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## It Takes Two to Tango: The Supreme Court Rejects Unilateral Liability under Section 8(b) of RESPA

**By Phillip L. Schulman, Andrew C. Glass, Holly Spencer Bunting, Roger L. Smerage**

The United States Supreme Court has unanimously ruled that a real estate settlement service provider does not violate Section 8(b)<sup>1</sup> of the Real Estate Settlement Procedures Act (“RESPA”) where it keeps for itself an allegedly “unearned fee.” Instead, a provider violates Section 8(b) when it divides a fee with another entity which did not provide services in connection with the fee. The Court’s decision, *Freeman v. Quicken Loans, Inc.*,<sup>2</sup> resolves a decade-old split among the lower federal appellate courts. Moreover, the decision makes clear that policy statements promulgated by the U.S. Department of Housing and Urban Development (“HUD”), applying Section 8(b) to a broad range of conduct, are not entitled to deference given their conflict with the unambiguous language of the statute itself. Nevertheless, the Court’s holding is limited to assessing unearned fees in light of RESPA, and settlement service providers should be aware that charging such fees may run afoul of other laws and enforcement mechanisms.

### Background

Congress enacted RESPA<sup>3</sup> “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.”<sup>4</sup> RESPA contains prohibitions on kickbacks (Section 8(a)) and fee-splitting (Section 8(b)).<sup>5</sup> Section 8(b), the focus of the *Freeman* decision, states:

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.<sup>6</sup>

As discussed in a previous K&L Gates Client Alert,<sup>7</sup> HUD interpreted Section 8(b) as prohibiting the collection of a fee from a consumer for which a settlement service provider performed no service but kept the entire fee for itself – a so-called “unearned, undivided” fee.<sup>8</sup> The federal courts of appeals were divided over whether to adopt this aspect of HUD’s interpretation of Section 8(b).<sup>9</sup> After the most recent of these decisions in the Fifth Circuit,<sup>10</sup> the Supreme Court finally granted certiorari to resolve the circuit split.<sup>11</sup>

### The *Freeman* Court’s Analysis

In a unanimous decision, the Supreme Court concluded that “to establish a violation of [Section 8(b)], a plaintiff must demonstrate that a charge for settlement services was divided between two or more persons.”<sup>12</sup> The Court reasoned that Section 8(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.”<sup>13</sup> The Court interpreted Section 8(b) as requiring “two distinct exchanges” before liability will attach: first, the service provider must receive a “charge” from

## It Takes Two to Tango: The Supreme Court Rejects Unilateral Liability under Section 8(b) of RESPA

the consumer, and second, the provider must then “‘give,’ and another person ‘accept,’ a ‘portion, split, or percentage’ of the charge.”<sup>14</sup>

Because it found that the language of Section 8(b) was unambiguous, the Court determined that it need not entertain the parties’ dispute over the type of deference to give HUD’s interpretation of the statute.<sup>15</sup> Rather, the Court rejected HUD’s interpretation outright because HUD’s “policy statement [with respect to unearned, undivided fees] goes beyond the meaning that the statute can bear.”<sup>16</sup>

The Court also rejected the petitioners’ alternative interpretations of Section 8(b). For instance, the Court found implausible the petitioners’ suggestion that a consumer could constitute the second actor in the required exchange under Section 8(b). The Court reasoned that (1) such a reading would subject consumers to Section 8 criminal liability,<sup>17</sup> but (2) the language of Section 8 provided no support for the idea that Congress intended such an outcome.<sup>18</sup>

Nor did the Court accept the petitioners’ argument that liability for accepting a “percentage” of a fee could arise where a settlement service provider accepted “100 percent” of a fee. Rather, the Court held that the “normal usage” (which, “in the absence of contradictory indication, governs [the Court’s] interpretation of texts”) of the phrase “portion, split, or percentage” has the meaning “a part of a whole.”<sup>19</sup> The Court did recognize that the words “portion” and “percentage” sometimes “can be used to include the entirety, or 100 percent.”<sup>20</sup> Yet, taking into consideration the common dictionary definition of those terms and Congress’s inclusion of the word “split” (which the Court noted “cannot possibly mean the entirety”), the Court concluded that Congress intended Section 8(b) liability to arise only where a fee was divided.<sup>21</sup>

Finally, the petitioners argued that the “two-party” interpretation of Section 8(b) liability would render Section 8(a), the anti-kickback provision, superfluous. This argument found no traction with the Court. The Court reasoned that Section 8(a) is both broader than Section 8(b) in that “it applies to the transfer of any ‘thing of value,’ rather than to the dividing of a ‘charge’ paid by a consumer,” and narrower than Section 8(b) in that “it requires an ‘agreement or understanding’ to refer business.”<sup>22</sup> As such, the Court ruled that “each subsection reaches conduct that the other does not.”<sup>23</sup>

### Impact of Decision

The Court’s decision in *Freeman* resolves a question of RESPA Section 8(b) liability, which, for the past decade, had led to divergent results in lower courts and thus uncertainty in the marketplace. With the Court’s clarification, the scope of conduct to which RESPA liability attaches has narrowed. Indeed, in those circuits where the courts of appeals had previously found RESPA Section 8(b) liability for a settlement service provider’s unilateral retention of an unearned fee, the threat of such liability under those circumstances no longer exists. Because the Court was clear that a Section 8(b) violation exists only to the extent a settlement service provider collects a fee and shares a portion of that fee with another person that performs no services, settlement service providers may now be able to employ more efficient nationwide practices related to the charging of fees, rather than inconsistent practices tied to differing Section 8(b) interpretations in particular jurisdictions. Nevertheless, if a settlement service provider splits a fee or a mark-up with another party that performs no services, those entities remain susceptible to claims for violating Section 8(b) of RESPA.

Moreover, unilateral conduct that may have given rise to RESPA Section 8(b) liability prior to *Freeman* is not entirely exculpated as a result of the decision. Despite the Court’s clarification that Section 8(b) liability does not attach where a service provider collects an unearned fee from a consumer in connection with a real estate settlement, but does not divide that fee with another party, RESPA is not the lone source of potential liability. Indeed, such conduct may still be subject to state

## It Takes Two to Tango: The Supreme Court Rejects Unilateral Liability under Section 8(b) of RESPA

unfair-and-deceptive acts and practices (UDAP) laws. Further, although the Court undermined HUD's 2001 Policy Statement addressing the scope of Section 8(b), which the Consumer Financial Protection Bureau ("CFPB") has indicated it plans to follow, the relative infancy of the CFPB precludes a full understanding of how it intends to enforce RESPA. The CFPB could lobby Congress to amend the statute to prohibit the very conduct that the *Freeman* Court found did not violate Section 8(b). Or, the CFPB could more immediately target settlement service providers with allegedly unfair fees through the exercise of its authority to prevent purportedly unfair or deceptive acts and practices.

### Conclusion

Ultimately, RESPA is not a price regulation statute. The Supreme Court's decision in *Freeman* clarifies that real estate settlement service providers will not face RESPA Section 8(b) liability for the fees they charge consumers so long as they do not split or share such fees with third parties. Nevertheless, such conduct is not free from legal challenge and potential exposure to other forms of liability, including the enforcement powers of the CFPB. The executive and legislative branches of the federal government also may seek to amend RESPA to broaden its prohibitions so that they reach such conduct. Thus, while the Court's decision in *Freeman* is a victory for real estate settlement service industries, settlement service providers should ensure compliance with all applicable laws when charging and collecting fees from consumers.

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<sup>1</sup> 12 U.S.C. § 2607(b).

<sup>2</sup> --- U.S. ---, --- S. Ct. ---, No. 10-1042 (May 24, 2012).

<sup>3</sup> 12 U.S.C. §§ 2601, *et seq.*

<sup>4</sup> 12 U.S.C. § 2601(a).

## It Takes Two to Tango: The Supreme Court Rejects Unilateral Liability under Section 8(b) of RESPA

<sup>5</sup> 12 U.S.C. § 2607(a), (b).

<sup>6</sup> 12 U.S.C. § 2607(b).

<sup>7</sup> See *No More Split Decisions: The Supreme Court Grants Certiorari to Address What it Means to Split Charges under RESPA Section 8(b)*, K&L Gates Client Alert (Oct. 24, 2011) (hereinafter “*Split Decisions Alert*”), available at <http://www.klgates.com/no-more-split-decisions-the-supreme-court-grants-certiorari-to-address-what-it-means-to-split-charges-under-respa-section-8b/>.

<sup>8</sup> The Consumer Financial Protection Bureau (“CFPB”), which assumed enforcement of RESPA on July 21, 2011, pursuant to the Dodd-Frank Act, stated that it would continue to apply HUD’s interpretation of Section 8(b). See *Identification of Enforceable Rules and Orders*, 76 Fed. Reg. 43,569, 43,570-74 (July 21, 2011).

<sup>9</sup> See *Split Decisions Alert*; compare circuit decisions aligning with HUD, *Cohen v. JP Morgan Chase & Co.*, 498 F.3d 111, 117-26 (2d Cir. 2007); *Santiago v. GMAC Mortgage Group, Inc.*, 417 F.3d 384, 389 (3d Cir. 2005); *Sosa v. Chase Manhattan Mortgage Corp.*, 348 F.3d 979, 982 (11th Cir. 2003), with those which did not, *Freeman v. Quicken Loans, Inc.*, 626 F.3d 799, 801-06 (5th Cir. 2010); *Haug v. Bank of Am., N.A.*, 317 F.3d 832, 836 (8th Cir. 2003); *Boulware v. Crossland Mortgage Corp.*, 291 F.3d 261, 265 (4th Cir. 2002); *Krzalic v. Republic Title Co.*, 314 F.3d 875, 879 (7th Cir. 2002). Although some of these circuit decisions were in so-called “mark-up” cases rather than in “unearned, undivided fee” cases, the decisions addressed the issue of whether a unilateral act could violate Section 8(b).

<sup>10</sup> See *Freeman v. Quicken Loans, Inc.*, 626 F.3d 799, 803-06 (5th Cir. 2010) (rejecting HUD’s interpretation of RESPA Section 8(b) and concluding that Section 8(b) liability only arose when the subject fee was divided between two or more actors).

<sup>11</sup> *Freeman v. Quicken Loans, Inc.*, 132 S. Ct. 397 (2011).

<sup>12</sup> *Freeman v. Quicken Loans, Inc.*, --- U.S. ---, --- S. Ct. ----, No. 10-1042, slip op. at 13 (May 24, 2012) (hereinafter “slip op.”).

<sup>13</sup> *Id.* at 6 (emphasis added).

<sup>14</sup> *Id.* at 6-7 (internal alterations omitted) (“Congress’s use of different sets of verbs, with distinct tenses, to distinguish between the consumer-provider transaction ... and the fee-sharing transaction ... would be pointless if, as petitioners contend, the two transactions could be collapsed into one”).

<sup>15</sup> Slip op. at 6; see *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842-44 (1984) (“[i]f the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress”). Notably, the newly formed CFPB, in conjunction with the U.S. Department of Justice (“DOJ”), submitted an amicus curiae brief in support of petitioners, which brief advocated for deferring to HUD’s position. See Brief for the United States as Amicus Curiae Supporting Petitioners, *Freeman v. Quicken Loans, Inc.*, No. 10-1042, at 13-27 (2011).

<sup>16</sup> Slip op. at 6. The courts of appeals had already uniformly rejected HUD’s interpretation that Section 8(b) prohibits “overcharges” – namely, fees that are allegedly unreasonably high in relation to the service provided. See *Split Decisions Alert*. The Supreme Court agreed, finding that HUD’s interpretation regarding overcharges “is manifestly inconsistent with the statute HUD purported to construe.” Slip op. at

## It Takes Two to Tango: The Supreme Court Rejects Unilateral Liability under Section 8(b) of RESPA

4-5 (“even those Courts of Appeals which have found [Section 8(b)] not to be limited to fee-splitting situations have held that the statute does not reach unreasonably high fees”).

<sup>17</sup> See 12 U.S.C. § 2607(d).

<sup>18</sup> See slip op. at 7 (“this would make lawbreakers of consumers – the very class for whose benefit [Section 8(b)] was enacted”). That HUD had stated in its policy statement that it was “unlikely to direct any enforcement actions against consumers for the payment of unearned fees” and that DOJ had not sought to prosecute any consumers for such payments did not save petitioners’ argument, because HUD’s “assurance is cold comfort” and the DOJ’s “prosecutorial discretion is not a reason for courts to give improbable breadth to criminal statutes.” *Id.* at 7-8. Nor did the Court accept “petitioners’ suggestion that an unstated *mens rea*” – that is, specific criminal intent – “requirement [could] be read into the criminal enforcement provision.” *Id.* at 8 (“[w]e find it virtually unthinkable that Congress would leave it to imputed *mens rea* to preserve from criminal liability some or all of the class RESPA was designed to protect”).

<sup>19</sup> *Id.* at 8-10.

<sup>20</sup> *Id.* at 8.

<sup>21</sup> See *id.* at 10.

<sup>22</sup> *Id.* at 11.

<sup>23</sup> *Id.* The Court also rejected, with little discussion, arguments that relied on the “caption” of RESPA Section 8 and the overall statutory purpose of RESPA. See *id.* at 11-13.

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