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To: Clients and Friends

From: David F. Dulock

Subject: RESPA Section 8(b) Fee Splitting - U.S. Supreme Court Takes HUD to the Woodshed on Undivided Unearned Fee Interpretation in SOP 2001-1

In a unanimous decision decided May 24, 2012, in *Freeman, et al. v. Quicken Loans, Inc.*, 132 S.Ct. 2034 (2012), the U.S. Supreme Court refused to give deference to HUD's undivided unearned fee interpretation expressed in Statement of Policy 2001-1 and ruled that Section 8(b) of RESPA (12 U.S.C. §2607(b))¹ does not prohibit a settlement service provider from charging an unearned fee when the provider retains the entire fee.

The Court stated, "§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 held that in order to establish a violation of Section 8(b), it must be demonstrated that a charge for settlement services was divided between two or more persons.

Without going into the Court's legal analysis, suffice it to say the Court used a plain language reading of the text in deciding that Section 8(b) does not prohibit undivided unearned fees or prohibit unreasonably high fees for services actually performed. But, before you get too excited over this decision, please be aware that:

1. Regulation Z's creditor-paid loan originator compensation regulation (12 CFR §1026.36(d)(1)) generally restricts or prohibits loan originators from keeping fees in addition to the compensation received from the creditor. (*See*, comment 36(d)(1)(ii))
2. State laws, such as fraud and deceptive practices statutes and regulations, generally prohibit the charging and/or retention of unearned fees. (*See*, for example, Texas Administrative Code, 7 TAC §80.10(a)(5))
3. This decision may not be the final say. The Consumer Financial Protection Bureau assumed HUD's RESPA consumer protection functions pursuant to authority granted by the Dodd-Frank Act. It filed "a friend of the court" brief in this case supporting HUD's interpretation and may attempt to use its Dodd-Frank Act authority to enforce HUD's interpretation by other means.

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¹ Section 8(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 in connection with a transaction involving a federally related mortgage loan other than for services actually performed."