

## Consumer Financial Protection Bureau Brought Down a Notch

Articles October 17, 2016

Earlier last week the United States Court of Appeals for the DC Circuit issued its 110 page opinion concerning the Consumer Financial Protection Bureau (“CFPB”) and CFPB enforcement action in PHH Corporation Et al vs Consumer Financial Protection Bureau (Case No. 15-1177). The first sentence of the opinion is that “This is a case about executive power and individual liberty” is reflective of the seriousness of the issues addressed.

In the administrative proceeding below the CFBP had imposed sanctions of \$109 million against PHH for violations of RESPA. PHH challenged the penalty based upon traditional administrative law bases, but further challenged the constitutional authority and existence of the CFPB.

The Court of Appeals granted relief to PHH –albeit not to the extent sought, declaring that “the CFPB’s concentration of enormous executive power in a single, unaccountable, unchecked Director not only departs from settled historical practice, but also poses a far greater risk of arbitrary decision making and abuse of power, and a far greater threat to individual liberty, than does a multi-member independent agency.” (page 9). Thus, the structure of CFPB as a single-director independent agency structure is unconstitutional. But the Circuit did not gut CFPB as an agency, instead interpreting Dodd Frank as creating an executive agency – not an independent agency, and noting that, accordingly, the “President of the United States now has the power to supervise and direct the Director of the CFPB, and may remove the Director at will at any time.”

With respect to the RESPA issues the Court reversed the CFPB’s departure from prior interpretations of RESPA on procedural due process grounds, and its efforts to apply Section 8 of RESPA to bar a captive reinsurance arrangement holding that RESPA does not bar captive reinsurance arrangements so long as “the amount paid by the mortgage insurer for the reinsurance does not exceed the reasonable market value of the reinsurance.” The Court also rejected CFBP interpretation of regulations to say that there was no statute of limitations on actions by CFPB for administrative action on any consumer protection law, finding that there clearly was a year statute of limitations under RESPA and that was binding on the CFBP.

On page 13 the Circuit summarized what it anticipated would be the effect of their 110 page opinion: “In so ruling, we underscore the important but limited real-world implications of our decision. As before, the CFPB will continue to operate and perform its many critical responsibilities, albeit under the ultimate supervision and direction of the President. Section 8 will continue to mean what it has traditionally meant: that captive reinsurance agreements are permissible so long as the mortgage insurer pays no more than reasonable market value for the reinsurance. And the three-year statute of limitations that has traditionally applied to agency actions to enforce Section 8 will continue to apply.”

This post also appeared on the Commercial Law League Blog.

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