Special Alert: D.C. Circuit upholds CFPB's constitutionality but rejects its interpretation of RESPA

On January 31, the U.S. Court of Appeals for the D.C. Circuit issued its long-awaited en banc decision in *CFPB v. PHH Corporation*. In a 7-3 decision, the court concluded that the CFPB's single-director structure is constitutional, even though the president can only remove the director for cause. Importantly, however, the court also reinstated the portion of the October 2016 panel opinion concluding that the CFPB misinterpreted the Real Estate Settlement Procedures Act (RESPA) and its statute of limitations. As a result, the $109 million penalty imposed on PHH is vacated and the case will go back to the CFPB, where new leadership must decide whether to pursue the action. PHH has 90 days to seek review by the Supreme Court.

Ten judges issued seven separate opinions in this case, totaling 250 pages. The following is a summary of the key holdings.

Constitutional issues

In October 2016, a panel of the D.C. Circuit concluded that the CFPB's structure violates Article II of the Constitution because, unlike other independent agencies, all of the CFPB's authority was consolidated in a single director—rather than a commission or board—who could only be removed by the president "for cause." (A detailed discussion of the October 2016 panel decision is available here.)

Writing for the en banc majority, Judge Pillard rejected this conclusion, stating that the CFPB's structure did not differ materially from that of other independent agencies:

> The Supreme Court eighty years ago sustained the constitutionality of the independent Federal Trade Commission, a consumer-protection financial regulator with powers analogous to those of the CFPB. *Humphrey's Executor v. United States*, 295 U.S. 602 (1935). In doing so, the Court approved the very means of independence Congress used here: protection of agency leadership from at-will removal by the President. The Court has since reaffirmed and built on that precedent, and Congress has embraced and relied on it in designing independent agencies.

The majority also rejected PHH's argument that the CFPB's single-director structure made it more problematic than independent agencies headed by commissions or boards:

> [T]he constitutional distinction PHH proposes between the CFPB's leadership structure and that of multi-member independent agencies is untenable. That distinction finds no footing in precedent, historical practice, constitutional principle, or the logic of presidential removal power…. Congress and the President have historically countenanced sole-headed financial regulatory bodies. And the Supreme Court has upheld Congress's assignment of even unmistakably executive

> responsibilities—criminal investigation and prosecution—to a sole officer protected from removal at the President's will.

Finally, the majority noted that "[t]he threat PHH's challenge poses to the established validity of other independent agencies … is very real." In the majority's view:

> PHH seeks no mere course correction; its theory, uncabined by any principled distinction between this case and Supreme Court precedent sustaining independent agencies, leads much further afield. Ultimately, PHH makes no secret of its wholesale attack on independent agencies—whether collectively or individually led—that, if accepted, would broadly transform modern government.

The three judges from the October 2016 panel (Kavanaugh, Henderson, and Randolph) each filed separate dissents arguing that the CFPB was unconstitutional and, in the case of Judge Randolph, that the administrative law judge who originally heard the CFPB's case against PHH was not properly appointed. Judges Wilkins, Brown, and Griffith filed or joined separate concurrences agreeing with the majority but on different grounds.

Statutory issues

Although the en banc court reversed the October 2016 panel on the constitutional issues, it reinstated the panel's opinion "insofar as it related to the interpretation of RESPA and its application to PHH … in this case." That portion of the panel opinion addressed three issues, which—because of their importance to persons and entities subject to RESPA and CFPB jurisdiction—are discussed in detail below, even though they are not included in the en banc opinions.

1. **The Interpretation of RESPA Section 8(a)**

Section 8(a) of RESPA states that "[n]o person shall give and no person shall accept any fee, kickback, or thing of value pursuant to any agreement or understanding, oral or otherwise, that business incident to or a part of a real estate settlement service involving a federally related mortgage loan shall be referred to any person." The CFPB alleged that, in what is sometimes referred to as a "captive reinsurance arrangement," PHH violated RESPA by selecting mortgage insurers for its loans based on whether those insurers purchased reinsurance from a PHH affiliate. In June 2015, CFPB Director Cordray affirmed the conclusion of an administrative law judge that PHH violated RESPA but increased the required disgorgement of premiums from $6.4 million to $109 million.

In reversing the CFPB's finding that PHH violated RESPA Section 8(a), the panel refused to defer to the CFPB's interpretation of the statute because "[t]he basic statutory question in this case is not a close call." The panel held that captive reinsurance arrangements were permissible where mortgage insurers pay no more than reasonable market value for the reinsurance because Section 8(c)(2) of RESPA provides that "[n]othing in this section shall be construed as prohibiting … the payment to any person of a bona fide salary or compensation or other payment for goods or facilities actually furnished or for services actually performed…."

The panel held that "Section 8(c) specifically bars the aggressive interpretation of Section 8(a) advanced by the CFPB in this case" and was "designed to provide certainty to businesses in the mortgage lending process." It further stated that "[t]he CFPB's interpretation flouts that statutory goal and upends the entire system of unpaid referrals that has been part of the market for real estate settlement services." The panel explained:

> [T]he answer is commonsensical: If the payment to the lender-affiliated reinsurer is more than the reasonable market value of the reinsurance, then we may presume that the excess payment above reasonable market value was not a bona fide payment for the reinsurance but was a disguised payment for a referral. Otherwise, there is no basis to treat payment of reasonable market value for the reinsurance as a prohibited payment for the referral – assuming, of course, that the reinsurance was actually provided. In other words, in the text and context of this statute, a bona fide payment means a payment of reasonable market value.

The panel acknowledged that "the lender's actions create a kind of tying arrangement in which the lender says to the mortgage insurer: We will refer customers to you, but only if you purchase another service from our affiliated reinsurer, albeit at reasonable market value." However, the panel concluded that RESPA "does not proscribe that kind of arrangement." Instead, it "proscribes payments for referrals."

Judge Tatel, joined by Judges Millett and Pillard, filed a concurrence stating that, although the en banc court did not address the statutory questions, he believed that the bureau's interpretation of RESPA was reasonable.

2. The CFPB's Retroactive Reversal of HUD's Interpretation

The panel also found that the CFPB violated "bedrock principles of due process" by applying its interpretation of RESPA retroactively. Before Congress created the CFPB, the Department of Housing and Urban Development (HUD) was responsible for RESPA. The panel emphasized that "HUD repeatedly reaffirmed" its interpretation that Section 8(c)(2) allowed captive reinsurance arrangements so long as the mortgage insurer paid no more than reasonable market value for the reinsurance and that "the mortgage lending industry relied on it."

The panel stated that "[t]he Due Process Clause limits the extent to which the Government may retroactively alter the legal consequences of an entity's or person's past conduct. That anti-retroactivity principle is deeply rooted in our jurisprudence, and embodies a legal doctrine centuries older than our Republic." Therefore, because PHH did not have fair notice of the CFPB's interpretation at the time it participated in captive reinsurance arrangements and did so "in justifiable reliance on HUD's interpretation," the CFPB could not penalize PHH for its conduct.

The panel found the CFPB's position "deeply unsettling in a Nation built on the Rule of Law," adding that: "When a government agency officially and expressly tells you that you are legally allowed to do something, but later tells you 'just kidding' and enforces the law retroactively against you and sanctions you for actions you took in reliance on the government's assurances, that amounts to a serious due process violation. The rule of law constrains the governors as well as the governed."

3. The Statute of Limitations

In the PHH action, the CFPB took the position that, under Dodd-Frank, there is no statute of limitations for CFPB administrative actions—as opposed to actions brought in federal court—to enforce RESPA or any other consumer protection law. The panel disagreed, stating that "[t]he general working presumption in federal civil and criminal cases is that a federal civil cause of action or criminal offense must have some statute of limitations and must not allow suits to be brought forever and ever after the acts in question."

The panel held that, in authorizing the CFPB to bring administrative actions, the Dodd-Frank Act tied "the CFPB's administrative adjudications to the statutes of limitations of the various federal consumer protection laws it is charged with enforcing." Therefore, when the CFPB is enforcing RESPA, RESPA's three-year statute of limitations applies.

Notably, however, the panel expressly declined to "decide whether each alleged above-reasonable-market value payment from the mortgage insurer to the reinsurer triggers a new three-year statute of limitations for that payment." Instead, it left "that question for the CFPB on remand and any future court proceedings."

It is also worth noting that, in his concurrence, Judge Tatel states that he would have concluded that the five-year statute of limitations in the Dodd-Frank Act applied to administrative actions, rather than the three-year statute of limitations in RESPA.

If you have questions about the decision or other related issues, please visit our Consumer Financial Protection Bureau practice page, or contact a Buckley Sandler attorney with whom you have worked in the past.