Supreme Court Clarifies RESPA Unearned Fee Provision

Authors

Greg Pulles
Brent Ylvisaker

Related Services

Financial Services Regulatory

Related Offices

Minneapolis

May 25, 2012
Attorney Articles

In a unanimous decision written by Justice Antonin Scalia (Freeman v. Quicken Loans, Inc., United States Supreme Court Docket No. 10-1042 (May 24, 2012)), the United States Supreme Court holds that in order to establish a violation of § 2607 (b) of the Real Estate Settlement Procedures Act ("RESPA"), a plaintiff must demonstrate that a charge for settlement services was divided between two or more persons, and that it cannot be understood to reach a single provider's retention of an unearned fee (what the Court called an "undivided unearned fee").

RESPA § 2607(b) provides that "[n]o person shall give and no person shall accept any portion, split, or percentage of any charge made or received for the rendering of a real estate settlement service . . . other than for services actually performed." The plaintiffs, all of whom had obtained mortgages from the defendant, alleged that the defendant had violated § 2607(b) by charging them fees for which no services were provided in return (loan discount fees, loan processing fees and/or loan origination fees). The defendant argued that the § 2607(b) claims were not cognizable because the allegedly unearned fees were not split with another party.

The Court began with a 2001 policy statement issued by the Department of Housing and Urban Development ("HUD") which interpreted § 2607(b) as applying beyond situations where at least two persons split or share an unearned fee, and which concluded that a provider may be liable where it charges a fee "that exceeds the reasonable value of goods, facilities, or services provided." HUD concluded in the 2001 statement that the excess over reasonable value constitutes a "portion" of the charge "other than for services actually performed." Justice Scalia found this "reasonable value" test was "manifestly inconsistent with the statute HUD purported to construe" and that "the statute does not cover overcharges."

Plaintiffs argued that HUD's position should be accorded deference under Chevron USA Inc. v. Nat. Res. Defense Council, Inc., 467 U.S. 837 (1984). The Court found that HUD's policy statement "goes beyond the meaning that the statute can bear," stating:

> "In our view, § 2607(b) unambiguously covers only a settlement-service provider's splitting of a fee with one or more other persons; it cannot be understood to reach a single provider's retention of an unearned fee."

The Court reasoned that:

> "By providing that no person 'shall give' or 'shall accept' a 'portion, split, or percentage' of a 'charge' that has been 'made or received,' 'other than for services actually performed,' § 2607(b) clearly describes two distinct exchanges . . . . First, a 'charge' is 'made' to or 'received' from a consumer

> by a settlement-service provider . . . . That provider then 'give[s],' and another person 'accept[s],' a 'portion, split, or percentage' of the charge."

The Court found that "Congress's use of different sets of verbs, with distinct tenses, to distinguish between the consumer-provider transaction . . . and that fee-sharing transaction . . . would be pointless if . . . the two transactions could be collapsed into one."

The Court rejected the argument that the consumer is the person who gives a portion, split or percentage of a charge to the provider, satisfying the two exchange requirement, because "this would make lawbreakers of consumers" and would lead to the "logical consequence that a consumer would be liable to himself." The Court noted that the normal meaning of the terms "portion, split, or percentage" reinforced the conclusion that § 2607(b) did not cover situations where a provider retained the entirety of a fee.

This decision settles a previous Circuit Court split on the issue, with the Fourth, Fifth, Seventh, and Eighth Circuits having previously limited § 2607(b) to situations involving splits with third parties and the Second, Third, and Eleventh Circuits having decided that § 2607(b) applies to all unearned fees.

© 2012 Dorsey & Whitney LLP. This article is intended for general information purposes only and should not be construed as legal advice or legal opinions on any specific facts or circumstances. An attorney-client relationship is not created or continued by reading this article. Members of the Dorsey & Whitney LLP group issuing this communication will be pleased to provide further information regarding the matters discussed therein.