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## QUOTE OF THE MONTH

"Charging fees for services never provided is an abusive practice that results in the same increase in settlement costs to the consumer whether the provider shares its ill-gotten gains with another provider or keeps them all for itself."

— Kevin K. Russell, partner  
Goldstein & Russell PC

## RESPA tip

"A submission by a borrower to a lender that does not identify a property is not an application and thus does not trigger the Good Faith Estimate requirement."

## SUPREME COURT GEARS UP FOR RESPA SHOWDOWN

The merit briefs are in and the U.S. Supreme Court is gearing up for a RESPA showdown. The parties in the case of *Tammy Foret Freeman, et al., v. Quicken Loans Inc. (10-1042)* have finalized their written arguments and are poised to duke it out before the Court during the oral arguments scheduled for Feb. 21.

The Court is looking to answer whether Section 8(b) of RESPA prohibits a real estate settlement services provider from charging an unearned fee only if the fee is divided between two or more parties.

RESPA Section 8(b) 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.

### Freeman's arguments

**Tammy Freeman's** merit brief makes it clear that she is in agreement with the U.S. Department of Housing and Urban Development's (HUD) interpretation of RESPA Section 2607(b), which states that only one culpable actor is necessary for a violation. However, her arguments extended beyond the Court providing deference to HUD's interpretation.

She argued that common usage of the language in the statute and the usage in other federal statutes show that the 5th Circuit Court of Appeals was wrong when it determined that two or more actors are necessary for a Section 2607(b) violation.

"Section 2607(b) prohibits accepting 'any portion, split or percentage' of an unearned fee. The 5th Circuit read this language to require that the defendant split the unearned charge with a third party," wrote **Kevin K. Russell**, a partner with Goldstein & Russell PC and the counsel of record on the case. "But in common usage and throughout the U.S. Code, the phrases 'any portion' and 'any percentage' also include the entirety, or 100 percent.

"Federal embezzlement statutes, for example, prohibit those entrusted with public funds from misappropriating 'any portion' of that money," Russell continued. "No one would seriously contend that such a statute would permit someone to embezzle all of the funds entrusted to her care."

Russell argued that the 5th Circuit was wrong when it determined that the phrase "no person shall give and no person shall accept" implied that more than one culpable actor was necessary for a violation to occur.

"That is not a natural, much less a necessary, reading of this language," Russell argued. "In this case, there were two parties to the transaction — Quicken required petitioners to 'give,' and Quicken then 'accept[ed]' the unearned charge. To the extent a culpability requirement is reasonably read into the statute, the provision

Dear Reader,

The New Year is upon us and we have much to look forward to. Between U.S. Supreme Court cases and new mortgage disclosure forms, 2012 will likely be an eventful year in the RESPA world.

The Court has already read briefs and heard arguments in the case of *First American v. Edwards*. It's likely the opinion will be released by this summer. In the case of *Freeman v. Quicken Loans*, the Court will be hearing oral arguments next month. That case will also likely be decided later on this year. The outcome of both cases could lead to some changes on the RESPA front.

The Consumer Financial Protection Bureau (CFPB) is still hard at work on the mortgage disclosure forms. According to Director **Richard Cordray**, the proposed rulemaking for the forms should be published by this summer. *RESPA News* will be keeping a close eye on any new developments as the CFPB determines how its final forms will look.

Even as the bureau continues to work, there are questions lingering about the constitutionality of Cordray's appointment. The Department of Justice has published its opinion that the president had the power to make the appointment. That doesn't mean, however, that it won't lead to a legal battle in the future. The problem the CFPB could run into if Cordray is forced to step down, is the issue of whether the bureau can publish final rules without a director in place. If Cordray's appointment was illegal, would the final rules mandated while he was in power be considered legitimate? We'll have to wait and see what happens next.

There's no telling exactly what this year will bring, but it is obvious that it will be important to keep well informed of the important RESPA changes as they happen. You can do that by staying logged on to [www.RESPANews.com](http://www.RESPANews.com).

Until next time,



Angela Rulffes  
Editor  
[arulffes@octoberresearch.com](mailto:arulffes@octoberresearch.com)

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**RESPA News**  
3046 Brecksville Rd., Suite D  
Richfield, Ohio 44286  
Tel: (330) 659-6101  
Fax: (330) 659-6102  
Email: [contactus@RESPAnews.com](mailto:contactus@RESPAnews.com)

**OWNER & PUBLISHER**  
Erica Meyer

**CHIEF EXECUTIVE OFFICER**  
Chris Casa

**EDITORIAL & PUBLISHING**  
Editorial Director  
Syndie Eardly

**Editors**  
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# U.S. Supreme Court

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nonetheless does not require both a culpable giver and a culpable receiver in any one transaction. For example, a law providing that ‘no person shall knowingly send and no person shall knowingly accept child pornography’ is most naturally understood to prohibit knowingly sending child pornography, even if it is never knowingly received — either because it gets lost in the mail or because it is mistakenly sent to an innocent recipient. Section 2607(b) likewise establishes two independent prohibitions.”

The 5th Circuit’s interpretation of Section 2607(b) would render it unnecessary, Russell argued, because Section 2607(a) already prohibits kickbacks, which include those paid from unearned fees. He argued that the specific language of Section 2607(b) proves that its purpose is to ban all unearned fees, shared or not.

“Reading Section 2607(b) to do little more than prohibit the kickbacks already banned by subsection (a) would also thwart RESPA’s goal of protecting consumers from ‘abusive practices’ that lead to ‘unnecessarily high settlement charges,’” Russell wrote. “Charging fees for services never provided is an abusive practice that results in the same increase in settlement costs to the consumer whether the provider shares its ill-gotten gains with another provider or keeps them all for itself.”

Russell’s argument then proceeded to HUD’s interpretation of the statute. He said that if there is ambiguity regarding the scope of the statute then HUD’s interpretation should have deference because it was the agency charged with administering the statute. He argued that HUD has consistently interpreted Section 2607(b) as prohibiting unearned fees even when they are not split between two parties.

Russell requested the Court reverse the 5th Circuit’s decision and find in favor of Freeman.

## Quicken Loans arguments

Quicken Loans’ merit brief, on the other hand, argues that the plain language of the statute makes it clear that two parties are necessary for a violation.

“RESPA Section 2607(b) has a plain meaning that is revealed by the words Congress used and the statute in which the provision appears: it prohibits the sharing or division of a real estate settlement service fee between two providers where the shared portion of the fee is not earned by the recipient,” said **Thomas Hefferon**, a partner with Goodwin Proctor LLP and the counsel of record. “It does not address situations where a borrower claims she was charged a fee that she believes was not earned by the lender and the lender retains that fee.

“The law begins with the phrase ‘No person shall give and no person shall accept,’ which the 5th Circuit and three other circuit courts of appeal have all concluded contemplates conduct by two culpable actors,” Hefferon continued. “This conclusion is bolstered by RESPA’s use in Section 2607(a) of the same formulation in defining the conduct of intentional kickbacks.”

Hefferon argued that Section 2607(b) is a “fee splitting statute” rather than an “unearned fee statute” because the statute prohibits the giving or accepting of “any portion, split or percentage of a charge,” and words such as split and portion imply sharing or dividing.

“Charging fees for services never provided is an abusive practice that results in the same increase in settlement costs to the consumer whether the provider shares its ill-gotten gains with another provider or keeps them all for itself.”

— Kevin K. Russell, partner  
Goldstein & Russell PC

“Quicken Loans’ conduct in charging a loan discount fee as part of its price and retaining that fee cannot reasonably be said to have involved apportioning, splitting or accepting a percentage of the fee,” Hefferon wrote.

He argued that the language of the statute and its structure clearly convey the actions it prohibits.

“Section 2607(b) further underscores its narrow focus on backroom deals by describing two separate transactions that each must be met before the law is potentially implicated,” Hefferon explained. “First, there must be a ‘charge made or received for a real estate settlement service.’ Then, someone must ‘give’ and someone must ‘accept’ ‘any portion split or percentage’ of that charge. That the law must be read this way is compelled by its structure and by the verbs Congress chose, the former plainly directed at the imposition of charges and the latter at a voluntary transaction with respect to the charges already received.”

According to Hefferon, statutory context and legislative history show that the conduct being targeted by Congress in Section 2607(b) is the division or sharing of fees among culpable actors.

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# U.S. Supreme Court

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“Statutory context also points solely to the 5th Circuit’s proper construction. RESPA’s findings and purposes refers to ‘referral fees’ and a desire to outlaw only ‘certain’ practices, without mentioning or implying that unearned fees generally are addressed,” Hefferon said. “Indeed, Congress in enacting the law expressly commissioned HUD to study the settlement service business more closely and report back as to ‘the necessity for further legislation.’”

Hefferon further argued that HUD’s interpretation should not be afforded deference because its interpretation, contained in HUD’s 2001 Policy Statement, is not a policy judgment or a rule that has been through notice-and-comment.

“The Court should not defer in any fashion to the statement, as it provides no reasoned explanation for its conclusion and otherwise lacks the power to persuade,” Hefferon concluded.

He requested the Court affirm the 5th Circuit’s holding.

## The facts

A group of borrowers, including Freeman, obtained residential mortgage loans from Quicken Loans. Quicken Loans allegedly charged the borrowers a loan discount fee at closing but failed to give them a discount. The borrowers filed a lawsuit against Quicken Loans alleging a violation of RESPA Section 8(b) by imposing an unearned fee.

Quicken Loans argued that unearned, undivided fees are not actionable under RESPA Section 8(b). The district court agreed with Quicken, and the plaintiffs appealed to the 5th U.S. Circuit Court of Appeals.

On Nov. 17, 2010, Chief Judge **Edith Jones** affirmed the district court’s ruling. Jones recognized a split in the courts but found

that the express language of RESPA Section 8(b) is unambiguous and clearly requires two culpable actors, and that RESPA Section 8(b) does not cover undivided, unearned fees.

The 4th, 7th and 8th Circuits have each held that RESPA Section 8 is exclusively an anti-kickback provision. The 2nd, 3rd and 11th Circuits have rejected the two-party requirement and held that RESPA Section 8(b) prohibits mark-ups.

“Quicken Loans’ conduct in charging a loan discount fee as part of its price and retaining that fee cannot reasonably be said to have involved apportioning, splitting or accepting a percentage of the fee.”

— Thomas Hefferon, partner  
Goodwin Proctor LLP

“Only the 2nd Circuit has explicitly addressed whether RESPA Section 8(b) prohibits a sole provider’s undivided, unearned charges and found that it did,” Jones noted. “All circuits agree that the statute plainly prohibits fee splitting and every circuit addressing the issue has rejected the contention that simple overcharges are actionable under the statute.”

Circuit Judge **Patrick Higginbotham** dissented from the court’s ruling. He argued that he would have followed the 2nd Circuit’s lead in *Cohen v. JP Morgan Chase & Co.* and ruled that unearned, undivided fees are a violation of RESPA Section 8(b).

Freeman filed a *writ of certiorari* in the U.S. Supreme Court on Feb. 15, 2011, and the Court granted the writ on Oct. 7, 2011.

## INDUSTRY ASSOCIATIONS FILE BRIEFS WITH THE SUPREME COURT

Industry associations are making sure their voices are heard in the case of *Tammy Foret Freeman, et al., v. Quicken Loans Inc. (10-1042)*, which is currently being reviewed by the U.S. Supreme Court. The National Association of Realtors (NAR) filed an *amicus* brief on Jan. 10. A group of industry associations, which included the American Escrow Association, American Land Title Association (ALTA) and the Real Estate Services Providers Council (RESPRO), filed a joint *amicus* brief on the same day. The merit briefs are already in for the case, and the oral arguments are scheduled for Feb. 21.

Both briefs take the position that Tammy Freeman is wrong in her

argument that only one party is necessary for a Section 8(b) violation. They argue that the 5th Circuit Court of Appeals was right to find in favor of Quicken Loans, and they ask the Court to affirm that ruling.

### NAR’s arguments

In its *amicus* brief NAR argued that the text of RESPA Section 8(b) clearly requires two culpable actors.

RESPA Section 8(b) states: No person shall give and no person shall accept any portion, split or percentage of any charge made



# U.S. Supreme Court

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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 association argued that there are three features of Section 8(b) that clearly illustrate that the statute does not regulate charges for settlement services.

First, NAR said the language of the statute requires two different exchanges: 1) The consumer paying for a service; and 2) a division of that fee between the provider of the service and another person.

According to the association, RESPA only prohibits the division of the fee with another person, if no services were performed for the fee. It does not prohibit the provider from charging and receiving a fee from the consumer, NAR argued.

Second, NAR told the Court that the words “give” and “accept” indicate an exchange between two people. “Under the petitioners’ and HUD’s interpretation, however, the consumer ‘give[s]’ the part of the charge and a provider ‘accept[s]’ it,” NAR wrote. “That reading makes the consumer, the alleged victim of the offense, a violator of the statute and, at least theoretically, subject to severe civil and criminal sanctions. The petitioners and HUD provide no basis for concluding that Congress intended such an absurd circumstance.”

Third, the association argued that Section 8(b) only applies to the giving and accepting of a “portion, split or percentage” of the fee. NAR said this language indicates that there is a giving and receiving for a part of something, rather than a whole.

NAR said that RESPA’s legislative history confirms that Congress meant Section 8(b) to apply only to fee-sharing by providers of settlement services.

Lastly, the association told the Court that Freeman’s interpretation of Section 8(b) would “create significant practical problems for providers of settlement services, including NAR’s members.”

NAR argued that the 5th Circuit correctly held that Section 8(b)

is not meant to regulate charges paid by consumers for settlement services.

“Petitioners, and the government, argue that a plaintiff can state a claim against a settlement service provider under Section 8(b) by alleging that the provider did not perform sufficient services in exchange for some ‘portion, split or percentage’ of the charge paid by the consumer to that provider,” NAR wrote. “That reading of Section 8(b) transforms the provision from a restriction on abusive fee-sharing by settlement-service providers into a vehicle to regulate directly charges for settlement services. RESPA’s text and history, as well as the

consequences of petitioners’ and the government’s interpretation, demonstrate that the court of appeals properly rejected the petitioners’ position.”

RESPA News spoke to **Ken Trepeta**, director of real estate services at NAR, about the association’s decision to file an amicus brief in the case. He indicated that there will be a significant

and negative impact on the industry if the Consumer Financial Protection Bureau (CFPB) is allowed to regulate service providers’ charges.

“NAR believes the case is very important because a decision that allows CFPB, and private litigators, to scrutinize what is essentially an individual firm’s pricing model is contrary to RESPA’s plain meaning and would have dramatic impact across the industry,” Trepeta said. “As it is, many settlement service providers relied on the plain meaning of RESPA for decades and then found themselves at significant risk when those meanings were contradicted by courts.”

He told RESPA News that this is a hardship the industry does not need right now.

“The industry is already under significant strain from regulations and the housing market,” Trepeta said. “Constantly evolving standards and rules are detrimental to the industry and the housing market as a whole.”

## Arguments in the joint amicus brief

The joint *amicus* brief filed by a group of associations that included

“NAR believes the case is very important because a decision that allows CFPB, and private litigators, to scrutinize what is essentially an individual firm’s pricing model is contrary to RESPA’s plain meaning and would have dramatic impact across the industry.”

— Ken Trepeta, director of real estate services  
National Association of Realtors

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# U.S. Supreme Court

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ALTA and RESPRO also focused on the text of Section 8(b). The groups, like NAR, argued that if the language of the statute is construed the way Freeman indicated, consumers would be liable for a RESPA violation by paying the fee to the service provider.

“Petitioners’ construction, which would make consumers liable for paying unearned fees, is strong evidence that Congress never intended Section 8(b) to be interpreted in that fashion.”

The groups also said that Freeman’s argument that the statute prohibits all unearned fees is wrong. Congress did not intend to regulate the pricing of settlement services, the groups said. They argued that Congress specifically rejected proposals to regulate pricing.

The groups said that Section 8(b) is meant to supplement Section 8(a).

“Thus, the language of section 8(b) addresses in a different way the same concern caused by kickbacks and/or avoids circumvention of

the kickback and referral fee provision, by also prohibiting fee splitting or sharing where no services were provided for the fee, even absent proof of a referral or an explicit agreement to pay kickbacks,” they said.

They also argued that the Court should not defer to the U.S. Department of Housing and Urban Development’s 2001 Policy Statement that interpreted Section 8(b) as requiring only one party for a violation. The group said that the policy statement had “procedural infirmities” and that it was inconsistent with Congress’s intent.

“In sum, the problem with petitioners’ position is that neither the statutory text of Section 8(b) nor the overall purpose of RESPA and Section 8 suggest that RESPA was intended to address all perceived pricing ills in real estate services,” the groups said. “Rather, RESPA was intended to increase the disclosure consumers received and to prohibit certain limited abusive practices — namely kickbacks and fee splitting where no services were performed. Congress realized that price regulation and caps bore their own set of problems, which is illustrated by application of petitioners’ view and HUD’s position on Section 8(b).”

# CFPB Director

## OBAMA’S ‘IN-YOUR-FACE’ ANNOUNCEMENT CHALLENGES REPUBLICAN IMPASSE

When it comes to consumer protection, President **Barack Obama** came out swinging in 2012. On Jan. 4, after much debate and controversy, Obama named **Richard Cordray** the first director of the Consumer Financial Protection Bureau (CFPB). The president made his announcement while visiting Cordray’s home state of Ohio.

Obama and Cordray took to the stage together backed by applause from the audience that filled the Shaker Heights High School in Shaker Heights, Ohio. The president wasted little time in announcing his decision to appoint Cordray.

“I am joined by someone you might recognize — Richard Cordray,” the president told the crowd. “Today, I’m appointing Richard as American’s consumer watchdog, and that means he is going to be in charge of one thing, looking out for the best interest of American consumers.”

Obama noted that he nominated Cordray for the director position last summer. “You may be wondering why I’m appointing him today,” Obama said to the crowd. “For almost half a year, the Republicans in the Senate have blocked Richard’s appointment.”

Obama continued as the crowd responded with boos.

“When Congress refuses to act then I have an obligation as president to do what I can without them,” the president continued. “I have an obligation to act on behalf of the American people.”

Obama said that blocking Cordray’s appointment had nothing to do with whether or not Cordray was qualified. The president told the crowd that the Senate refused to vote either way. He then touted his choice to nominate Cordray.

“You need someone looking out for your interest and fighting for you and that’s Richard Cordray,” Obama said. “He’s the right man for the job.”

Article II of the U.S. Constitution says that the president may fill vacancies that take place while the Senate is in recess. A report for Congress about recess appointments, written by the Congressional Research Service, says the Constitution does not state how long Congress must be in recess before the president

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# 2012 Keynote Speakers Announced



## Dr. Mark Sniderman

Executive Vice President  
& Chief Policy Officer

Federal Reserve Bank  
of Cleveland

Read Full Bio @

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& Chief Executive Officer

Best Brands Corporation

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# CFPB Director

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can make an appointment. However, the report indicates that there may be a question if a Congressional break for less than three days is considered a recess.

This may be the issue that the Republicans grab on to if they decide to fight the appointment. According to the report, 10 days is the shortest time period during which a president has made a recess appointment.

The Senate had a *pro forma* session on Jan. 3 where it met for approximately one minute. Its next *pro forma* session was scheduled for Jan. 6. The president's choice to make a recess appointment after only one day of congressional recess is unprecedented, according to the report's statistics.

The CFPB was unable to gain its full power as mandated under the Dodd-Frank Wall Street Reform and Consumer Protection Act until a director is in place.

## CONSTITUTIONALITY OF CORDRAY APPOINTMENT QUESTIONED

In a move that some are calling unprecedented and unconstitutional, President **Barack Obama** recently appointed **Richard Cordray** as the first director of the Consumer Financial Protection Bureau (CFPB). There was immediate backlash as people began questioning whether the president's move was legal and whether the CFPB should attain its full powers.

Directly after Obama's announcement, Republicans from both the House and Senate called his action into question. Senate Minority Leader **Mitch McConnell**, R-Ky., said the president's move was "arrogant."

"Although the Senate is not in recess, President Obama, in an unprecedented move, has arrogantly circumvented the American people by 'recess' appointing Richard Cordray as director of the new CFPB," McConnell said. "This recess appointment represents a sharp departure from a long-standing precedent that has limited the president to recess appointments only when the Senate is in a recess of 10 days or longer. Breaking from this precedent lands this appointee in uncertain legal territory, threatens the confirmation process and fundamentally endangers Congress's role in providing a check on the excesses of the executive branch."

U.S. Rep. **Spencer Bachus**, R-Ala., chairman of the House Financial Services Committee, also hinted at potential legal troubles for the new bureau thanks to the president's move.

"President Obama has delegitimized the CFPB and has opened the agency up to legitimate legal challenges that will cripple it for years," he said. "The greatest threat to our economy right now is uncertainty, and the president just guaranteed there will be even more uncertainty."

**Frank Keating**, president and chief executive officer of the American Bankers Association (ABA), said in a statement that the appointment could make the bureau's future actions unconstitutional.

"The controversial nature of [the] recess appointment reinforces the banking industry's concerns about the bureau's structure and lack of accountability," Keating said. "It puts the bureau's future actions in constitutional jeopardy, threatening its work, complicating compliance efforts of banks and further undermining the entity's authority and credibility. It's critical that Congress strengthen accountability at the CFPB by instituting a board or commission to address the director's unchecked authority to make decisions that could limit financial choices available to consumers.

"By abandoning the opportunity to compromise on the governance structure of the CFPB, the potential to create regulatory clarity for our industry, allow for the regulation of non-banks and ultimately benefit consumers is damaged," Keating continued.

"This controversial appointment is unprecedented, constitutionally questionable and puts the authority of the director and the validity of the bureau's work in legal jeopardy."

— U.S. Chamber of Commerce

The U.S. Chamber of Commerce also questioned the constitutionality of the president's decision and said a bipartisan commission rather than a single director is necessary to ensure the bureau is held accountable for its actions.

"This controversial appointment is unprecedented, constitutionally questionable and puts the authority of the director and the validity of the bureau's work in legal jeopardy," the chamber said in a statement. "What's more, it ignores repeated calls to reform the bureau by restoring basic checks and balances.

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# CFPB Director

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The Senate has already made it clear that structural changes are needed before a director can be confirmed and the executive branch has defied convention to undermine that process.”

“The president had a choice to work with Congress to implement the necessary reforms for this agency,” the statement continued. “Instead, he chose a political maneuver that ignores the advice and consent power of the Senate, harms consumers and ensures that the CFPB’s authority will be challenged and resolved by the courts.”

Some of the members of the Senate Judiciary Committee wrote a letter to Attorney General **Eric Holder**, on Jan. 6, requesting information regarding the role the Department of Justice or the Office of Legal Counsel played in developing or advising the president on his decision to appoint Cordray.

“The Justice Department and the White House owe it to the American people to provide a clear understanding of the process that transpired and the rationale it used to circumvent the checks and balances promised by the Constitution,” the letter said. “Overturning 90 years of historical precedent is a major shift in policy that should not be done in a legal opinion made behind closed doors hidden from public scrutiny.”

The letter discussed legal opinions regarding recess appointments. The opinions indicated that a recess must be longer than three days in order for the president’s appointment to be legally valid.

The letter asked Holder to answer eight questions regarding the department’s involvement in the recent recess appointments. In addition to answering the specific questions, the letter requested that any formal opinion that was prepared for the White House be included in Holder’s response.

**Marx Sterbcow**, managing attorney of the Sterbcow Law Group, said that legal challenges to the appointment are quite possible.

“The Cordray appointment from a political standpoint will only add to the dysfunctional political environment in Washington, D.C., but from the CFPB standpoint, his appointment now gives the rudderless bureau some direction and stability,” Sterbcow said. “Whether his appointment stands up legally will be something to watch very carefully because it is widely assumed that lawsuits will emerge challenging the way he was appointed. However, lawsuits challenging this appointment will take time and during the interim period he will be able to establish his ideology for consumer protection.”

## The law

So, the question remains: Were the president’s actions unconstitutional? The answer seems to be different depending on who you ask.

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## HOUSE REPUBLICANS: ADVICE AND CONSENT OF SENATE ERASED FROM APPOINTMENT CLAUSE

The U.S. House Republicans criticized President **Barack Obama** for his decision to install **Richard Cordray** as the first permanent director of the Consumer Financial Protection Bureau (CFPB) while Senate lawmakers were on break. In a scathing Jan. 6 letter to the White House, a group of 96 lawmakers said the president’s “attempt to override legislative power effectively erases the advice and consent of the Senate from the appointment’s clause and imperils the legislative checks on executive power that the Founders thought necessary to prevent the emergence of tyranny.”

Senate Republicans had blocked the Cordray nomination for months, arguing that the Dodd-Frank Wall Street Reform and Consumer Protection Act entrusted the CFPB’s single director with too much power. Without a director, the agency was not able to wield its full authority. The president broke the stalemate by appointing Cordray to the post, on Jan. 4, while the Senate was away.

The Senate had instituted a series of procedural *pro forma* sessions in an attempt to block any recess appointments. In their letter, the Republicans argued that the Senate “was demonstrably not in recess” when the president sought to utilize his recess appointment powers.

“The appointment of [Cordray] is especially egregious,” the lawmakers wrote, referencing Senate’s Dec. 8, 2011, choice to reject a motion to invoke cloture on Cordray’s nomination. Further, they charged that the appointment was a clear attempt to “override the judgment of the Senate and circumvent its constitutional role.”

The Republicans also said the appointment prevented the Senate from further questioning Cordray as part of the confirmation process, thereby eliminating the “last and only check on a nearly unaccountable yet extremely powerful position.”

“These appointments establish a dangerous precedent that threatens the confirmation process and undermines the system of checks and balances embedded in the Constitution,” the lawmakers concluded. “We stand committed to undoing the damage these appointments have done to our republic and expect that these appointments will be determined to be unconstitutional and invalidated by both the courts and the American people.”

The letter also called out three recess appointments to the National Labor Relations Board.



# CFPB Director

Continued from page 8

Obviously, the president believed he was in the right. Cordray has also made it clear that he believes his appointment was legal and that the bureau has the full use of its powers under the Dodd-Frank Wall Street Reform and Consumer Protection Act.

“The importance of this day has less to do with me personally and much more to do with you — and the millions of individuals and families across the country who access consumer financial markets every day to participate in our economy and to pursue their dreams and aspirations,” Cordray wrote in the CFPB’s blog on Jan. 4. “That’s because now, with a director, the CFPB can exercise its full authorities — with respect to both banks and nonbanks — to help those markets operate fairly, transparently and competitively.”

However, many believe the president’s act was unconstitutional. One primary argument is that the Senate was not actually in recess, and therefore the recess appointment was invalid.

Article II, Section 2 of the U.S. Constitution states that the president has the power, “by and with the advice and consent of the Senate,” to appoint officers of the United States. It further states that, “the president shall have power to fill up all vacancies that may happen during the recess of the Senate, by granting commissions which shall expire at the end of their next session.”

## DOJ: PRESIDENT’S RECESS APPOINTMENTS CONSTITUTIONAL

The Office of Legal Counsel within the U.S. Department of Justice (DOJ) recently published a legal memorandum opinion regarding President **Barack Obama**’s choice to make four recess appointments in early January.

Obama’s Jan. 4 appointment of **Richard Cordray** while Congress was in a short recess caused many to question whether the appointment was supported by the U.S. Constitution. Since that time, Republicans in Congress have written multiple letters criticizing Obama’s action and asking whether it was constitutional.

The DOJ said in its Jan. 6 opinion that the president was within his constitutional rights.

“The convening of periodic *pro forma* sessions in which no business is to be conducted does not have the legal effect of interrupting an intrasession recess otherwise long enough to qualify as a ‘recess of the Senate’ under the recess appointments clause,” the DOJ said. “In this context, the president therefore has discretion to conclude that the Senate is unavailable to perform its advise-and-consent function and to exercise his power to make recess appointments.”

The opinion explains that the Senate agreed on Dec. 17, 2011, to adjourn and convene *pro forma* sessions with no business conducted on every Tuesday and Friday until Jan. 23. It indicated that the

The question is whether the Senate was in recess. As the letter from the Senate Judiciary Committee indicated, at least one legal opinion pointed out that under Article I, Section 5 of the U.S. Constitution, neither the House nor the Senate can adjourn for more than three days without the consent of the other. The argument is that one may infer from this language that Congress is not in recess unless it is adjourned for more than three days. Because Congress had not been adjourned for three days, those opposed to Obama’s appointment of Cordray say that it was unconstitutional.

The other side of the argument is that the Constitution does not specify how long a recess must be and that Congress was in recess.

Looking beyond the constitutionality of the appointment, some have questioned whether, under the Dodd-Frank Act, the bureau can have its full powers without Cordray first being appointed by the Senate. Section 1011(b)(2) of the Dodd-Frank Act states that “the director shall be appointed by the president, by and with the advice and consent of the Senate.”

With so many proponents on each side of the argument, it’s difficult to say if there is a right answer. It’s likely the answer can only be found in the hands of the courts and their legal interpretations of the U.S. Constitution.

Senate convened a *pro forma* session on Jan. 3 for less than one minute. The next day, Obama appointed Cordray.

“You asked whether the president has authority under the recess appointments clause to make recess appointments during the period between Jan. 3 and Jan. 23 notwithstanding the convening of periodic *pro forma* sessions,” the DOJ said. “We advised you that he does. This opinion memorializes and elaborates on that advice.”

The DOJ indicated that, in its judgment, the sessions would not interrupt the intersession recess “in a manner that would preclude the president from determining that the Senate remains unavailable throughout to ‘receive communications from the president or participating as a body in making appointments.’”

“The Senate could remove the basis for the president’s exercise of his recess appointment authority by remaining continuously in session and being available to receive and act on nominations, but it cannot do so by providing for *pro forma* sessions at which no business is to be conducted,” the DOJ continued.

The DOJ said it used past opinions of the attorney general and the office of legal counsel, as well as historical practice and case law to come to its decision.



# Mortgage Disclosure Forms

## DOES THE CORDRAY APPOINTMENT MEAN FINAL DISCLOSURE FORMS ARE ON THE WAY?

Many have called into question President **Barack Obama**'s choice to appoint **Richard Cordray** as the first director of the Consumer Financial Protection Bureau (CFPB) while the Senate was in recess. Even as the constitutionality of the appointment hangs in the balance, the bureau is continuing to work on RESPA regulation and the new RESPA/Truth in Lending (TIL) mortgage disclosure forms.

Looking beyond the question of whether Obama's actions were legal, the title insurance industry is at least hopeful that with a director in place, there could be finalized RESPA/TIL mortgage forms in the near future. Before a director was in place, there was a question about whether the bureau could finalize regulations.

**Jonathan Cannon**, an associate with Buckley Sandler, told *RESPA News* that there was a "general legal consensus" that regulations could not be written without a director. He indicated that there was a question if the final disclosures could be promulgated without a director in place.

"I would look for things to move forward at a much faster pace from the CFPB. The more they can get enacted the harder it will be for the Republicans to get the toothpaste back in the tube."

— Charles Cain, senior vice president, agency manager Midwest Region at WFG National Title Insurance Co.

Obama's appointment of Cordray seems to make this concern moot — at least for the time being. There is the possibility that the appointment could be challenged in the courts, and the result of that challenge could leave the bureau without a director again.

However, with Cordray currently in place, the industry began looking toward the future, with some expecting the bureau to move faster on the combined disclosures and RESPA regulation in general.

"I would look for things to move forward at a much faster pace from the CFPB," said **Charles Cain**, senior vice president, agency manager, Midwest Region at WFG National Title Insurance Co. "The more they can get enacted the harder it will be for the Republicans to get the toothpaste back in the tube. I would anticipate that the new GFE/TIL/HUD-1 initiative will be accomplished this year."

**Mary Schuster**, president of Op2, agreed.

"Certainly the appointment of Cordray indicates that the work of the CFPB continues to move swiftly along. The brisk pace of the combined RESPA/TIL disclosure form creation means that our industry must remain highly informed and engaged during this critical time in the process. Remember, Dodd-Frank requires the CFPB to have a proposed final form by July 31 of this year. That means the prototypes you see today are meaningful and relevant. If you haven't studied them and responded to the CFPB's request for your input, you're missing a critical opportunity to make your voice heard," she said.

While **Frances Riley**, partner at the Princeton, N.J.-based firm of Saul Ewing LLP, didn't think the progress will move faster, he agreed that Cordray's appointment eliminates the concern about when the new forms will finally be implemented.

"The appointment will not have an immediate impact on the RESPA/TIL disclosure combination efforts, as they are well underway and Cordray is not going to be working 'on the ground' with the implementation," he said. "However, before his appointment there certainly was a question whether the actual implementation of final forms and related regulations would be achieved by the Dodd Frank deadline. This concern is now evaporated. Generally, I also think that his appointment will usher in clearer policy objectives and a slew of new regulations to meet those objectives. So, for the industry, I think it means that it can expect these policy statements and proposed regulations 'sooner rather than' what yesterday seemed like 'later.'"

**Marx Sterbcow**, managing attorney of the Sterbcow Law Group, said the forms will likely be moving forward even if Cordray doesn't work with them directly.

"Obviously the RESPA/TIL disclosures will continue, but I don't expect Cordray to focus his attention on this issue except to make sure the documents don't cause another implementation, design and interpretation disaster like RESPA reform created in 2010," Sterbcow said. "As for RESPA enforcement and regulation under Cordray's watch, it remains too soon to see how high on his priority list this is, but some people in the industry believe the CFPB may begin examining 'marketplace business conduct practices' involving lenders/banks and others involved in the settlement service industry."

Time will tell whether appointing a director allowed the CFPB to quicken its pace when it comes to RESPA regulation. The industry can be sure that the bureau made the mortgage forms a priority in the past and that will likely continue in the future. Whether other aspects of RESPA regulation are a priority remains to be seen.



# Mortgage Disclosure Forms

## ARE YOU PREPARED FOR THE NEW MORTGAGE DISCLOSURE FORMS?

If you have any connection with mortgage lending then you know that the Dodd-Frank Wall Street Reform and Consumer Protection Act required the Consumer Financial Protection Bureau (CFPB) to draft new mortgage disclosures. The bureau has the responsibility of combining RESPA's Good Faith Estimate (GFE) and the Truth in Lending (TIL) initial disclosures. Now, with a director in place at the CFPB, it's possible we will be seeing new mortgage disclosure forms this year.

### Will the forms be completed in 2012?

The CFPB jumpstarted its work by publishing prototypes of the forms even before the bureau itself was fully operational. Since May 2011, the CFPB has been releasing drafts for public comment in an effort to produce forms that will be easily understood by consumers.

These forms are certainly something to keep an eye on in 2012, though there is a question of when they will go into effect. **Craig Doriot**, co-founder and chief technology officer of LoanSifter Inc., said Dodd-Frank requires the new GFE/TIL form to be enacted this year, and he thinks that will happen.

"Since Dodd-Frank calls for this form to be enacted by July 2012, and because the existing TIL disclosure is primarily a subset of GFE questions along with other calculations, I see no reason it wouldn't be enacted by 2012," Doriot said.

**Elizabeth Steinhaus**, general counsel for Fairway Independent Mortgage Corp., also believes it's possible for the form to be completed in 2012, but isn't certain it will actually come to fruition this year.

"The CFPB is moving along quite nicely with its prototypes," Steinhaus said. "But creating new forms, getting feedback on them, responding to the feedback and finalizing them can be a very lengthy process. Given how long it's taken the federal government in general to enact new regulations in the wake of Dodd-Frank, I think it's unlikely, but stranger things have happened."

### Industry impact

If new disclosure forms are published this year, what kind of impact will they have on the industry? Doriot expects that the impact will be substantial.

"Adaptation across the board will be required by mortgage technology vendors along with mortgage lenders of all shapes and sizes," Doriot said. "For example, there could be increased pressure for disclosure vendors to be integrated with title companies. Hopefully, we'll also see an uptick in consumer confidence in both the CFPB and the mortgage industry at large."

Steinhaus, on the other hand, foresees an easier path ahead as long as there is legal and regulatory consistency.

"The forms seem like they'd be great for borrowers because all the information is one place," Steinhaus explained. "You have the highest monthly payments, cash to close, the interest rate — it's very simple for the consumer. The impact of the forms will likely depend on other factors, such as whether they are consistent with state regulations and investors' requirements. If everyone was consistent, it would be easy."

### Industry preparation

It seems logical that the best way to prepare for the finalization of the forms in the upcoming year is to get a strategy and plan ahead. Unfortunately, Doriot and Steinhaus agreed that it may not be that simple.

"Right now, about the only thing lenders or vendors can do is to identify the systems and processes that are currently in place that relate to borrower disclosures," Doriot said. "It will be tough to prepare much further without having the new forms finalized."

"Because the new forms aren't final, I don't know if we have enough information at this point to truly prepare effectively," Steinhaus stated. "I do think lenders ought to be proactive and learn as much as they can. We're often told that a new regulation will take effect by a 'drop dead' date, and then the date keeps getting pushed back. As a result, there's a tendency to sit around and do nothing. But this, I feel, is a mistake. Lenders could be talking to their state agencies to find out how these new forms will be handled, and they can reach out to their technology providers and share ideas on how to best prepare."

On the bright side, Doriot said integrating the new forms into existing company processes shouldn't be too difficult.

"The forms themselves are fairly straightforward enhancements over what exists today, and shouldn't require considerable effort for any established vendor in enhancing or modifying the GFEs

*Continued on page 20*



What will 2012 hold for the real estate and mortgage markets?

How will Dodd-Frank and QM / QRM rules change business?

What will distressed property levels mean for title insurance?

How will UAD requirements impact the appraisal industry?

To find the answers, October Research and sponsor Windward | Resware asked some of the top experts to take an in-depth look at each aspect of the real estate, mortgage and settlement services industry.

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- An analysis of the impact of the Dodd-Frank Act, particularly with regard to the new mortgage disclosure forms and the imminent release of the QM and QRM rules.



# Case Law

Continued from page 12

RESPA violation, the defendants said the person being referred must be charged the fee for the service provided. Because the plaintiffs were not charged, the defendants say they were not referred to FMLS.

The court disagreed with the defendant's arguments.

In order for a motion to dismiss for failure to state a claim to be successful, said District Judge **Richard Story** in the court's opinion, the court will accept the plaintiff's allegations as true and will only grant the motion if the facts alleged fail to show that the plaintiffs are entitled to relief.

"The defendants' arguments for dismissal thus miss the mark: the defendants do not argue that the facts alleged by the plaintiffs, even if true, do not show a plausible claim for relief; instead, the defendants' arguments attack the plaintiffs' allegations on the merits," Story said.

Story determined that the plaintiffs had pled adequate facts to show that they had a valid RESPA claim against the defendants.

"The plaintiffs have alleged that FMLS provides 'business incident to' the provision of a real estate settlement service — *i.e.*, access to the FMLS database," Story said. "They have alleged that the defendant brokers and agents 'referred' the plaintiffs' business to FMLS by paying FMLS hidden settlement fees funded by real estate commissions. And finally, the plaintiffs have alleged that FMLS paid the defendant brokers kickbacks. If all of these facts are true, the plaintiff is entitled to relief under RESPA Section 8(a) as against FMLS and the defendant brokers."

The court found, however, that the plaintiffs had not stated sufficient facts against the defendant agents to show a RESPA violation. The court noted that the plaintiffs alleged that only the brokers received kickbacks from FMLS.

Story granted the defendants' motion to

dismiss as to the claims against the agents, but denied the motion as to claims against FMLS and the brokers.

## Section 8(b)

The plaintiffs alleged that the defendants violated Section 8(b) through an improper splitting of the brokers' commissions. The plaintiffs said Section 8 was violated in two ways. The first was by the payment of the hidden settlement fee to FMLS, and the second was through FMLS's payment of kickbacks too the brokers.

Similar to its Section 8(a) determination, the court found that the plaintiffs need only allege facts that show a plausible violation and that they had succeeded as to both of the plaintiffs' theories. The court denied the defendants' motion to dismiss as to the Section 8(b) claim.

## Section 8(c)(4)

The plaintiffs alleged that the defendants violated RESPA Section 8(c)(4) by operating an undisclosed affiliated business arrangement (AfBA).

The defendants argued that the plaintiff failed to show sufficient facts that the defendants' arrangement constituted an AfBA and that RESPA Section 8(c) does not contain an independent cause of action for the non-disclosure of AfBAs. Rather, the defendants argued that Section 8(c) provides a safe harbor from liability under RESPA as long as the AfBAs satisfy certain conditions.

The court decided that Section 8(c) does provide for an independent basis for liability under RESPA and said that Section 8(d)(3) supports this determination.

"Section 8(d)(3) specifically states, 'No person or persons shall be liable for a violation of the provision of subsection (c)(4)(A) of this section if such person or persons proves by a preponderance of the evidence that such violation was not intentional and resulted from a bona fide

error ...'" Story wrote. "The converse of this provision seems to be that where a violation of Section 8(c)(4) is intentional or not resulting from error, it will lead to liability under RESPA."

The court found that the U.S. Department of Housing and Urban Development's regulations support its conclusion.

"According to the regulations promulgated under RESPA, 'an affiliated business arrangement is not a violation of Section 8 of RESPA ... if the conditions set forth in this section are satisfied,'" Story said.

"Again, the converse of this provision is that an AfBA that does not satisfy the criteria of Section 8(c)(4) is a violation of RESPA."

After determining that an independent cause of action does exist under Section 8(c)(4), the court found that the plaintiffs had alleged sufficient allegations to show that FMLS and the brokers and agents formed an AfBA. The court also found that the plaintiffs alleged sufficient facts to plausibly show that the defendants' AfBA violates RESPA.

"In the amended complaint, the plaintiffs allege that neither FMLS nor the defendant brokers or agents disclosed to the plaintiffs the existence of their affiliate relationship," Story said. "The plaintiffs also allege that they were not given an opportunity to opt-out of using FMLS's services. Finally, the plaintiffs allege that the defendant brokers received kickbacks from FMLS as a result of their affiliated relationship. The court finds that these allegations sufficient to plausibly show that the RESPA defendants AfBA does not satisfy the conditions of Section 8(c)(4) and therefore violates RESPA."

The court denied the defendants' motion to dismiss the plaintiff's Section 8(c)(4) claim.

The court then denied the defendants' motion as to a number of the plaintiffs' other claims and granted the motion as to the plaintiff's Sherman Act, unfair competition and civil conspiracy claims.





# Case Law

*Continued from page 14*

specific violation. Damages are a necessary element of a RESPA claim.”

Eichholz claimed he suffered damages and alleged that he was “frustrated and experienced a range of intense, negative emotions when Wells Fargo reinvestigated his account and found no errors.” He later added that he suffered economic damages, damages to his credit report, “potential increases to insurance rates and limited job prospects.”

Rosen found Eichholz’s damages were not valid because they did not occur as a result of Wells Fargo’s Section 6 violation. He determined that Eichholz had negative credit history before Wells Fargo submitted his account information. Rosen also determined that Eichholz’s claim of emotional damages was not sufficient.

“The plaintiff claims to have suffered a ‘range of intense, negative emotions,’” Rosen opined. “However, merely experiencing frustration does not constitute emotional distress. Recoverable emotional distress requires ‘[a] highly unpleasant mental reaction, such as anguish, grief, fright, humiliation or fury,’ because ‘[t]he law intervenes only where the distress inflicted is so severe that no reasonable man could be expected to endure it.’ While the plaintiff

doubtless experienced an unpleasant emotion, frustration does not rise to the level of emotional distress. Furthermore, even if the plaintiff’s harm constituted emotional distress, the plaintiff has failed to describe the ‘range of intense, negative emotions’ he felt with any degree of detail, nor has the plaintiff offered proof thereof. . . . Merely claiming to have experienced negative emotions does not suffice to establish damages under RESPA.”

Rosen then indicated that he found something in Eichholz’s claims that was worrisome.

“While the court resolves the plaintiff’s Section 2605(e)(3) claim on other grounds, it is important to note that the plaintiff’s case implicates a worrisome statutory quandary that does not appear to have come up in other reported cases,” Rosen explained. “Namely, it appears that mortgagors can force servicers of federally regulated mortgages to violate Section 2605(e)(3) of RESPA by sending a QWR and subsequently requesting a reinvestigation from a credit agency under 15 U.S.C. Section 1681s–2. Under 15 U.S.C. Section 1681s–2(b)(1), a bank must conduct an investigation when it is informed of a dispute between a consumer and a credit agency. Additionally, 15 U.S.C. Section 1681s–2(b)(1)(C) requires the bank to notify the credit agency about the outcome of its investigation; and Section 1681s–2(b)(2)

only gives the bank 30 days to do so. ‘Regardless of the results of its investigation, the bank must report back to any [credit agency] that notified it of the dispute.’”

The problem Rosen found was that under RESPA Section 2605(e)(3), a servicer is prohibited from providing information regarding overdue payments to credit agencies for 60 days after the servicer receives a QWR from a borrower disputing the account.

“Thus, mortgage servicers faced with a credit dispute and a QWR must choose which statute to violate: the servicer can refuse to report the results of its investigation, thereby violating 15 U.S.C. Section 1681s–2(b)(1)(C); or the servicer can report the results of its investigation in violation of 12 U.S.C. Section 2605(e)(3),” Rosen said “While equitably estopping the borrower from asserting a Section 2605(e)(3) claim might circumvent the problem, it is not the role of courts to override clear statutory language. Nevertheless, the intersection of these two statutory provisions creates a vexing conundrum for unsuspecting servicers of federally regulated mortgages. Fortunately, this dilemma does not have to be resolved in this case.”

Rosen granted Wells Fargo’s motion to dismiss all of Eichholz’s claims.

## BORROWER SUES LENDER FOR TRANSFERRING MORTGAGE WITHOUT NOTICE

A residential mortgage loan borrower claimed his lender committed multiple violations of RESPA including failing to respond to his qualified written request (QWR) and failing to send him notification of the transfer of his mortgage note. The court determined that all of the borrower’s RESPA claims failed, and granted the defendants’ motion to dismiss.

Heard in the U.S. District Court, District of Hawaii, the case is *Kerry K. Long v. Deutsche Bank National Trust Co. as Trustee for Soundview Home Loan Trust 2006 WF-1*;



*Wells Fargo Bank NA; and Does 1-20 (No. 10-00359).*

**Kerry Long** purchased residential property in June 2006 and obtained a mortgage loan from Wells Fargo Bank. Long alleged that Wells Fargo: 1) completed the application without providing Long with a copy; 2) did not explain the application to Long; 3) concealed that it had overstated Long’s income on the application; and 4) concealed that Long would be unable to afford the loan once the payments were amortized over the life of the loan.

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# Case Law

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According to the court, Long did not explain how Deutsche Bank National Trust Co. was involved in the transaction, but the complaint does allege that Deutsche Bank was subsequently assigned the note and mortgage.

Long filed a lawsuit against Wells Fargo and Deutsche Bank alleging 15 claims including a violation of RESPA.

He claimed that Wells Fargo violated RESPA by “accepting charges for rendering of real estate services which were in fact charges for other than services actually performed in violation of 12 U.S.C. Section 2607, and by failing to timely and promptly notify the plaintiff of the assignment or sale or transfer of the alleged note and/or mortgage for the subject property in violation of 12 U.S.C. Section 2605.” Long also alleged that both Wells Fargo and Deutsche Bank violated Section 2605(e) by failing to respond to Long’s request to resolve servicing issues.

The court first determined, in its Oct. 24, 2011, opinion that Long’s RESPA claims fail because he did not plead any actual damages.

“Because damages are a necessary element of a RESPA claim, failure to plead damages is fatal to a RESPA claim,” said District Judge **J. Michael Seabright**. “Although the complaint alleges in general that the defendants are liable to the plaintiff for damages, it fails to allege that the plaintiff suffered any actual damages as a result of

the alleged RESPA violations.”

Seabright explained that Long’s claim that he suffered damages when he was forced to hire an attorney in this action is not enough because attorney’s fees do not qualify as actual damages. Rather, they are “separately enumerated as recoverable losses in Section 2605(f)(3),” Seabright explained.

“In opposition, the plaintiff asserts that he seeks ‘actual damages paid in fighting a fraudulent and deceptive foreclosure,’” Seabright said. “No such allegations are

loan. No such allegations are included in the first amended complaint,” Seabright said. Second, the statute of limitations for Section 2607 had already run.

The court then reviewed Long’s assertion that Wells Fargo failed to timely notify Long of the transfer of his mortgage note. Seabright found that this claim also failed because it did not constitute a RESPA violation.

“RESPA governs the notice requirements where loan servicing is assigned, sold or

transferred, but does not govern notice requirements where a note or mortgage is transferred,” Seabright said. “The plaintiff cannot base a RESPA violation on this allegation.”

Lastly, Seabright reviewed Long’s claim that the defendants violation RESPA Section 2605(e) by failing to respond to his request to resolve servicing issues.

“Although the complaint alleges in general that the defendants are liable to the plaintiff for damages, it fails to allege that the plaintiff suffered any actual damages as a result of the alleged RESPA violations.”

— District Judge J. Michael Seabright  
 U.S. District Court, District of Hawaii

included in the first amended complaint, and even if included, such allegations would not establish damages caused as a result of RESPA violations — the plaintiff fails to explain how any RESPA violation would cause foreclosure of the subject property. In sum, Plaintiff has failed to allege a necessary element of his RESPA claims.”

Next the court determined that Long’s claim that Wells Fargo violated RESPA by accepting charges for services other than those performed failed for two reasons. First, Seabright found Long failed to state a claim under Section 2607. “A RESPA violation occurs when a party receives a fee for providing a referral regarding a mortgage

“The first amended complaint vaguely asserts that the plaintiff ‘submitted a request for information and a request that the defendants resolve servicing issues,’” Seabright said. “This allegation is insufficient to establish that the plaintiff made an actual QWR — the first amended complaint fails to include sufficient facts to establish that the plaintiff’s communication(s) to any of the defendants was written or concerned servicing of his loan as defined by RESPA and triggered the defendants’ duty to respond.”

Seabright granted the defendants’ motion to dismiss the RESPA claims along with all of his other allegations.

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# CFPB Regulation

## CFPB INVESTIGATES POSSIBLE RESPA VIOLATION

There has been some question in the industry as to whether the Consumer Financial Protection Bureau (CFPB) plans to make RESPA enforcement one of its current top priorities. After a recent Securities and Exchange Commission (SEC) filing, the one thing the industry knows for sure is that the bureau has already opened at least one RESPA investigation this year.

In a form that PHH Corp. filed with the SEC on Jan. 10, the company indicated that the CFPB opened an investigation to determine whether the company violated RESPA. The form stated that the bureau opened its investigation earlier this month and is reviewing PHH's mortgage insurance practices.

"In January 2012, the CFPB notified the company that the CFPB had opened an investigation to determine whether mortgage insurance premium ceding practices to the company's captive reinsurers comply with RESPA and other laws enforced by the CFPB and requested certain related documents and information for review," PHH wrote. "The company has provided reinsurance services in exchange for the premiums ceded, and believes that it has complied with RESPA and other laws.

"There can be no assurance whether or not this investigation will result in the imposition of any penalties and fines against the company or its subsidiaries," PHH continued.

*RESPA News* contacted a PHH spokesperson regarding the

investigation. However, the company declined to comment.

There certainly have been some in the industry questioning whether the bureau had plans to make RESPA enforcement a priority. During the Real Estate Services Providers Council's (RESPRO) Affiliated Business Regulatory Seminar in November 2011, **Phil Schulman**, a partner at the Washington, D.C.-based firm K&L Gates, questioned **Bart Shapiro**, senior advisor for the Office of Community Banks and Credit Unions at the CFPB, about the bureau's plans.

"We've heard informally that the bureau is gearing up, and its focus has been on distressed homeowners and trying to solve issues for people who are facing foreclosures and that RESPA enforcement is not the highest priority of the moment," Schulman asked "Can you comment on that as to where RESPA enforcement is at over at the bureau in terms of priority?"

"I would be afraid to speak to enforcement generally," Shapiro answered. "I don't know if they are looking at it as should they move ahead on RESPA verses should they move ahead on Truth and Lending Act issues, or should they move ahead on Credit Card Act issues and things of that nature. I know they try to break out into teams over in the enforcement office, and I think they are just looking at different cases that come in to see how they need to be investigated, what needs to be worked up and things of that nature. So I don't know that they are prioritizing any one statute enforcement over another. I think it is more workload management for the office."

## CFPB BEGINS OVERSEEING MORTGAGE COMPANIES

On Jan. 5, the Consumer Financial Protection Bureau (CFPB) announced the start of its long-awaited nonbank supervision program. The bureau also gave covered nonbanks a hint of what to expect from their new regulator.

"This is an important step forward for protecting consumers," said **Richard Cordray**, the CFPB's new director. "Holding both banks and nonbanks accountable to consumer financial laws will help create a fairer, more transparent market for consumers. It will create a better environment for the honest businesses that serve them. It will help the overall economic stability of our country."

The launch of the CFPB's nonbank program came one day after President **Barack Obama** appointed Cordray to head the bureau. While the Cordray nomination was in limbo, the CFPB lacked the legal authority to regulate nonbanks such as mortgage lenders and servicers. Proponents of the bureau have noted that prior to passage of the Dodd-Frank Act, there was no federal program to

supervise nonbanks, which account for a large portion of the consumer credit market.

With Cordray in place, the CFPB now has the authority to oversee nonbanks, regardless of size, in certain specific markets including mortgage companies (originators, brokers and servicers including loan modification or foreclosure relief services).

Last summer, the CFPB sought public comment to develop an initial rule, identifying six possible markets for consideration: debt collection; consumer reporting; prepaid cards; debt relief services; consumer credit and related activities; and money transmitting, check cashing and related activities.

The CFPB said it will soon propose its initial rule on this issue.

Dodd-Frank also gives the CFPB the authority to supervise any nonbank that it determines is posing a risk to consumers.



# CFPB Regulation

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## Supervision Process

The CFPB said like its bank supervision program, the regulator’s nonbank supervision program is “designed to ensure that nonbanks comply with federal consumer financial laws and it is designed to assess risk to consumers arising from these businesses.” The agency also said the program will include conducting individual examinations and may include new reporting requirements for businesses.

“How often and to what degree the examinations are performed will depend on CFPB’s analysis of risks posed to consumers based on factors such as the nonbank’s volume of business, types of products or services and the extent of state oversight,” the CFPB wrote.

The CFPB’s said its approach to nonbank examination will be the same as its approach to bank examination. In October 2011, the agency outlined this approach when it released the field guide that examiners will use for both banks and nonbanks.

“Before examiners go into a business, they will review information that is available publically or from other state or federal regulators,” the CFPB said. “Examiners will be looking at the business’s consumer financial products and services with a

focus on risk to consumers.

“Examiners will review the business’s compliance with federal consumer financial laws for the entire life cycle of the product or service, including how a product is developed, marketed, sold and managed,” the regulator continued. “Examiners will conduct interviews with personnel and observe the business’s operations. One important component that examiners will be looking for is the nonbank’s internal ability to detect, prevent and remedy violations that may harm consumers.”

The CFPB noted that nonbank businesses generally will be told of an upcoming examination and will receive status updates throughout the process. If a company is in violation of federal consumer financial laws, the CFPB said it will seek corrective actions, including strengthening the company’s programs and processes to ensure that violations do not recur and, where appropriate, that remedies are instituted.

“When necessary, examiners will coordinate and work closely with CFPB’s enforcement staff to bring appropriate legal actions to address harm to consumers,” the agency said.

Log on to [www.respanews.com](http://www.respanews.com) to read about the CFPB’s staffing and training and its next steps moving forward with the implementation of its nonbank supervision program.

## CFPB PUBLISHES EXAMINATION PROCEDURES FOR LENDERS, BROKERS

The Consumer Financial Protection Bureau (CFPB) released its mortgage origination examination procedures on Jan. 11. The bureau said publication of the procedures was a key step in implementing its nonbank supervision program.

“Theses procedures are a field guide for CFPB examiners looking at mortgage originators in both the bank and nonbank sectors of the industry,” the bureau said in its release.

“The mortgage market cannot work well for consumers if the spotlight shines only on one part of it, while the rest is left in darkness,” said CFPB Director **Richard Cordray**. “Our supervision program will illuminate the entire marketplace by making nonbanks play by the same rules as the banks.”

The release indicated that until now, independent lenders, broker and servicers were not subject to federal supervision. The Dodd-Frank Wall Street Reform and Consumer Protection Act changed that when it provided the CFPB with the authority to supervise nonbank mortgage participants.

The procedures outline the type of information that examiners will gather when evaluating mortgage originators’ policies and procedures and assessing whether originators are in compliance with applicable laws.

“The examination manual tracks key mortgage originator activities, from initial advertisements and marketing practices to closing practices,” the bureau said. “The CFPB will be implementing its nonbank mortgage supervision program based on its assessment of risk to consumers, including consideration of factors such as the volume of business, types of products or services and the extent of state oversight. The CFPB will also be coordinating with federal and state regulators in order to maximize overall supervisory capability and minimize regulatory burden.”

The examination procedures manual is divided into seven modules that identify specific matters the agency will review.

The seven modules consist of:

*Continued on page 20*



## POLL RESPONDENTS VOTE ON CORDRAY APPOINTMENT

On Jan. 4, after much debate and controversy, President **Barack Obama** appointed **Richard Cordray** as the first Consumer Financial Protection Bureau (CFPB) director. The president made his announcement while visiting Cordray's home state of Ohio.

There was immediate backlash as some questioned whether the appointment was legal.

On Jan. 6, the Department of Justice released a legal memorandum opinion stating that the president was within his constitutional rights. Even so, the debate continues over the legality of Obama's action.

RESPA News published a Reader's Poll that ran from Jan. 5 through Jan. 31 and asked the question: Do you think President Obama's appointment of Richard Cordray as CFPB director was unconstitutional?

Of the respondents, 56 percent said the appointment was unconstitutional. Of that group, 28 percent said the appointment was unconstitutional because Congress was not in recess when he made the appointment. Another 28 percent simply said that Cordray's appointment was unconstitutional.

Forty percent of the respondents disagreed. Of that group, 24 percent said that the appointment was constitutional. Another 16 percent said that the appointment was constitutional because Obama made the appointment while Congress was in recess.

The rest of the group, 4 percent, said that they didn't know if the appointment was unconstitutional.

A few of the readers also left comments.

"The obstructionist Republicans dragged their feet on the nomination in protest to the new CFPB," the reader wrote. "Their non-action had nothing to do with Cordray. The president did the right thing when the Republicans were playing their games and obstructing the process again."

"Just one more example of ignoring the Constitution and the checks and balances," another reader said.

## RESPANEWS.COM JANUARY 2012 READERS' POLL

*Do you think President Obama's appointment of Richard Cordray as CFPB director was unconstitutional?*

- ▶ **28% of respondents said**  
The appointment was unconstitutional.
- ▶ **28% of respondents said**  
The appointment was unconstitutional because Congress was not in recess when it was made.
- ▶ **24% of respondents said**  
The appointment was constitutional
- ▶ **16% of respondents said**  
The appointment was constitutional because Obama made the appointment while Congress was in recess.
- ▶ **4% of respondents said**  
They didn't know if the appointment was unconstitutional

Visit us at [www.RESPAnews.com](http://www.RESPAnews.com) to answer the current Readers' Poll:

The Consumer Financial Protection Bureau has been in power since July, how do you think the bureau is doing so far?



# CFPB

## Are you prepared for the new mortgage disclosure forms?

*Continued from page 11*

to take the TIL calculations into consideration,” Doriot said. “At the same time, it behooves all lenders to make sure their particular vendor has a handle on this issue before the new forms take effect.”

Steinhaus agreed that the integration of the forms can be simple as long as reliable technology is available.

“I think it boils down to the technology lenders are using,” Steinhaus said. “Most lenders are somewhat dependent on their tech partners to maintain compliance, particularly if they don’t have their own in-house solution. If a lender has a reliable partner with a strong track record of managing regulatory changes, I would imagine the integration process will be fairly simple and pain-free. At the same time, lenders should take it upon themselves to make sure their providers are indeed ready.”

She also said that it is likely lenders will not need to spend a

significant amount of time learning the new forms or training employees to understand them.

“Compared to the current forms, the prototypes are simpler and much more understandable,” Steinhaus stated. “Everything is all in one place, so they should not require a lot of explaining to employees or to borrowers. In fact, they will probably make the loan officer’s job easier. Most of the training that occurs will be in connection to the technology that facilitates these disclosures, not the forms themselves.”

Doriot believes consolidating the forms is a good idea, especially with the overlap of information that is published on the current GFE and TIL forms. He indicated, however, that there are still some issues that the CFPB needs to work out before the forms are finalized.

In addition, he commented that the new HUD-1 and TIL combined form that is currently in the works will “present new challenges since it is final and will require the incorporation of title fees from third party title vendors.”

## CFPB publishes examination procedures for lenders, brokers

*Continued from page 18*

- Company business model;
- Advertising and marketing;
- Loan disclosures and terms;
- Underwriting, appraisals and originator compensation;
- Closing;
- Fair lending; and
- Privacy.

The manual states the examination objectives as:

- To assess the quality of a supervised entity’s compliance management systems in its mortgage origination business;
- To identify acts or practices that materially increase the risk of violations of federal consumer financial law, and associated harm to consumers, in connection with mortgage origination;
- To gather facts that help determine whether a supervised entity engages in acts or practices that are likely to violate federal consumer financial law in connection with mortgage origination; and
- To determine, in accordance with CFPB internal consultation requirements, whether a violation of a federal consumer financial law has occurred and whether further supervisory or enforcement actions are appropriate.

## R E S P A ★ tips

“A submission by a borrower to a lender that does not identify a property is not an application and thus does not trigger the Good Faith Estimate requirement.”

— From the Department of Housing and Urban Development’s *RESPA final rule FAQs*

“In general, the lender or mortgage broker should provide the special information booklet at application. Alternatively, they may place it in the mail to the applicant not later than three business days after the application is received or prepared.”

— From the Department of Housing and Urban Development’s *RESPA final rule FAQs*

If the mortgage broker is not an exclusive agent of the lender, the broker should provide the GFE. The lender is not required to send an additional GFE, but the lender must ensure one was sent and includes an estimate of all costs.

— From the Department of Housing and Urban Development’s *RESPA final rule FAQs*

