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Does the Real Estate Settlement Procedures Act of 1974, Which Was Targeted Primarily at Kickbacks between Service Providers, Also Bar Charges for Undivided, Unearned Services (10-1042)

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Does the Real Estate Settlement Procedures Act of 1974, Which Was Targeted Primarily at Kickbacks Between Service Providers, Also Bar Charges for Undivided, Unearned Services?

CASE AT A GLANCE

The Real Estate Settlement Procedures Act of 1974 provides that "[n]o person shall give and no person shall accept any portion, split, or percentage of any charge made or received … other than for services actually performed." The Supreme Court must decide whether this language prohibits a party from charging for services not actually performed if the party retains the entire charge, without splitting it with any other party.

Freeman v. Quicken Loans, Inc.
Docket No. 10-1042

Argument Date: February 21, 2012
From: The Fifth Circuit

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INTRODUCTION

The Real Estate Settlement Procedures Act (RESPA) was passed in 1974 primarily to address concerns about undisclosed kickbacks and referral fees that drive up the cost of real estate settlement services. The Department of Housing and Urban Development (HUD) has consistently maintained that RESPA bars charges for unperformed settlement services even if those charges are not split between parties, but kept entirely by one provider. The real estate industry believes that such a reading turns RESPA into de facto price controls because any judge or jury could decide that some fees were not earned "for services actually provided" if the price appeared too high. The Supreme Court must decide whether RESPA bans fees for unprovided services if those fees are not split, and in doing so must decide what deference, if any, should be accorded to HUD's interpretation of the statute.

ISSUES

Does the Real Estate Settlement Procedures Act of 1974 bar undivided, unearned fees, or does it only prohibit unearned fees that are split between two or more providers?

If the words of RESPA do not provide an unambiguous answer to this question, what degree of deference, if any, should the courts give to HUD's interpretation of the statute?

FACTS

The petitioners are three couples, the Freemans, the Bennetts, and the Smiths, each of whom obtained a mortgage loan in Louisiana from Quicken Loans. Quicken charged the Freemans $980, and the Bennetts $1,100, as a "loan discount fee." However, the borrowers argued, Quicken did not provide any "loan discount," and as a result these fees were unearned. Quicken charged the Smiths a $575 "loan processing fee," which Quicken claims was actually a mislabeled loan discount fee. In either case, the Smiths allege that they received nothing for this fee and so it, too, was unearned.

The Bennetts filed a putative class action suit in federal court, with which suits by the Smiths and the Freemans were later consolidated. All three suits alleged violation of § 2607(b) of RESPA, which 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 in connection with a transaction involving a federally related mortgage loan other than for services actually performed.

The district court granted summary judgment to Quicken, following the majority of courts of appeals which had held that RESPA does not bar unearned fees unless they are split or shared. The district court refused to defer to HUD's contrary interpretation of the statute, holding that the "plain language" of the statute dictated the result. (Under this reasoning, the district court found it unnecessary to address another argument put forward by Quicken: that a loan discount fee is part of the price of the loan, like interest, and not a fee for "settlement services" that is governed by RESPA.)

The Fifth Circuit Court of Appeals, in an opinion by Chief Judge Edith Jones, upheld the district court ruling, finding that the language of § 2607(b) "is unambiguous and does not cover undivided unearned fees." The court reasoned that the phrase "no person shall give and no person shall accept" implies that the statute is only violated if two parties act together, one giving and the other receiving the payment. Further, the court found that the phrase "portion, split or percentage" supported this reading because "all three words require less than 100 percent or the whole of something." Using the canon of construction *noscitur a sociis* ("it is known from its associates"), the Fifth Circuit concluded that the words "percentage" and "portion," which can sometimes include 100 percent or the entire portion, were intended to have the narrower meaning of less than the entirety connoted by "split." Finally, the Circuit Court declined to give deference to HUD's interpretations because the statute was clear, and HUD's interpretations—unlike regulations promulgated by notice and comment rulemaking—were statements of policy that lack the force of law.

Judge Patrick Higginbotham dissented. Although he agreed that HUD's interpretation was not entitled to deference because he was not "persuaded that the process through which it was promulgated was sufficiently considered to merit *Chevron* deference," he disagreed with the majority's interpretation of the statute. He would have followed a prior Second Circuit decision that held that the statute does bar undivided, unearned settlement charges.

CASE ANALYSIS

The petitioners (borrowers) argue that RESPA was intended to provide clear disclosure to consumers of the costs of settlement services and to bring down those costs through the elimination of abusive practices. According to the petitioners, the meaning of § 2607(b) can best be determined by considering it in context with the preceding § 2607(a).

Section 2607(a) expressly prohibits kickbacks:

> No person shall give and no person shall accept any fee, kickback, or thing of value pursuant to any agreement or understanding, oral or otherwise, 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) then addresses unearned fees:

> 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.

The borrowers argue that limiting § 2607(b) to cases where there is a divided charge would render it largely superfluous, because kickbacks are already barred under § 2607(a). Such a reading, according to the borrowers, would also thwart RESPA's goal of protecting consumers from "abusive practices" that lead to "unnecessarily high settlement charges." Moreover, to read "percentage" and "portion" to require a split is against common usage, under which each includes the entirety (such as 100 percent), and at odds with their use in other statutes. For example, a federal embezzlement statute prohibits the misappropriation of "any portion" of the public funds entrusted to a person. Clearly, the petitioners point out, that statute would include someone who misappropriated *all* of the funds under their control. Congress's intent to include the entirety within these phrases is also shown by the reference to "any" portion or percentage, which could clearly include 100 percent. Further, holding that this phrase only covers divided fees would render the words "percentage" and "portion" mere surplusage, since they would add nothing that was not already covered by the word "split."

As to the Fifth Circuit's argument that the statute requires both a culpable giver and a culpable recipient, petitioners argue that the phrase "no person shall give and no person shall accept" does not require that both always be present. It simply contains two distinct prohibitions, barring any party either from giving or accepting an unearned charge.

Finally, petitioners argue that if the statute is ambiguous, courts should defer to the reading of the statute promulgated by HUD (a power now transferred to the Consumer Finance Protection Bureau, or CFPB). Congress authorized HUD to issue "regulations" and "interpretations" to carry out RESPA's aims. HUD has always maintained that unearned fees are prohibited both in regulations and in a 2001 Statement of Policy issued in response to a court case that had refused to apply RESPA to unearned, undivided fees.

The respondent, Quicken Loans, argues that RESPA was primarily a disclosure statute, like many other regulations of that period, intended to give consumers the information and power to shop for closing services, with market forces in turn bringing down costs. RESPA established the Good Faith Estimate of Closing Costs and uniform closing statements and required HUD to publish a booklet for consumers on settlement costs. RESPA also barred referral fees and kickbacks because these are, by their nature, hidden from consumers and prevent the market from working. In establishing this disclosure-based system, respondent argues, Congress rejected the direct regulation of settlement service prices. The petitioners' position, according to the respondent, would essentially create price controls by allowing any judge or jury to determine that a fee was partly unearned due to overcharging. The statute is limited to changing business practices in the industry (i.e., referral fees and kickbacks), not directly regulating prices.

Quicken maintains, as the Fifth Circuit found, that the phrase "no person shall give and no person shall accept" contemplates conduct by two culpable parties, supporting that argument by pointing out that the exact same phrase is used in § 2607(a), dealing with referral fees and kickbacks. This is also supported by the phrase "portion, split, or percentage," which connotes the sharing or division of the fee. The petitioners' argument that "portion" and "percentage" should be read to encompass the whole is contrary to *noscitur a sociis,* a traditional canon of statutory construction that "dictates that words grouped in a list should be given related meaning." Here, Congress has chosen three words, each of which commonly denotes less than the entirety. Moreover, Quicken argues, each of these three words has a distinct meaning within the context of the statute. "Split" generally refers to an even division, "percentage" covers uneven divisions, and "portion" refers to situations where a provider gives away a component of the overall charge.

The legislative history further supports this reading, according to the respondent, because Congress rejected an alternative bill that would have regulated pricing, and directed HUD to study the settlement services industry and to report back on "the necessity for further legislation." Among the items HUD was directed to consider was the question of whether "federal regulation of the charges … is necessary and desirable."

Finally, Quicken argued that RESPA, as a criminal statute, must be narrowly construed under the rule of lenity.

As to the effect of HUD's interpretation, the respondent argues that deference is not appropriate. The "ultimate question" under *Chevron* is "whether Congress would have intended, and expected, courts to treat an agency's rule, regulation, application of a statute, or other agency action as within, or outside, its delegation to the agency of 'gap-filling' authority." Here, respondents argue, Congress never indicated an intent to rely on HUD's expertise and did not intend to delegate such authority. Nor does the Policy Statement warrant deference because it was an agency interpretation (a statement advising the public of the position taken by the agency), not a regulation that has the force of law.

SIGNIFICANCE

Banks, title companies, and other settlement service providers are concerned about the outcome of this case because under the petitioners' reading, and HUD's long-standing policy, RESPA bars overcharges. As stated in HUD's 2001 Statement of Policy, one type of unearned charge that is barred by § 2607(b) is a fee "in excess of the reasonable value of goods or facilities provided or the services actually performed." Industry participants are concerned that any aggrieved borrower could assert that some charge exceeds the "reasonable value" of the services performed and that a judge or jury could thereby impose ex post, ad hoc price controls. This concern is exacerbated by the transfer of authority over RESPA regulations and enforcement from HUD to the newly formed CFPB. While there is a track record in dealing with these issues under HUD's guidance, there is no assurance that the CFPB will not take a harder line if it has the authority. This makes the Court's reasoning on whether the statute is ambiguous, and the standards for deferral to an agency's interpretation, even more important.

The petitioners tried to limit the concern that a decision in their favor would allow challenges to the price charged for a good or service. Rather, the petitioners argue, their position would only bar fees for goods or services that are not actually provided, and would not include examining whether a fee for actual goods or services was excessive. Such a reading, of course, would reject the position taken by HUD (and presumably the CFPB), that RESPA is intended to sweep broadly in cleaning up business practices in the settlement industry. It does sound odd, as well, to suggest that RESPA would prohibit a totally unearned fee, but not allow a challenge to, say, a $5,000 fee for recording the loan documents.

It should be remembered, of course, that RESPA is not the only game in town. Unearned charges or overcharges can be challenged on numerous other grounds, such as state statutes barring consumer deception and unfair business practices.

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