D.C. Circuit Affirms Constitutionality of the CFPB's Independent Leadership Structure, But Reinstates Some Limits on How It May Enforce the Law

March 28th, 2018 | and Erik Kosa

Erik Kosa

On January 31, 2018, the U.S. Court of Appeals for the District of Columbia – sitting en banc – held in *PHH Corporation v. CFPB* that the CFPB's leadership structure is constitutional, and affirmed that the Bureau's Director may only be fired for cause.

The ruling reversed an earlier decision by a three-judge panel of the court that held that the CFPB's single-member leadership, which concentrates power with the Director, is unconstitutional unless the Director can be removed at will by the President.

While the case may be appealed to the Supreme Court, it represents a big win for the Bureau's independence in the long run. In the short term, however, it means a Director appointed by President Trump can stay in place for a full five-year term regardless of the outcome of the next presidential election. The CFPB has been without a permanent Director since Richard Cordray resigned in late November, and a new Director's tenure would extend well into the next presidential administration. The decision also means there are likely to be large swings in the CFPB's approach to its duties every five years unless Congress decides to restructure the agency as a bipartisan, multi-member commission like the Federal Trade Commission.

While not covered as widely as the constitutional issue, the ruling also reinstated two important statutory holdings of the lower panel that restrict the CFPB's enforcement powers in key areas, without further elaboration. First, the court reinstated the holding that Section 8 of the Real Estate Settlement Procedures Act allows certain captive reinsurance arrangements, and that the CFPB violated due process by retroactively applying a new interpretation of the statute to PHH's conduct. Second, the court reinstated the ruling that the CFPB may not circumvent applicable statutes of limitations by bringing lawsuits in its own administrative tribunal – where the CFPB had claimed no statute of limitations applies – rather than federal court. In other words, there are no special rules that allow the Bureau to evade limitations periods in the consumer protection laws it enforces.

The CFPB's Leadership Structure is Constitutional.

In the opinion, the court noted that federal financial regulators have traditionally been "permissibly afforded a degree of independence" and that the CFPB "is neither distinctive nor novel in any respect that calls its constitutionality into question."[1] The court determined that authorizing the President to remove the Director only for cause still allowed the President "ample tools to ensure

the faithful execution of the laws."[2] The court also found no constitutional problems with the Bureau's budgetary independence; it derives its funding not from Congress, but from the Federal Reserve.[3] The court concluded that "precedent leaves to the legislative process, not the courts, the choice whether to subject the Bureau's leadership to at-will presidential removal."[4]

The CFPB Violated PHH's Due Process Rights by Retroactively Applying a New Interpretation of RESPA to its Conduct.

In the original enforcement action, the CFPB challenged PHH's captive reinsurance arrangement, whereby PHH referred customers to mortgage insurers that, in turn, purchased reinsurance from a PHH affiliate. The Bureau essentially alleged that when PHH originated mortgages, it referred consumers to its mortgage insurer partners and took reinsurance fees as kickbacks in violation of RESPA, and that consumers ended up paying more in mortgage insurance premiums. Even though the Department of Housing and Urban Development – which oversaw this law before the CFPB – had previously blessed similar arrangements, the CFPB imposed a $109 million penalty, with much of the conduct giving rise to that amount occurring outside the applicable three-year statute of limitations in RESPA.

The three-judge D.C. Circuit panel vacated this penalty in its 2016 decision, and in this decision, the full D.C. Circuit just reinstated without further analysis. In its 2016 decision, the court found that the CFPB violated due process by retroactively applying a new interpretation of RESPA against PHH. Consistent with HUD's established interpretation, the court held that Section 8 allows captive reinsurance arrangements, provided that the amount paid by the mortgage insurer for the reinsurance does not exceed the reasonable market value of the reinsurance.

The CFPB is Bound by Statutes of Limitations in its Administrative Tribunal.

On the issue of whether a statute of limitations applies to CFPB administrative enforcement actions, the court reinstated the circuit panel's decision soundly rejecting the Bureau's argument that the Consumer Financial Protection Act ("CFPA") – part of the Dodd-Frank financial reforms – allows it to bring cases in its administrative tribunal, where it can get the same remedies as in federal court, without being subject to any statute of limitations. The CFPB had argued that (1) no statute of limitations of any kind applies in administrative adjudications under the CFPA and (2) alternatively, by its language, RESPA's statute of limitations applies only in court, not in the administrative forum. While the case involved alleged violations of RESPA, the ruling has ramifications well beyond RESPA, including the ever-changing theories behind unfair, deceptive, or abusive acts or practices ("UDAAP") claims.

The decision reinstated by the full D.C. Circuit states that (1) the CFPA expressly incorporates the applicable statutes of limitations in the consumer protection laws no matter the forum and (2) by its terms, RESPA's three-year statute of limitations clearly applies to limit how far back the CFPB can proceed in this case. In other words, there are no special rules for administrative tribunals that allow the Bureau to evade limitations periods in the consumer protection laws it enforces.

Under this decision, we can expect two things. First, expect more statute of limitations disputes to turn on when the "discovery" of the violation occurred. The time to sue under the CFPA begins to run when the CFPB knows, or with the exercise of due diligence should know, facts that will form the basis for an action.[5] It is especially difficult to determine when a federal agency knows or should have known it has a viable UDAAP claim. Agencies have numerous employees, offices,

and layers of leadership, which makes it difficult to pinpoint when knowledge should be attributed to the government.[6] Second, expect the CFPB to double-plead claims as UDAAP violations more often. Some consumer protection laws have statutes of limitations shorter than three years.[7] We can expect the CFPB to attempt to transform claims by pleading a UDAAP violation for the same conduct that gives rise to a violation of another consumer protection statute when that statute has a limitations period shorter than the three years allowed by the CFPA. If the CFPB cannot have an unlimited time in which to file suit, perhaps by "piggybacking" UDAAP claims onto other statutory violations, the CFPB may at least ensure it always gets its three years.

Conclusion

The CFPB is in the midst of a leadership change. When the President and the Senate eventually settle on a permanent replacement, the Bureau will be poised to maintain its independence yet reigned in from some of its more aggressive past enforcement tactics.

[1] *PHH v. CFPB*, No. 15-1177, Slip Op. at 18-19 (Jan. 31, 2018).

[2] *Id*. at 18 (Jan. 31, 2018).

[3] *Id*. at 34 (Jan. 31, 2018).

[4] *Id*. at 67-68 (Jan. 31, 2018).

[5] *See* 12 U.S.C. § 5564(g) ("no action may be brought under this title more than 3 years after the date of discovery").

[6] *See Gabelli v. S.E.C.*, 133 S. Ct. 1216, 1223 (2013) (discussing difficulties in applying the discovery rule to federal agencies).

[7] *See, e.g.,* 15 U.S.C.A. § 1640(e) (setting one year period of limitations for bringing Truth-in-Lending Act claims).

Hudson Cook, LLP provides articles, webinars and other content on its website from time to time provided both by attorneys with Hudson Cook, LLP, and by other outside authors, for information purposes only. Hudson Cook, LLP does not warrant the accuracy or completeness of the content, and has no duty to correct or update information contained on its website. The views and opinions contained in the content provided on the Hudson Cook, LLP website do not constitute the views and opinion of the firm. Such content does not constitute legal advice from such authors or from Hudson Cook, LLP. For legal advice on a matter, one should seek the advice of counsel.