Client Alert.

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Supreme Court Curtails Effort to Expand RESPA

By Michael J. Agoglia and Deanne E. Maynard

In a case very closely watched by the financial services industry, the Supreme Court yesterday unanimously rejected the effort to broaden the reach of the Real Estate Settlement Procedures Act ("RESPA"). HUD, consumer advocates, and class action lawyers had long sought to use RESPA's anti-kickback provision to challenge residential mortgage closing costs as "unearned fees," and to do so without regard to whether or not they were actually split or divided between two actors. In its opinion, the Court held that to establish a violation of that section, "a plaintiff must demonstrate that [an allegedly unearned fee] for settlement services was divided between two or more persons." *Freeman v. Quicken Loans, Inc.*, 566 U.S. ___ (May 24, 2012). Morrison & Foerster filed the lead industry amicus brief in support of that result, on behalf of the American Bankers Association, American Financial Services Association, Consumer Bankers Association, Consumer Mortgage Coalition, Housing Policy Council of the Financial Services Roundtable, Independent Community Bankers of America, and Mortgage Bankers Association.

Class action lawyers had long sought to establish that Section 8(b) of RESPA allowed them to challenge closing cost charges—often pejoratively labeled "junk fees"—as simply excessive. They spoke publicly about this issue as a "Holy Grail," because such claims would be unaccompanied by any statutory or regulatory guidelines, allowing litigation to be brought in virtually any home loan transaction. Indeed, Quicken and the industry amici took pains to point out that such a result would be the worst of all worlds, given that Congress consciously decided against a rate setting and rate regulation scheme in enacting RESPA, choosing instead to require advance disclosure of the charges at issue.

Lower courts had divided in their interpretation of this issue following a 2001 policy statement from HUD, in which the agency read Section 8(b) to prohibit all "unearned" fees, regardless of whether the fee had been split between two or more parties. Before the Supreme Court, consumers urged that *Chevron* deference apply to that interpretation. The Court concluded that no deference was warranted, because the agency's interpretation was starkly at odds with the statutory text itself. In a careful examination of that text, the Court reasoned that Section 8(b) clearly contemplates a two-part transaction: (1) the provider's "recei[pt]" of a charge from the consumer, and (2) the provider's "giv[ing]" or "accept[ing]" of a "portion, split, or percentage" of that charge to another party. The Court also noted that the natural reading of the words "portion, split, or percentage" implies a sharing of the whole between two parties. Finally, responding to the plaintiffs' lament that the Court's reading would permit "a provider to charge and keep the entirety of a $1,000 unearned fee," the Court reasoned that "Congress may well have concluded that existing remedies, such as state-law fraud actions, were sufficient to deal with the problem of entirely fictitious fees," but that at any rate, that policy concern could not be read to overcome the unambiguous statutory language.

This result is viewed as particularly significant for a number of reasons. It should effectively prevent what otherwise would have been a massive wave of litigation, attacking all manner of disclosed closing costs as excessive, and doing so without any accompanying standard to decide that underlying issue.

The new Consumer Financial Protection Bureau ("CFPB")—which has taken over RESPA enforcement from HUD—is undoubtedly disappointed by the *Freeman* decision. The CFPB had filed an amicus brief on behalf of the plaintiffs,

advocating an interpretation that prohibited all "unearned fees," but a unanimous Court decided the issue otherwise. It remains to be seen whether the agency will seek to revive the issue of "unearned fees" on a prospective basis, by adopting new regulations pursuant to the agency's authority under the Dodd-Frank Act to issue rules prohibiting "unfair, deceptive and abusive acts." It also remains to be seen whether the Bureau will modify its current enforcement posture in light of the *Freeman* ruling. Regardless, the *Freeman* decision strongly signals that the Court will not look favorably on efforts to expand consumer protection statutes beyond their plain meaning.

The firm's efforts were led by Deanne Maynard, head of Morrison & Foerster's Appellate & Supreme Court practice, and appellate partner Brian Matsui. They worked closely with San Francisco partner Michael Agoglia, who has led efforts to defend successive waves of RESPA litigation, often as national coordinating counsel for the mortgage industry.

Contact:

Michael J. Agoglia
(415) 268-6057
magoglia@mofo.com

Deanne E. Maynard
(202) 887-8740
dmaynard@mofo.com

Brian R. Matsui
(202) 887-8784
bmatsui@mofo.com

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