



05 JUNE 2015

*Legal News: Consumer Financial Services*

# CFPB Director Cordray Issues First-Ever Agency Appellate Decision in RESPA Case

The Director of the Federal Consumer Financial Protection Bureau (CFPB), Richard Cordray, issued a decision yesterday in the first appeal of a Bureau administrative enforcement action.

Cordray's decision upholds in part, and reverses in part, a 2014 Administrative Law Judge (ALJ) decision which held that PHH Corp. (PHH) violated the Real Estate Settlement Procedures Act (RESPA) by accepting payments for the referral of a settlement service business pursuant to a captive reinsurance arrangement.

CFPB Enforcement counsel (Enforcement) had alleged that PHH participated in a "mortgage insurance kickback scheme" in violation of RESPA for over a decade. Enforcement claimed that PHH, a mortgage lender, referred borrowers to certain mortgage insurers, who in exchange for the referrals, agreed to purchase reinsurance from a PHH subsidiary at supposedly inflated rates, taking the reinsurance fees as kickbacks. Enforcement also alleged that PHH pressured the mortgage insurers into participating in the arrangement and steered business to them "even when it knew the prices [the mortgage insurers] charged were higher than competitors' prices." The PHH matter followed a series of settlements between the CFPB and various mortgage insurers settling similar Enforcement allegations.

PHH and its reinsurance defendants asserted defenses and contested the action, which was tried extensively in the first administrative proceeding held under Title X procedures of the Dodd-Frank Act. ALJ Cameron Elliot of the U.S. Securities and Exchange Commission presided pursuant to an interagency agreement.

In November 2014, ALJ Elliot issued a recommended decision that ruled in favor of Enforcement, but also rejected many of its claims and theories. The ALJ decision held that some reinsurance payments violated RESPA Sections 8(a) and 8(b). The recommended decision granted injunctive relief and ordered PHH to disgorge more than \$6 million in damages (Enforcement had sought more than \$400 million in disgorgement and civil penalties). CFPB rules provide that recommended decisions in an administrative adjudication are appealed directly to the Director of the CFPB. PHH and Enforcement both appealed the ALJ's recommended decision, and Director Cordray heard argument in early 2015.

In his ruling issued June 4, 2015, the Director affirmed the ALJ's findings but went much farther in concluding that the captive reinsurance arrangement violated RESPA. He issued a 38-page decision and final order that requires PHH to disgorge \$109 million and imposes strict injunctive relief. In so holding, the Director rejected several long standing principles that RESPA case law and HUD policy statements and advice had previously established.

Notable aspects of the Director's decision include the following:

- **The Director agreed with the ALJ that no statute of limitations applies when the CFPB challenges a RESPA violation in an administrative proceeding;** RESPA's three-year statute of limitations for CFPB enforcement only applies to civil actions filed in court. This would mean that CFPB Enforcement could avoid the RESPA statute of limitations by opting to pursue an enforcement action on the administrative track rather than in a court of law.
- **Director Cordray concluded that RESPA section 8(c)(2) is not an exemption to Section 8 liability,** agreeing with Enforcement that it is a violation of section 8(a) when a lender makes referrals to a real estate settlement service provider in exchange for a thing of value (including in consideration for the purchase of goods or services — at any price), and that such a violation cannot be saved by Section 8(c)(2).
- The Director flatly rejected HUD's 1997 letter regarding reinsurance, long relied upon by the industry (and credited even by ALJ Elliot), in which then-Assistant Secretary of HUD-FHA Commissioner Nicholas Retsinas stated that captive reinsurance arrangements are permissible under RESPA so long as the Section 8(c)(2) exception for payments in return for goods or facilities actually furnished or for services actually performed is satisfied.
- Cordray's opinion rejected Enforcement's theory of a continuing violation, holding that the continuing violation theory is not applicable to RESPA.
- However, Cordray held that PHH committed a separate violation of RESPA each time it accepted a reinsurance payment on or after July 21, 2008 – going beyond Judge Elliot's ruling, which had limited PHH's violations to payments that were connected with loans that closed on or after July 21, 2008. **In so holding, Cordray declined to follow the leading appellate case, widely accepted by federal courts and by ALJ Elliot, holding that a RESPA cause of action accrues at the closing.**
- Apparently because of the Director's view of section 8(c)(2), he not only enjoined PHH from violating RESPA for fifteen years, but he **enjoined PHH from referring borrowers to any provider of settlement services if that provider has agreed to purchase any service from PHH, or make any payment to, PHH, if the purchase or payment is triggered by the referral.**

Respondents may file a petition for review of the Director's final order in a United States Court of Appeals within 30 days of the service of Director Cordray's final order. If PHH appeals, the order requires it to pay the disgorgement amount of \$109 million into an escrow account.

It is of course unclear what weight if any the courts will give to this decision especially in light of several of the dramatic departures that this decision makes from prior law. The likely appellate process should be a fascinating one with no doubt a great deal of industry interest and likely amicus participation.

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