# THE BANKING LAW JOURNAL

VOLUME 129 NUMBER 7 JULY/AUGUST 2012

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POSTMASTER: Send address changes to The Banking Law Journal, A.S. Pratt & Sons, 805 Fifteenth Street, NW., Third Floor, Washington, DC 20005-2207.

# Supreme Court Clarifies RESPA Unearned Fee Rules

STEVEN A. MEYEROWITZ

*The U.S. Supreme Court has ruled that the provision of the Real Estate Settlement Procedures Act that prohibits giving and accepting "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" requires that the charge be divided between two or more persons before a plaintiff can recover damages.*

Nearly four decades ago, Congress enacted the Real Estate Settlement Procedures Act ("RESPA")[1] to regulate the market for real estate "settlement services," defined to include "any service provided in connection with a real estate settlement," such as "title searches,…title insurance, services rendered by an attorney, the preparation of documents, property surveys, the rendering of credit reports or appraisals,…services rendered by a real estate agent or broker, the origination of a federally related mortgage loan…, and the handling of the processing, and closing or settlement."[2] Among RESPA's consumer-protection provisions is §2607, which was intended to further Congress's stated goal of "eliminat[ing]…kickbacks or referral fees that tend to increase unnecessarily the costs of certain settlement services."[3] Section 2607(a) provides:

> No person shall give and no person shall accept any fee, kickback, or thing of value pursuant to any agreement or understanding, oral or oth-

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Published by A.S. Pratt in the July/August 2012 issue of *The Banking Law Journal.*
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> erwise, that business incident to or a part of a real estate settlement service involving a federally related mortgage loan shall be referred to any person.

Subsection (b) adds the following:

> No 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 in connection with a transaction involving a federally related mortgage loan other than for services actually performed.

These provisions are enforceable through actions for damages brought by consumers of settlement services against "[a]ny person or persons who violate the prohibitions or limitations" of §2607, with recovery set at an amount equal to three times the charge paid by the plaintiff for the settlement service at issue.[4]

In the recent decision of *Freeman v. Quicken Loans, Inc.*,[5] the U.S. Supreme Court had to decide whether, to establish a violation of §2607(b), a plaintiff must demonstrate that a charge was divided between two or more persons. In a unanimous decision by Justice Antonin Scalia, the Court answered that question in the affirmative.

## BACKGROUND

The case involved three married couples who had obtained mortgage loans from Quicken Loans, Inc. In 2008, they filed separate actions in Louisiana state court, alleging that Quicken had violated §2607(b) by charging them fees for which no services had been provided. In particular, the Freemans and the Bennetts alleged that they had been charged loan discount fees of $980 and $1,100, respectively, but that Quicken had not given them lower interest rates in return. The Smiths' allegations focused on a $575 loan "processing fee" and a "loan origination" fee[6] of more than $5,100.

Quicken removed the lawsuits to federal court, where the cases were consolidated. It then moved for summary judgment on the ground that the claims were not cognizable under §2607(b) because the allegedly unearned fees were

not split with another party. The district court agreed and granted summary judgment in favor of Quicken. A divided panel of the U.S. Court of Appeals for the Fifth Circuit affirmed, and the case reached the Supreme Court.

## THE SUPREME COURT'S RULING

As Justice Scalia observed, the dispute between the plaintiffs and Quicken boiled down to whether §2607(b) prohibited the collection of an unearned charge by a single settlement service provider — a so-called "undivided unearned fee" — or whether that section covered only transactions in which a provider shared a part of a settlement service charge with one or more other persons who did nothing to earn that part.

Justice Scalia observed that the former interpretation found support in a 2001 policy statement issued by the Department of Housing and Urban Development ("HUD"), the agency that was until recently authorized by Congress to "prescribe such rules and regulations" and "to make such interpretations" as "may be necessary to achieve the purposes of [RESPA]."[7] That policy statement declared that §2607(b) prohibited "any person from giving or accepting any unearned fees, i.e., charges or payments for real estate settlement services other than for goods or facilities provided or services performed."[8] The policy statement specifically interpreted §2607(b) as "not being limited to situations where at least two persons split or share an unearned fee."[9] More broadly, the policy statement construed §2607(b) as authority for regulation of the charges paid by consumers for the provision of settlements. It stated that "a settlement service provider may not mark-up the cost of another provider's services without providing additional settlement services; such payment must be for services that are actual, necessary and distinct."[10] Moreover, the policy statement provided that in addition to facing liability when it collected a fee that was entirely unearned, a provider might also be liable under §2607(b) when it charged a fee that exceeded "the reasonable value of goods, facilities, or services provided" on the theory that the excess over reasonable value constituted a "portion" of the charge "other than for services actually performed."[11]

Justice Scalia added, however, that this last point was "manifestly inconsistent with the statute HUD purported to construe." As Justice Scalia

explained, when Congress enacted RESPA in 1974, it included a directive that HUD make a report to Congress within five years regarding the need for further legislation in the area.[12] Among the topics required to be included in the report were recommendations on whether federal regulation of the charges for real estate settlement services in federally related mortgage transactions was "necessary and desirable," and, if so, recommendations with regard to what reforms should be adopted.[13] Justice Scalia then declared that the directive for recommendations regarding the desirability of price regulation would make "no sense" if Congress had already resolved the issue — if §2607(b) already carried with it authority for HUD to proscribe the collection of unreasonably high fees for settlement services, *i.e.,* to engage in price regulation.

Then, Justice Scalia rejected the plaintiffs' narrower argument that, by allegedly charging each of them an unearned fee, Quicken "accept[ed]" a "portion, split, or percentage" of a settlement, service charge (*i.e.,* 100 percent of the charge) "other than for services actually performed,"[14] in violation of the law. The Court held that §2607(b) unambiguously covered "only a settlement-service provider's splitting of a fee with one or more other persons" and could not be understood to reach a single provider's retention of an unearned fee.[15]

Justice Scalia reasoned that, by providing that no person "shall give" or "shall accept" a "portion, split, or percentage" of a "charge" that had been "made or received," "other than for services actually performed," §2607(b) described two distinct exchanges. First, a "charge" was "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. As Justice Scalia reasoned, Congress's use of different sets of verbs, with distinct tenses, to distinguish between the consumer provider transaction (the "charge" that was "made or received") and the fee-sharing transaction (the "portion, split, or percentage" that was "give[n]" or "accept[ed]") would be pointless if, as the plaintiffs contended, the two transactions could be collapsed into one.

Moreover, Justice Scalia continued, the phrase "portion, split, or percentage" reinforced the conclusion that §2607(b) did not cover a situation in which a settlement service provider retained the entirety of a fee received from a consumer. Justice Scalia acknowledged that it was certainly true that "portion" or "percentage" *could* be used to include the entirety, or 100 per-

cent. Justice Scalia continued, however, by noting that that was not the "normal" meaning of "portion" when one spoke of "giv[ing]" or "accept[ing]" a portion of the whole.

Additionally, Justice Scalia declared, that meaning was confirmed by the "commonsense canon of *noscitur a sociis* — which counsels that a word is given more precise content by the neighboring words with which it is associated."[16] The words "portion" and "percentage" did not stand in isolation, but were part of a phrase in which they were joined together by the intervening word "split" — which, Justice Scalia observed, could not mean the entirety. Justice Scalia stated that it was "clear" that, in employing the phrase "portion, split, or percentage," Congress sought to invoke the words' common "core of meaning," which was to say, a part of a whole.

Finally, Justice Scalia rejected the plaintiffs' argument that Quicken's interpretation of §2607(b) would lead to the allegedly absurd result of permitting a provider to charge and keep the entirety of a $1,000 unearned fee, while imposing liability if the provider shares even a nickel of a $10 charge with someone else. That result did not strike Justice Scalia as "particularly anomalous."

Given that the plaintiffs in *Freeman* did not contend that Quicken split the challenged charges with anyone else, Justice Scalia's opinion concluded that summary judgment had been properly granted in favor of Quicken, and the Court affirmed the judgment of the court of appeals.

## CONCLUSION

The Court's decision — that to establish a violation of §2607(b), a plaintiff must demonstrate that a charge for settlement services was divided between two or more persons — may not have been satisfactory to the plaintiffs in *Freeman*, or to future plaintiffs seeking to recover damages under RESPA. It does, however, set forth clear guidance for the future for both borrowers and lenders — and for the courts.

## NOTES

[1] 12 U. S. C. §2607(b).

[2] §2602(3).

[3] §2601(b)(2).
[4] §2607(d)(2).
[5] No. 10–1042 (U.S. May 24, 2012).
[6] Quicken maintained that at least the "loan origination" fee charged to the Smiths was in fact a mislabeled loan discount fee, like the allegedly unearned fees charged to the Freemans and the Bennetts, and argued that loan discount fees fell outside the scope of §2607(b) because they were not fees for settlement services, but rather, as the Eleventh Circuit Court of Appeals has held, were part of the pricing of a loan. *See Wooten* v. *Quicken Loans*, *Inc*., 626 F. 3d 1187 (2010). The Supreme Court did not decide this issue.
[7] §2617(a). On July 21, 2011, HUD's consumer-protection functions under the RESPA were transferred to the Consumer Financial Protection Bureau. *See* Dodd-Frank Wall Street Reform and Consumer Protection Act, §§1061(b)(7) and (d), 1062, 1098, 1100H, 124 Stat. 2038, 2039–2040, 2103–2104, 2113. That day, the CFPB issued a notice stating that it would enforce HUD's RESPA regulations and that, pending further bureau action, it would apply HUD's previously issued official policy statements regarding RESPA. 76 Fed. Reg. 43570–43571.
[8] 66 Fed. Reg. 53057 (2001).
[9] *Id.*
[10] *Id.,* at 53059.
[11] §2607(b).
[12] *See* §2612(a) (1976 ed.).
[13] §2612(b)(2).
[14] §2607(b) (2006 ed.).
[15] The Court did not decide whether the position set forth in HUD's 2001 policy statement should be accorded deference under *Chevron U. S. A. Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U. S. 837 (1984), because it concluded that even the more limited position espoused by the policy statement and urged by the plaintiffs went "beyond the meaning that the statute [could] bear," *MCI Telecommunications Corp.* v. *American Telephone & Telegraph Co.*, 512 U. S. 218, 229 (1994).
[16] *United States* v. *Williams*, 553 U. S. 285, 294 (2008).