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Enforcement

PHH Arguments Signal Tough Going for CFPB But Raise Unsettling Scenarios for Industry

The Consumer Financial Protection Bureau (CFPB) could lose an enforcement case argued in a federal appeals court April 12, but that doesn't mean mortgage and financial services companies will walk away as winners (*PHH Corp. v. Cons. Fin. Protection Bureau*, D.C. Cir., No. 15-cv-01177, argued 4/12/16).

Two judges on the U.S. Court of Appeals for the District of Columbia Circuit (a third was absent but will still weigh in on the ruling) focused their toughest questions on CFPB attorney Lawrence DeMille-Wagman.

He defended CFPB Director Richard Cordray's June 2015 ruling that said PHH Corp. violated the Real Estate Settlement Procedures Act (RESPA) and had to give up \$109 million in what Cordray said were ill-gotten mortgage reinsurance premiums.

No one is making predictions, but several attorneys who heard the argument said the courtroom back-and-forth strongly suggests an impending loss for the CFPB.

Even so, a loss for the CFPB, which clearly would be a victory for PHH and its lawyers, doesn't necessarily translate into good news for the mortgage industry, they said. They laid out various scenarios that could hand PHH a victory in this case while allowing the agency to take similar actions against other companies.

And even the worst-case scenario for the CFPB — a ruling that the bureau is unconstitutional and that Cordray's rulings and orders must be undone — could raise unsettling questions for an industry that already is heavily invested in the existing framework.

What About RESPA? High on the list of concerns is whether the case will end with clear answers about how RESPA is to be applied. Former U.S. Solicitor General Ted Olson, now a partner with Gibson, Dunn & Crutcher, argued on behalf of PHH, saying the basic context of the dispute is the CFPB's "rewriting of RESPA."

Among other points, he said, the CFPB effectively erased provisions authorizing the transactions at issue in this case, and ignored long-standing interpretations by regulators and courts. The CFPB "did a complete 180" with no warning, he said, running roughshod over basic due process safeguards, not to mention the "over-arching and egregious" separation of powers problem

posed by an agency he called unaccountable to the president and the Congress.

"This agency can do anything it wants," Olson told Judges Brett M. Kavanaugh and A. Raymond Randolph. Judge Karen L. Henderson could not attend but will weigh in on the decision after listening to the audio of the argument.

Throughout his remarks, and especially in his closing statement, Olson urged the court to specifically address the CFPB's findings of RESPA violations, citing the importance of clarity on those questions to the mortgage industry.

"The RESPA questions could potentially go unresolved," Benjamin G. Diehl, special counsel in the Los Angeles offices of Stroock & Stroock & Lavan, told Bloomberg BNA April 12. "And there's also no remand to the district court because this came to the Court of Appeals directly from Director Cordray's decision," said Diehl, who did not attend the argument.

Skepticism on Structure. Ironically, that question may take on more importance if the CFPB loses on the constitutional claim. Kavanaugh called the CFPB's leadership structure "novel," saying it's "dangerous in our system" for too much power and too few restrictions to be concentrated in one person.

DeMille-Wagman responded by saying Congress can structure agencies with many people at the top, or just one. And although any president seeking to remove the CFPB director would face restrictions, he said the "for-cause" restriction and other limits either mirror provisions in the Federal Trade Commission Act that courts already have upheld, or still provide in some manner a "clear chain of command" to the White House.

"The president has sufficient power when he has power to remove," DeMille-Wagman said.

Asked for the CFPB's preferred remedy should it lose on the constitutional claim, DeMille-Wagman said severance of the "for-cause" provision would be the best course. Olson said his client seeks a ruling that overturns Cordray's rulings and orders and vacates Cordray's \$109 million disgorgement order.

Jennifer Lee, a former CFPB enforcement attorney and now a partner with Dorsey & Whitney in Washington, D.C., said the judges were hostile toward CFPB arguments on the patchwork of issues presented by the case — RESPA's statute of limitations, the separation of powers, the constitutionality of the agency, the CFPB's reading of RESPA and others.

Lee, who was at the argument, singled out remarks by Kavanaugh and Randolph about widespread acceptance of practices targeted by the CFPB.

“What was most interesting about the judges’ questions was that they revealed the court’s underlying assumption that if a practice is widespread in the industry, it must be because industry actors held a widespread belief that the practice was legal under RESPA,” Lee said in an April 12 e-mail to Bloomberg BNA. “This is an underlying assumption that the CFPB does not share.”

Statute of Limitations. The statute-of-limitations question received significant attention by Kavanaugh and Randolph. The CFPB said RESPA’s three-year limitations statute only applies to actions brought in court. Under the Dodd-Frank Act, the agency said, no such limit applies to actions brought administratively.

Kavanaugh told DeMille-Wagman that the CFPB’s reading of Dodd-Frank would leave few limits on CFPB enforcement action.

Randolph, speaking to Olson and later to DeMille-Wagman, said federal courts sometimes “borrow” statutes of limitation and use them to restrict action by federal officials. In his remarks to DeMille-Wagman, he said cases dating “from the 1800s” allow that result.

Olson said the CFPB’s stance on the statute of limitations highlights what he called a lack of control over the CFPB. “There’s got to be a statute of limitations,” Olson said.

Losing by Winning? Some lawyers said the case could bang around in the courts while leaving compliance and enforcement questions up in the air.

One scenario is that the court could rule against the CFPB on the constitutional claim, virtually guarantee-

ing a review by the full D.C. Circuit or a direct appeal to the U.S. Supreme Court, but without addressing the merits of the RESPA arguments, leaving the industry in a state of confusion.

The likely best-case outcome for the CFPB, predicted another lawyer who heard the argument, is that the panel reverses Cordray’s ruling and says the CFPB can’t change RESPA’s meaning retroactively. That, according to the attorney, might mean a victory for PHH while freeing the CFPB to bring PHH-style cases against other companies.

Or, if the CFPB loses and the case goes before the full D.C. Circuit, Chief Judge Merrick Garland, President Barack Obama’s nominee to fill the late Justice Antonin Scalia’s seat on the U.S. Supreme Court, might face the choice of either recusing himself or ruling on a constitutional question while holding nominee status, one said.

Others raised the possibility that the case, in whatever posture, goes to the U.S. Supreme Court and produces a 4-4 tie, leaving the D.C. Circuit’s decision as controlling precedent.

“That possible outcome can’t be written off by any stretch of the imagination,” Diehl said.

Audio of the argument is expected to be available on D.C. Circuit’s website at some point.

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Cordray’s ruling is at http://files.consumerfinance.gov/f/201506_cfpb_decision_by_director_cordray_redacted_226.pdf.