must allow for such damages.[105] In analyzing a number of cases and statutes, the *Johnstone* court made several flawed assumptions. Chiefly, the court assumed that RESPA was a statute similar to FCRA, ECOA, FHA, and the 1974 Privacy Act and that the rights and interests to be protected by RESPA were the same as these other pieces of legislation. Presumably borrowing from the analysis in *Carey v. Piphus*,[106] the

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[97] *Id.* at 814.

[98] *Id.* (citing *Rawlings*, 64 F. Supp. 2d at 1166).

[99] *Id.* (citing *Hrubec*, 829 F. Supp. at 1506).

[100] *Id.*

[101] *Id.* at 816 (making use of *Katz*, 992 F. Supp. 250, and *Aiello v. Providian Fin. Corp.*, 239 F.3d 876 (7th Cir. 2001)).

[102] *Id.*

[103] *Id.* at 815 (noting that FCRA, the 1974 Privacy Act, and the Internal Revenue Code provision in *Hrubec* all were concerned with protecting private information).

[104] *Id.*

[105] *Id.* at 816. The court rejected the reasoning of both *Katz* and *Aiello* in coming to its conclusion.

[106] 435 U.S. 247 (1978).

Johnstone court implied that the right protected by the statute was determinative of the type of damages that were recoverable under the statute. While this certainly may be a useful analysis, the court incorrectly assumed that Congress enacted RESPA to protect the consumer's right to privacy. Moreover, the court failed to acknowledge that those rights sought to be protected by RESPA are far different from those rights protected by FCRA, the FHA, and the1974 Privacy Act.

The United States District Court for the Northern District of Illinois held that emotional distress damages could be recovered under RESPA in *Ploog v. Homeside Lending, Inc.*[107] In *Ploog*, the court addressed the plaintiff's contention that the defendant violated, *inter alia*, § 2605 of RESPA.[108] In considering what encompassed actual damages under § 2605, the court placed great emphasis on the *Hrubec* and *Johnstone* holdings.[109] The *Ploog* court relied heavily on the rationale in *Hrubec*, *Rawlings*, and *Johnstone* that RESPA was both a consumer-protection statute similar to the FHA, the ECOA, and FCRA and that RESPA's actual damages provision was similar as well.[110] Moreover, the *Ploog* court emphasized the statement in *Katz* that "many courts have held consumer protection statutes are to be interpreted broadly in order to give effect to their remedial purposes."[111] In broadly construing RESPA's actual damages provision, the *Ploog* court held that mental anguish was an actual damage and thus recoverable under RESPA.[112]

The problem with the *Ploog* holding is twofold. First, the court assumed that RESPA was like the FHA, ECOA, and FCRA. In this regard, the *Ploog* court, like the *Johnstone* court, failed to note that RESPA is in fact quite unlike the FHA, ECOA, and FCRA. Unlike those statutes with which it is so often compared, RESPA is not concerned with the protection of privacy or other similar rights whose violation generally gives rise to awards for emotional or mental distress damages. From its plain language, RESPA is concerned with the efficiency of the servicing of mortgage loans and the clarification of certain disclosures by loan servicers to consumers. Moreover, the *Ploog* court failed to thoroughly analyze the legislative history of RESPA. If it had, it surely would have recognized that RESPA is a product of compromise and that it was therefore inappropriate to employ the remedial purpose canon in order to justify a broad interpretation of RESPA's

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[107] 209 F. Supp. 2d 863, 870 (N.D. Ill. 2002).

[108] *Id.*

[109] *Id.* at 869-70.

[110] *Id.*

[111] *Id.* at 870 (citing *Katz*, 992 F. Supp. at 255-56).

[112] *Id.*

actual damages provision. The decision is also important in that it evidences how certain canons of statutory construction have impacted the interpretation of RESPA and RESPA's actual damages provision.

IV. STATUTORY INTERPRETATION: OR WHY NON-PECUNIARY DAMAGES SHOULD NOT BE RECOVERABLE UNDER RESPA

In allowing the recovery of emotional distress damages, the aforementioned courts have often relied heavily on the remedial purpose canon of construction in order to justify an expansive reading of § 2605(f) of RESPA. As more clearly analyzed below, because RESPA was born of compromise, the use of the remedial purpose canon as a means to broadly construe the language in § 2605 is improper. Without the benefit of the remedial purpose canon, the argument in favor of allowing the recovery of emotional distress damages under § 2605(f) of RESPA is, at best, tenuous.

A. Methods of Statutory Interpretation

As Kenneth Starr noted in a 1988 law review article, the "interpretation of statutes has tended to remain a rather ad hoc enterprise, with basic rules of the game not firmly settled."[113] For a good portion of the Twentieth Century, this was not always the case, as the judiciary relied heavily on legislative history materials to interpret statutes.[114] More recently, scholars

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[113] Kenneth W. Starr, *Of Forests and Trees: Structuralism in the Interpretation of Statutes*, 56 Geo. Wash. L. Rev. 703, 704 (1988). This Article will not fire another salvo in the war over statutory interpretation. Enough ink has been shed in that battle. For arguments over the merits of the various methods of statutory interpretation, *see e.g.* Eric S. Lasky, *Perplexing Problems with Plain Meaning*, 27 Hofstra L. Rev. 891 (1999); R. Randall Kelso, *Statutory Interpretation Doctrine on the Modern Supreme Court and Four Doctrinal Approaches to Judicial Decision-making*, 25 Pepp. L. Rev. 37 (1997); Jack L. Landau, *The Intended Meaning of "Legislative Intent" and Its Implications for Statutory Construction in Oregon*, 76 Or. L. Rev. 47 (1997); Maxwell O. Chibundu, *Structure and Structuralism in the Interpretation of Statutes*, 62 U. Cin. L. Rev. 1439 (1994); Nancy Eisenhauer, *Implied Causes of Action Under Federal Statutes: The Air Carriers Access Act of 1986*, 59 U. Chi. L. Rev. 1183 (1992); Richard A. Posner, *Statutory Interpretation—in the Classroom and in the Courtroom*, 50 U. Chi. L. Rev. 800 (1983); Abner J. Mikva & Eric Lane, *An Introduction to Statutory Interpretation and the Legislative Process* (Aspen L. & Bus. 1997); William N. Eskridge, Jr., *Dynamic Statutory Interpretation* (Harvard U. Press 1994); James Willard Hurst, *Dealing with Statutes* (Columbia U. Press 1982); Gwendolyn B. Folsom, *Legislative History: Research for the Interpretation of Laws* (Fred B. Rothman & Co. 1979); Francis J. McCaffrey, *Statutory Construction* (C. Book Co., Inc. 1953). Rather than adding fuel to fire, this Article will proceed from the position that there are certain foundational methods of statutory interpretation and canons that are aids to the process of interpretation.

[114] *See* Robert J. Gregory, *Overcoming Text in an Age of Textualism: A Practitioner's Guide to Arguing Cases of Statutory Interpretation*, 35 Akron L. Rev. 451, 452 (2002) (noting that "[f]or most of this century, the prevailing view of statutory interpretation was one that denied the primacy of the bare

and jurists generally have subscribed "to one of the three traditional or 'foundationalist' theories of statutory interpretation" including "intentionalism, purposivism and textualism."[115]

Intentionalism attempts to decipher how the legislature would have answered the question at issue had it been presented at the time the statute was enacted.[116] Purposivism concentrates on the purpose behind the enacting of the legislation in trying to interpret the particular portion of the statute in question.[117] Beginning in the late 1980s and early 1990s, a movement premised on one of the traditional theories of interpretation took shape. Counting Justice Antonin Scalia and other noted members of the judiciary and academia among its adherents, this new approach, often referred to as "new textualism,"[118] argues that the text of the statute provides the truest example of the legislature's intent in enacting the legislation at issue.[119] Courts will not resort to legislative history materials, new textualists argue, unless there is some real ambiguity in the text of the statute.[120]

B. "Actual Damages," Toward a Plain Meaning?

Before attempting to construe the legislative history of those statutes possessing actual damages provisions, it is important to determine whether the term "actual damages" has an intrinsically plain meaning that renders the term unambiguous within the context of the given statute. After all, as new textualists argue, when attempting to analyze a statute, "the beginning point

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text."); William N. Eskridge, Jr. & Philip P. Frickey, *Statutory Interpretation as Practical Reasoning*, 42 Stan. L. Rev. 321, 324 (1990); Bradford C. Mank, *Is a Textualist Approach to Statutory Interpretation Pro-Environmentalist?: Why Pragmatic Agency Decisionmaking is Better Than Judicial Literalism*, 53 Wash. & Lee L. Rev. 1231, 1268 (1996).

[115] Blake A. Watson, *Liberal Construction of CERCLA Under the Remedial Purpose Canon: Have the Lower Courts Taken a Good Thing Too Far*, 20 Harv. Envtl. L. Rev. 199, 211 (1996); William N. Eskridge, Jr., Philip P. Frickey & Elizabeth Garrett, *Legislation and Statutory Interpretation* (Found. Press 2000) (providing an overview of the three traditional methods of statutory analysis).

[116] Watson, *supra* n. 115, at 211-12.

[117] *Id.* at 212.

[118] William N. Eskridge, Jr., has referred to the practice of first attempting to find the ordinary meaning of the language in a statute via the textual context of the legislation and then using canons of construction to ascertain whether there is any clear indication that there is some meaning other than the ordinary one as "new textualism." Lasky, *supra* n. 113, at 897-98. This approach was explained by Justice Antonin Scalia in *Green v. Bock Laundry Mach. Co.*, 490 U.S. 504, 528 (1989) (Scalia, J., concurring).

[119] *See* Mank, *supra* n. 114, at 1237-38; Lasky, *supra* n. 113, at 899-900.

[120] *See* Starr, *supra* n. 113, at 706.

must be the language of the statute."[121] While the term is not defined within the text of RESPA, some limited guidance exists elsewhere.

1. HUD's View of Actual Damages

For instance, while RESPA itself does not define the term actual damages, HUD has endeavored to define the term.[122] In a December 1994 set of Rules and Regulations, the Federal Housing Commissioner of HUD attempted to clarify actual damages under § 2605 of RESPA.[123] Responding to an inquiry about what encompasses actual damages, HUD officials noted that the term encompasses "all proven actual damages that the borrower suffered because of the servicer's action" under § 2605 of RESPA.[124] Unfortunately, HUD's attempt does little to end the confusion over what actual damages encompass.

2. Secondary Source Definitions

In addition to HUD, multitudes of differing definitions of actual damages exist. For instance, a number of secondary sources define the term "actual damages." Black's Law Dictionary for one, defines actual damages as:

> compensation for actual injuries or loss. . . . [where t]he term [is] used to denote the type of damage award as well as the nature of injury for which recovery is allowed; thus, actual damages flowing from injury in fact are to be distinguished from damages which are nominal, exemplary, or punitive.[125]

According to this definition, "actual damages" are synonymous with compensatory damages. In addition, Barron's Law Dictionary defines "actual damages" as "those damages directly referable to the breach or tortious act; losses which can readily be proven to have been sustained, and for which the injured party should be compensated as a matter of right."[126]

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[121] *Perrone v. Gen. Motors Acceptance Corp.*, 232 F.3d 433, 435 (5th Cir. 2000) (quoting *Estate of Cowart v. Nicklos Drilling, Co.*, 505 U.S. 469, 475 (1992)).

[122] This is important because every court that has attempted to construe RESPA's actual damages provision has failed to acknowledge that HUD, on at least one occasion, attempted to provide guidance on the issue.

[123] *Real Estate Settlement Procedures Act*, 59 Fed. Reg. 65442, 65447 (Dec. 19, 1994) (codified at 24 C.F.R. pt. 3500 (2002)).

[124] *Id.*

[125] *Black's Law Dictionary* 33 (Bryan A. Garner ed., 5th ed., West 1979).

[126] Steven H. Gifis, *Barron's Law Dictionary* 124 (4th ed., Barron's 1996).

Of course, while these sources do provide a modicum of guidance, they do so without any textual context, such that their usefulness is, at best, slight.

3. Case Law in Other Contexts

In addition to secondary sources, a number of courts have attempted (with varying degrees of success) to define or properly construe actual damages with regard to a diverse group of statutes. While a number of courts have examined the term, a clear-cut definition has proven elusive. Part of the trouble lies in the issue of whether actual damages encompass only pecuniary damages or both pecuniary and non-pecuniary damages. For instance, courts have split over whether actual damages encompass emotional distress damages under the automatic stay provision of § 362 of the United States Bankruptcy Code. While the United States Court of Appeals for the Seventh Circuit has held that emotional distress damages are generally not recoverable as actual damages under § 362,[127] the First Circuit Court of Appeals has held that such damages are recoverable.[128] In addition to § 362 of the Bankruptcy Code, courts have also split over whether emotional distress damages are recoverable as actual damages under § 552 of the 1974 Privacy Act. For example, the United States Court of Appeals for the Sixth Circuit,[129] the United States District Court for the District of Massachusetts,[130] and the United States District Court for the District of Columbia[131] have all held that emotional distress damages are not recoverable as actual damages under the 1974 Privacy Act. The United States District Court for the Western District of Virginia[132] on the other hand, in an unreported decision, held that emotional distress damages are recoverable as actual damages under § 552 of the 1974 Privacy Act.

In addition to federal legislation, the actual damages provisions of a number of state laws have also proven to be fertile ground for disagreement.

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[127] *Aiello*, 239 F.3d at 880-81.

[128] *Fleet Mortg. Group v. Kaneb*, 196 F.3d 265, 269 (1st Cir. 1999).

[129] *See Hudson v. Reno*, 130 F.3d 1193, 1207 (6th Cir. 1997), *overruled in part on other grounds, Pollard v. E.I. Du Pont de Nemours & Co.*, 532 U.S. 843, 848 (2001).

[130] *See DiMura v. Fed. Bureau of Investigation*, 823 F. Supp. 45, 48 (D. Mass. 1993).

[131] *See Pope v. Bond*, 641 F. Supp. 489, 500-01 (D.D.C. 1986); *Houston v. U.S. Dept. of Treas.*, 494 F. Supp. 24, 29-30 (D.D.C. 1979) (analyzing the legislative history of the 1974 Privacy Act in concluding that actual damages do not encompass emotional or mental distress damages).

[132] *See Doe v. Herman*, 1999 U.S. Dist. LEXIS 17302 at *49 (W.D. Va. Oct. 29, 1999). In addition to the 1974 Privacy Act, emotional distress damages have been held to be actual damages for the purposes of the Fair Debt Collection Practices Act in *Smith v. Law Offices of Mitchell N. Kay*, 124 B.R. 182, 188 (D. Del. 1991), and the Truth in Lending Act in *Perrone*, 232 F.3d at 435-36.

In Tennessee, courts are split over whether emotional distress damages are recoverable as actual damages under the state's Human Rights Act. In *Belcher v. Sears, Roebuck & Co.*,[133] the United States District Court for the Middle District of Tennessee held that emotional distress damages were not recoverable as actual damages under the Tennessee Human Rights Act.[134] Some seven years after the *Belcher* decision, the same court in *England v. Fleetguard, Inc.*,[135] held that emotional distress damages were recoverable as actual damages under the Tennessee Human Rights Act.[136]

Unfortunately, while the judiciary has expended a great deal of effort in attempting to define the term "actual damages," a plain meaning has remained largely elusive. Dissatisfied with their attempts to ascertain the precise meaning of actual damages (and perhaps out of frustration), a number of courts have turned to certain canons of construction as aids in the process of statutory interpretation. Specifically, when analyzing RESPA's actual damages provision, a significant number of courts have turned to the remedial purpose canon in an effort to broadly construe the statute.

C. The Remedial Purpose Canon as an Aid to Interpretation

When, as in the case of actual damages, a statutory provision or term proves to be ambiguous or unclear, courts often employ certain canons of statutory interpretation as aids in analyzing the legislation at issue.[137] The numerous canons of statutory construction include the textual canons,

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[133] 686 F. Supp. 671 (M.D. Tenn. 1988).

[134] *Id.* at 673; *see* Tenn. Code Ann. § 4-21-101 (Lexis 1985).

[135] 878 F. Supp. 1058, 1060-62 (M.D. Tenn. 1995).

[136] In addition to Tennessee, the Commonwealth of Pennsylvania has had some difficulty ascertaining what encompasses "actual damages" under the Pennsylvania Unfair Trade Practices and Consumer Protection Law ("UTPCPL"), although the United States District Court for the Middle District of Pennsylvania, in the case of *Krisa v. Equitable Life Assur. Soc.*, firmly held that emotional distress damages were not recoverable as actual damages under the statute. 113 F. Supp. 2d 694, 707 (M.D. Pa. 2000). *See In re Bryant*, 111 B.R. 474, 479-80 (E.D. Pa. 1990); *McCauslin v. Reliance Fin. Co.*, 751 A.2d 683, 685 (Pa. 2000); *but see In re Belile*, 209 B.R. 658 (E.D. Pa. 1997). In addition, the Court of Appeals of California decision in *Balmoral Hotel Tenants Assn. v. Lee* held that "actual damages" did not encompass claims for mental suffering under the San Francisco Administrative Code and noted that a common sense interpretation of "actual damages" might only "denote damages that are capable of exact measurement and proof; such damages would presumably be limited to economic losses." 226 Cal. App. 3d 686, 690 (Cal. App. 1990). These cases are important for they show that even if a court were to juxtapose RESPA with another statute possessing an actual damages provision, it still would be difficult to ascertain a clear definition.

[137] *See* Watson, *supra* n. 115, at 208 (noting that the canons were developed as aids for the judiciary in the interpretation of statutes); Eskridge, Frickey, & Garret, *supra* n. 115, at 375.

extrinsic source canons, and substantive canons.[138] The type of statute at issue will often be determinative of the type of canon that the respective court chooses to employ. Included among the substantive canons of statutory interpretation is the remedial purpose canon.[139] Courts often employ the remedial purpose canon to allow for an expansive or liberal construction of remedial legislation.[140] The remedial purpose canon has been most often invoked in the interpretation of environmental, workers' safety, public health, discrimination, and labor relations statutes.[141] Courts have also frequently applied it in the interpretation of RESPA.[142]

In employing this canon, one is initially confronted with the issue of what "remedial" means with regard to legislation. As Judge Richard Posner has noted, almost "every regulatory statute that does not prescribe penal sanctions" could theoretically be considered remedial legislation.[143] Justice Antonin Scalia is even more cautious when confronted with the term, noting that "there does not exist, and does not seem to have existed since at least the eighteenth century, even a rough consensus as to what the term 'remedial statute' might mean . . . ."[144] While this Article will not belabor the point, suffice it to say there is less than a consensus as to exactly which pieces of legislation are remedial in nature and application, thereby calling into question the very practice of employing the canon as an aid to statutory interpretation. Regardless of the continuing debate, it is important to discuss the application of the remedial purpose canon in this article because courts construing RESPA have often invoked it. For the purposes of this Article and the issue of the recoverability of non-pecuniary damages, we will assume that RESPA is a "remedial" statute.

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[138] *See* Eskridge & Frickey, *supra* n. 114, at 375-83 (providing an excellent overview of all of the different types of statutory interpretation canons).

[139] *See e.g.* Watson, *supra* n. 115, at 201, 227 (characterizing the remedial purpose canon as a substantive canon "designed to promote constitutional principles or advance other generalized legal policies and goals").

[140] *Id.* at 230.

[141] *Id.* at 201.

[142] *See Katz*, 992 F. Supp. 250; *Rawlings*, 64 F. Supp. 2d 1156; *Johnstone*, 173 F. Supp. 2d 809.

[143] *See* Posner, *supra* n. 113, at 809.

[144] *See* Antonin Scalia, *Assorted Canards of Contemporary Legal Analysis*, 40 Case W. Res. L. Rev. 581, 586 (1990); Gregory, *supra* n. 114, at 463 (noting that arguments based on a statute's remedial purpose are generally held in low regard by the judiciary).

V. COMPROMISE LEGISLATION: A RESTRICTION ON THE USE OF THE REMEDIAL PURPOSE CANON

While courts have often employed the remedial purpose canon in the interpretation of statutes, its usefulness is diminished when the statute at issue is the result of legislative compromise. As Judge Posner has noted:

> [When] the statute is a compromise between one group of legislators that holds a simple remedial objective but lacks a majority and another group that has reservations about the objective, a court that construed the statute broadly would upset the compromise that the statute was intended to embody.[145]

Others have noted that the remedial purpose canon is limited in application "when a liberal construction would . . . upset a legislatively crafted compromise . . . ."[146] Still others have characterized the canon as "useless" when the statute at issue is a product of compromise.[147] Simply because a piece of legislation is deemed remedial does not mean that it should be interpreted broadly. The fact that many have questioned the remedial purpose of legislation is important because the remedial purpose canon has often been a decisive factor in the decisions by several courts to allow the recovery of emotional distress damages under § 2605 of RESPA.[148] Indeed, the respective courts in *Johnstone* and *Rawlings* strongly emphasized the remedial purpose of RESPA in holding that the actual damages provision in § 2605 encompassed damages for emotional or mental distress.[149]

While several of the aforementioned cases have indeed provided brief overviews of the purposes underlying RESPA, they have failed to consider RESPA for what it is—a product of compromise. The fact that RESPA is compromise legislation is important for it impacts the analysis of the actual damages provision of § 2605(f). RESPA was born of legislative

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[145] Posner, *supra* n. 113, at 809.

[146] Watson, *supra* n. 115, at 243, 250 (noting that some courts have found that "uncritical reliance on the remedial purpose canon may lead to interpretive errors" when it is apparent that the statute which is being analyzed is ambiguous and the product of compromise); *see Bushendorf v. Freightliner Corp.*, 13 F.3d 1024, 1026 (7th Cir. 1993) (noting that "[r]emedial statutes like other statutes are typically compromises, and a court would upset the compromise if it nudged such a statute closer to the victim side of the line than the words and history and other indications of the statute's meaning pointed").

[147] *See Contract Courier Servs., Inc. v. Research & Spec. Programs Admin.*, 924 F.2d 112, 115 (7th Cir. 1991).

[148] *See e.g. Katz*, 992 F. Supp. 250; *Rawlings*, 64 F. Supp. 2d 1156; *Johnstone*, 173 F. Supp. 2d 809.

[149] *See supra* nn. 87-105 and accompanying text.

compromise; therefore, it is improper to employ a broad construction under the remedial purpose canon. Under the more proper narrow interpretation that is employed with compromise legislation, actual damages under § 2605(f) would be limited to pecuniary loss. Before arriving at this conclusion, however, it is necessary to demonstrate why RESPA is compromise legislation and why it is improper to broadly construe the legislation under the remedial purpose canon.

A. A Statute Born of Compromise: The Enactment of RESPA I, a Tip of the Hat to the Real Estate Lobby

"Every human benefit and enjoyment, every virtue and every prudent act is founded on compromise and barter."[150]

It has often been said that "[s]tatutes are compromises among legislators who may hold incompatible conceptions of the public weal."[151] This statement was made with regard to a Wisconsin "lemon law" statute, but it could just as easily have been describing RESPA. From almost the day it was enacted, RESPA was criticized as being, at best, the product of compromise or even the outcome of a rather obvious capitulation to the real estate lobby and title company lobby. Indeed, the amount of compromise that went into the drafting and amending of RESPA is evident in the enactment history and legislative history of the statute.

As was touched on previously, RESPA, as originally enacted, was a blend of two competing bills offered in the 93rd Congress as a means to address the rise in settlement costs to the putative home purchaser/consumer.[152] Senate Bill 2228, proposed by Senator William Proxmire, sought to regulate closing costs directly via the Department of Housing and Urban Development, while Senate Bill 3164, proposed by Senator William Brock, sought to regulate the underlying business relationships and procedures of which the costs were a function.[153] The distinction between the two bills is important because many saw the Proxmire Bill as more favorable to consumers inasmuch as it allowed direct regulation of settlement charges by HUD.[154] On the other hand, the real

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[150] Edmund Burke, *Speech on the Conciliation of America, Vol. II* 169 (available at Bartleby.com, Inc., *Familiar Quotations* <http://www.bartleby.com/100/276.20.html> (accessed Nov. 3, 2002)) (internal punctuation omitted).

[151] *Kerr v. Puckett*, 138 F.3d 321, 323 (11th Cir. 1998).

[152] *See supra* nn. 33-34 and accompanying text.

[153] *See* Pub. L. No. 93-533, 88 Stat. 1724 (1974); Sen. Rpt. 93-866 (May 22, 1974).

[154] *See* Redden & McClellan, *supra* n. 15, at 93.

estate lobby and the title company lobby favored the bill proposed by Senator Brock because it did not vest HUD with direct regulatory authority over settlement matters.[155]

Shortly after Senate Bill 2228 was introduced, Senator Brock introduced Senate Bill 3164 in an effort to broaden the scope of bill 2228.[156] Senator Proxmire countered bill 3164 with Senate Bill 3232 in an effort to require lenders to bear all of the costs of settlement.[157] During the summer of 1973, the Senate Banking Committee held hearings on the competing bills. During this period, representatives of the real estate industry and title company industry appeared *en masse* in order to support Senate Bill 3164, prompting Senator Proxmire to note that:

> Whatever claims made on behalf of the Brock bill, the best way of judging its impact is to examine who is for it. The main supporters of the Brock bill are title insurance companies, State bar associations, mortgage lenders, real estate agents and other participants in the real estate settlement process. During recent hearings held by the House Banking Committee, 29 witnesses representing the real estate settlement industry testified. All 29 witnesses supported the House counterpart to Brock bill, H.R. 9989, introduced by Representative Stephens. During these same hearings, the Committee called seven consumer spokesmen or independent experts to testify. Not one of them supported the Stephens-Brock approach.[158]

After all of the testimony, the Senate Committee on Banking, Housing and Urban Affairs adopted Senate Bill 3164 without amendment, and RESPA was born.[159] In enacting RESPA pursuant to Senate Bill 3164, Congress chose to accept a bill that eliminated the legal authority for the direct federal control of closing costs as proposed by Senator Proxmire. In so doing, Congress compromised by passing legislation that at a minimum attempted to address a problem, but that was also a clear capitulation to the interests of the real estate industry.[160] While RESPA I (as some have called

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[155] *Id.*

[156] *Id.*

[157] *Id.*

[158] Sen. Rpt. 93-866, at 6557-58.

[159] *See* Redden & McClellan, *supra* n. 15, at 93.

[160] *See* Michael S. Glassman, *Real Estate Settlement and Procedures Act of 1974 and Amendments of 1975: The Congressional Response to High Settlement Costs*, 45 U. Cin. L. Rev. 448, 459 (1976) (noting that "[a]lthough RESPA may serve the purpose of providing consumers with more timely information about settlement procedures and costs, its prospects of protecting consumers from unnecessarily high settlement charges are dubious").

it) was seen as at least a partial capitulation to the real estate lobby, more industry-friendly changes were on the way.

B. The Fall of RESPA I and the Rise of RESPA II

On November 14, 1975, the House Committee on Banking, Currency and Housing submitted a report on RESPA to the House of Representatives.[161] While the report noted that Congress initially enacted RESPA to "provide the prospective homebuyer with adequate protection against unscrupulous practices," RESPA as a whole was labeled a failure, the report noting that:

> The attempt of last year to legislate nationally with the Real Estate Settlement Procedures Act on the problems that had arisen with regard to real estate practices in a number of jurisdictions has proved in many areas of the country to be unworkable, overly rigid in a number of other areas, and too inflexible to be administered adequately.[162]

In an effort to rectify the problems with RESPA I, the report continued in carefully reviewing a series of proposed amendments to the statute.[163] These amendments are important because they provide further evidence that RESPA is a product of compromise.

During the summer and fall of 1975, Congress was inundated with requests to repeal RESPA I. The requests came from ordinary consumers and not surprisingly, from representatives of the real estate industry, who were upset at the extra paperwork, regulations, and other burdens they saw as the result of the legislation.[164] As Representative Floyd Fithian of Indiana noted, shortly after the enactment of RESPA I, he was deluged with complaints from "[h]ome sellers, realtors, and banking officials . . . [who] expressed their concern over the adverse effects of [RESPA I]."[165] According to Representative Fithian, the real estate lobby in particular was concerned over what they saw as the unnecessary paperwork and regulations created by

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[161] H.R. Rpt. 94-667, at 1.

[162] *Id.* at 1-2; *see* Edward S. Hirschler, *Federal Regulation of Home Closings-The Real Estate Settlement Procedures Act of 1974*, 10 U. Rich. L. Rev. 63, 71 (1975) (noting that one of the alleged defects of RESPA was that it was "hastily drafted and dumped on the industry without adequate time for input from, or education of, those vitally concerned").

[163] *See* Darrow, *supra* n. 11, at 385.

[164] *Id.*

[165] 121 Cong. Rec. 30431 (1975) (statement of Rep. Fithian).

RESPA I.[166] Therefore, the 1975 amendments to RESPA I did away with many of the portions of the statute that had been criticized by the real estate industry.

The amendments to the initial RESPA, creating what has been referred to as RESPA II, were introduced on September 10, 1975.[167] These amendments were rather significant in that, as stated before, they repealed those portions that were seen as being at the very heart of RESPA I.[168] In terms of changes to RESPA I, RESPA II included a repeal of those provisions of "RESPA I that required a uniform settlement statement, advance disclosure of settlement costs, and prior disclosure to the buyer of the previous selling price of the property in certain instances."[169] As a result of these changes, it was said that RESPA II had vitiated the very core of the original RESPA.[170] Representative Leonor Sullivan went one step further, declaring in a 1975 House Report on RESPA that the proposed amendments to RESPA I are "the real estate industry's [attempt] . . . to pull the teeth of a consumer law which has been in effect less than five months."[171] Not surprisingly, the amendments to RESPA I were accepted and signed into law on January 2, 1976, and RESPA II was born.[172] The changes wrought by RESPA II are important to the issue of the recovery of emotional distress damages under § 2605 of RESPA because they clearly demonstrate that RESPA is a statute of compromise.[173]

In addition to the multitude of amendments to RESPA, the inconsistencies in certain portions of RESPA's penalty provision evidence that the statute was not meant to be broadly construed. For instance, RESPA provides remedies for violations of certain sections of the statute and does not proscribe remedies for other sections. Specifically, while RESPA provides for civil and criminal penalties for violations of the kickback provisions in section eight, it does not provide remedies for a mortgage

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[166] *Id.* (noting that 162 constituents had urged Rep. Fithian to support a then-proposed repeal of RESPA I).

[167] Sen. 2327, 94th Cong. (1975).

[168] *See* Darrow, *supra* n. 11, at 385.

[169] *Id.*

[170] *Id.* at 389; *see* Stoppello, *supra* n. 37, at 368; H.R. Rpt. 94-667, at 18 (Rep. Leonor K. Sullivan noting that the amendments to RESPA I would repeal the "heart of the law"). In her comments on the amendments to RESPA I, Rep. Sullivan attacked the provisions as an obvious capitulation to the real estate industry at the expense of the consumer. *Id.*

[171] H.R. Rpt. 94-667, at 22.

[172] Sen. 2327, 94th Cong. (enacted).

[173] Indeed, some might argue that the gutting of the consumer-protection provisions of RESPA I evidences that RESPA is not a consumer protection statute, but a mere disclosure statute. *See supra* nn. 7-13 and accompanying text.

lender's violation of section four or five.[174] As others have noted, this inconsistency evidences that "Congress intended to omit express penalties for certain violations of RESPA" and did not want the damages provisions of the statute to be construed broadly.[175]

As is evident from all of the above, RESPA is clearly a product of legislative compromise. It is also evident that, Congress, at least initially, enacted RESPA to protect the putative home purchaser/consumer against certain abusive practices. The problem then becomes how to rectify and properly interpret RESPA and its actual damages provision as consumer sensitive legislation in light of the enormous compromises that went into the statute's enactment and subsequent amendments. In order to properly construe those statutes (including RESPA) that possess actual damages provisions, it is necessary to formulate a proper analysis.

VI. SUGGESTED ALTERNATIVE TO THE CURRENT ANALYSIS EMPLOYED TO CONSTRUE STATUTORY "ACTUAL DAMAGES"

A. The Three-Prong Test

In an attempt to limit or lessen the confusion surrounding the term actual damages, I propose applying the following three-prong test. The test considers the plain meaning of actual damages within the respective statute but also takes into consideration whether the statute at issue is the product of legislative compromise. The test is as follows:

1) *Plain meaning prong*: First, the respective court construing the legislation should examine the plain meaning of the statute and provision at issue in order to determine whether the term actual damages is defined or has a common sense meaning within the text of the statute. After all, the primary indication of Congressional intent is contained in the plain language of the statute.

2) *Tempered examination of legislative history prong*: If a plain meaning is lacking, unclear, or ambiguous, the legislative history and enactment history of the statute should be examined,[176] all the while mindful of the fact that care should be taken to refrain from the use of the remedial

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[174] *See* Platt & Schulman, *supra* n. 49, at 8-1.

[175] *Id.*

[176] *See e.g. Public Citizen v. U. S. Dept. of Justice*, 491 U.S. 440, 456 (1989) (noting that legislative history can be examined when there is ambiguity in the text of the statute).

purpose canon when the legislation at issue is clearly the product of compromise.

3) *Rights protected prong*: If both of the above two prongs of the analysis are not helpful in deciphering the meaning of actual damages within the given statute, the respective court should look to the specific interests that the statutory provision was designed to protect. If a violation of those interests protected would normally give rise to emotional distress damages, then emotional distress damages should be recoverable.[177]

B. Application of the Three-Prong Test

Perhaps the best way to evaluate the efficacy of the above test is to apply it to our initial scenario involving RESPA. Suppose as in our original scenario, A and B seek to recover emotional distress damages as actual damages under § 2605(f) of RESPA. In considering the complaint of A and B, the court is left with the task of ascertaining whether emotional distress damages are indeed actual damages. In employing the three-prong test, the court first examines the language of RESPA, and any official comments to the statute. In examining RESPA, it becomes apparent that the meaning of actual damages is unclear on the face of the statute. Moreover, there is no definition of the term within the body of the legislation. Because the language of the statute is unclear and the statute does not provide a definition, the court proceeds to the second prong of the test.

In considering the legislative and enactment histories of RESPA, several important matters become apparent. Initially, it is evident that the legislative and enactment histories of the statute do not define or even address the term actual damages, save for the half-hearted 1994 attempt by HUD to define the term.[178] What the materials do address, however, are the significant revisions, amendments, and compromises that went into RESPA's enactment and subsequent amendments. Mindful of RESPA as a product of compromise, and still without a clear definition of actual damages, the court proceeds to the third prong of the test.

In analyzing the rights or interests protected by RESPA generally and § 2605 specifically, it becomes apparent to the court that the interests protected are economic rather than dignitary.[179] Indeed, the court ascertains

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[177] This prong of the test is derived from the Supreme Court of Oregon's decision in *Brewer v. Erwin*, 600 P.2d 398 (Or. 1979).

[178] *See supra* nn. 123-24 and accompanying text.

[179] In this context, the term "dignitary" refers to privacy interests, such as those protected by the 1974 Privacy Act. Frederick Z. Lodge, *Damages Under The Privacy Act Of 1974: Compensation And*

this from the plain language of § 2605(a) of RESPA, which addresses a consumer's right to be notified of the transfer of the servicing of his or her mortgage loan. The court then turns to consider what type of damages would normally be recoverable for the violation of the rights or interests protected by § 2605 of RESPA. In analyzing the matter, the court concludes that economic loss is most likely to be the largest if not sole component of any alleged loss. Unlike a host of other statutes with which RESPA has often been compared, a violation of § 2605 would not disclose private or other dignitary information so as to give rise to emotional distress or other non-pecuniary damages.

In expanding on the third-prong of the test, the court finds it useful to compare RESPA with a host of other "remedial" statutes. For instance, the court decides to juxtapose RESPA with several other statutes that have actual damages provisions that are similar to RESPA's, such as TILA, the 1974 Privacy Act, ECOA, and FCRA.[180] In examining these statutes, it is apparent that, unlike RESPA, Congress enacted these other pieces of legislation largely to protect dignitary interests. For example, TILA was enacted in part to protect the consumer from unfair and inaccurate credit card practices,[181] the 1974 Privacy Act was enacted to protect citizens from invasions of privacy,[182] the ECOA was enacted to protect against discrimination,[183] and FCRA was enacted in an effort to protect a "consumer's right to privacy."[184] The court will find after examining the other statutes, that "[t]he interests protected by these (other) provisions are, in large part, dignitary interests that can only be measured in terms of mental or physical injury."[185] In analyzing these statutes, the court acknowledges that the violation of statutes enacted to protect dignitary interests generally gives rise to non-pecuniary damages. Turning to RESPA, the court determines that unlike these statutes, § 2605 of RESPA concerns the notice that must be given when the servicing of a mortgage is transferred. The violation of this section of RESPA, the court concludes, simply is not the kind of occurrence that gives rise to non-pecuniary damages.[186] Unlike those

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Deterrence, 52 Fordham Intl. L.J. 611, 630 (1984) (noting that the term "actual damages" has been narrowly construed when the statute at issue was "designed to protect purely economic interests").

[180] It is interesting to note that the statutes all fail to define the term "actual damages."

[181] 15 U.S.C. § 1601(a).

[182] 5 U.S.C. § 552(a) (1982).

[183] 15 U.S.C. § 1691.

[184] 15 U.S.C. § 1681(a)(4).

[185] Lodge, *supra* n. 179, at 621.

[186] In addition to the above, the juxtaposition of statutes in order to ascertain the meaning of certain seemingly related provisions has been criticized when the statutes are not expressly related and do not

statutes that protect dignitary interests, non-pecuniary damages simply are not the type of harm that usually results from the violation of a statute designed to provide adequate notice of the change of the servicing of a mortgage.[187] Accordingly, the court in our hypothetical scenario concludes that non-pecuniary, emotional distress damages are not recoverable under § 2605(f) of RESPA.

While the above three-pronged analysis is an amalgam of the approaches taken by a number of courts and therefore not wholly unique, the addition of the third prong with regard to RESPA and its actual damages provision has not been discussed by court or scholars to date. If courts distinguish between "dignitary statutes" and "economic statutes," the meaning of actual damages with regard to each respective piece of legislation might become much clearer.

VII. CONCLUSION

The actual damages provision set forth in § 2605(f) of RESPA has been a source of great frustration to almost every court that has attempted to interpret it. Largely, and especially of late, it appears the judiciary has decided to take the path most traveled in interpreting § 2605(f). Rather than analyze and acknowledge the numerous compromises and amendments that went into the creation of the legislation and the affect this has on statutory interpretation, courts have simply employed the remedial purpose canon in an effort to broadly construe a narrow statute. Indeed, as this Article has argued, when construing statutes with actual damages provisions, courts should refrain from using the remedial purpose canon to broadly construe the legislation if the statute at issue was a product of legislative compromise. Instead of relying on a canon of construction to justify an expansive statutory interpretation, courts should first endeavor to ascertain whether the term "actual damages" has a plain meaning within the given statute. If the term does not have a plain meaning, a thorough analysis of the legislative history should be undertaken with the caveat that legislation born of compromise should not be given such a broad interpretation so as to upset the compromises that went into the respective statute's enactment. If, however, a careful review of the statute's legislative history shows that the statute is concerned with the protection of those dignitary interests whose violation normally would give rise to non-pecuniary damages, then they

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concern themselves with the same interests or rights. *See* Steven G. Johansen, *What Does Ambiguous Mean? Making Sense Of Statutory Analysis In Oregon*, 34 Willamette L. Rev. 219, 236-42 (1998).

[187] *See* Lodge, *supra* n. 179, at 630 (arguing that "actual damages" should be construed liberally to encompass non-pecuniary harm because the 1974 Privacy Act was enacted to protect dignitary interests rather than economic interests).

should be recoverable. If, on the other hand, the statute at issue is concerned with the protection of non-dignitary or economic interests for example, then the court should be wary of allowing the recovery of non-pecuniary damages.