LENDERS UPDATE™

ALT & ASSOCIATES NEWSLETTER

A COMPLIMENTARY SERVICE TO THE MORTGAGE LENDING INDUSTRY

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SUPREME COURT AND MORTGAGE BROKER OVERTIME AND MINIMUM WAGE

Yesterday the U.S. Supreme Court announced two decisions in two companion cases, Perez v. MBA and Nickols v. MBA. The effect of the two cases was a clear defeat for management of mortgage lenders and brokers. At issue was whether "mortgage brokers" (read "loan originators") were entitled to overtime pay and minimum wage. The answer was YES.

The issue had been put in doubt by two interpretive opinions of the U.S. Department of Labor ("DOL"). Some time ago the DOL issued an interpretive opinion saying that loan originators were exempt from these wage and hour requirements. Then in 2010 DOL issued a revised rule that reversed this prior interpretation. Loan originators no longer were exempt from these requirements and were entitled to overtime and a minimum wage.

The Mortgage Bankers Association challenged the last DOL position resulting in the two lawsuits noted above.

That said, the story is not really about workplace rules and loan originators. It is about regulatory and administrative law. *Now, you can all stop reading*. Obviously, this is an area dealt with by a bunch of nerdy wonks laboring deep in the stacks of a law library somewhere, if we still have law libraries that any one actually uses (thank you West Law/Lexis). Still the issue in question is important, so we will take a quick shot at it.

The issue:
The issue, in very brief terms, was whether or not a federal agency, such as DOL, could issue interpretive opinions without going through a "notice and comment" procedure. Overturning an established appellate court precedent and basing its opinion on the controlling statute, the Supreme Court, ruling on these cases, said yes they could.

Two types of rules:
As back ground, there are two kinds of administrative rules:

1. In the first instance, law is enacted and then an agency such as the CFPB adopts rule/regulations to implement these rules. These are called substantive or sometimes legislative rules. In the mortgage industry we have to deal with many of these rules, for example Reg Z or The Loan Originator Compensation Rule. But, before these rules can be implemented they are published and the public may comment on them i.e. "notice and comment". Quite frequently, the substance of the rules are amended or even, in some cases, not ever implemented as a direct result of these comments.
2. The second kind of rule is an interpretive rule. These rules may be issued without any comment from the public, i.e. without "notice or comment".

The distinction is important because substantives rules act almost as laws and are given deference by a court. Whereas interpretive rules, at least in theory, are not given that

same deference, although there is also now some case law giving deference to such rules, too.

In an industry such as ours, one that is so heavily reliant on these rules for its governance, this is a distinct and important issue. How far can a federal agency go? Are we required to be governed by all rules or just those subject to the public input of the "notice and comment" procedure?

Again relying on the applicable statute, the Supreme Court found that interpretive opinions such as that in question in these two cases, were not required, by applicable statue, to be subjected to "notice and comment". Therefore the DOL action in issuing the interpretive opinion was correct and, voila, loan originators are entitled to overtime and minimum wage.

The dissenting justices agreed with the decision but questioned whether any interpretive rule should be given deference without input from all of us. The decision affecting overtime and minimum wage, while perhaps not earth shattering, is important. Yet the decision based on existing law was that it could be made without pubic or legislative input. Is this the way we want it?

Again, in an industry so controlled by our regulators this is a significant question.

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