

Examining The Statute Of Limitations In CFPB Cases: Part 2

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One of the key issues raised in the oral argument before the D.C. Circuit in the Consumer Financial Protection Bureau's case against PHH Corporation[1] was the CFPB's position that no statute of limitations applies. In part 1 of this two-part series, we surveyed the many situations in which the CFPB asserts that there is no statute of limitations.

In this second part, we discuss a key statute of limitations that Judge A. Raymond Randolph raised at the PHH oral argument: 28 U.S.C. 2462. That statute provides that: "Except as otherwise provided by act of Congress, an action, suit or proceeding for the enforcement of any civil fine, penalty or forfeiture, pecuniary or otherwise, shall not be entertained unless commenced within five years from the date when the claim first accrued if, within the same period, the offender or the property is found within the United States in order that proper service may be made thereon." [2] Judge Randolph suggested that, to the extent that the statutes administered by the CFPB are silent regarding an applicable statute of limitations, Section 2462 should govern.

Applicability of Section 2462

In a recent unanimous decision that interpreted Section 2462 in a U.S. Securities and Exchange Commission case, the U.S. Supreme Court noted that "Chief Justice Marshall used particularly forceful language in emphasizing the importance of time limits on penalty actions, stating that it 'would be utterly repugnant to the genius of our laws' if actions for penalties could 'be brought at any distance of time.'" [3] The CFPB's position that a significant number of its enforcement cases are not subject to any statute of limitations appears to be inconsistent with this principle.

Section 2462 has been applied to a variety of other agencies in situations where no other statute of limitations applies. A leading decision by Judge Randolph himself held that Section 2462 was applicable to the U.S. Environmental Protection Agency.[4] It has also been applied, for example, to the Federal Election Commission.[5] But perhaps most relevant to the CFPB is that Section 2462 has been applied to the federal banking agencies and to the Federal Trade Commission.

Federal Banking Agencies

The federal banking agencies — the Federal Reserve Board, Federal Deposit Insurance Corporation, and



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Office of the Comptroller of the Currency — have long brought administrative proceedings under the Federal Deposit Insurance Act (FDI Act) against banks and their employees for violations of the “enumerated consumer laws,” which generally constitute violations of the FDI Act.[6]

In the past, the federal banking agencies tended to dispute the idea that administrative proceedings under the FDI Act were subject to Section 2462.[7] Therefore, it is not surprising that an OCC interpretive letter from 1977, which the CFPB has cited, asserts that “the comptroller is not restricted by any statute of limitations under either the Truth in Lending Act or [the FDI Act].”[8]

But a turning point was *Proffitt v. FDIC*, a D.C. Circuit decision by Judge Karen LeCraft Henderson — who, like Judge Randolph, is on the PHH panel.[9] *Proffitt* held that Section 2462 was applicable to certain administrative proceedings under the FDI Act.[10] The Ninth Circuit later agreed with *Proffitt* that Section 2462 is applicable to such proceedings and characterized a previous statement by the Ninth Circuit that “there is no federal statute of limitations” for these proceedings as dictum.[11] Since these rulings, it appears that the federal banking agencies have not attempted to assert that Section 2462 is inapplicable to them.[12]

FTC

The FTC has long enforced many of the “enumerated consumer laws” against nonbanks. And since at least the 1970s, courts have held that the FTC is subject to Section 2462 in various situations where no other statute of limitations applies.[13]

In a 1990 case, a court agreed with the FTC that it was subject to Section 2462 in an action for civil penalties for Equal Credit Opportunity Act violations.[14] The court ruled that the ECOA’s general statute of limitations was not applicable to the FTC.[15]

In 1995, the FTC declared as part of a rulemaking under the FDCPA that “the statute of limitations for actions brought by the commission against debt collectors is five years. 28 U.S.C. 2462.”[16] At the time, the FTC had authority to grant exemptions from the FDCPA “by regulation” to states if, among other things, “there is adequate provision for enforcement” at the state level.[17] This authority is now vested in the bureau.[18] In granting an exemption to Maine, the FTC compared Maine’s statute of limitations to Section 2462.[19]

CFPB

Despite these precedents suggesting that the CFPB is subject to Section 2462 — like its predecessors the federal banking agencies and the FTC, as well as many other agencies — there are few public statements by the CFPB about Section 2462.

At an early stage in the PHH case, the ALJ stated in an order that: “the parties have not briefed, and I have not considered, the effect of 28 U.S.C. § 2462, which might bar some forms of relief for claims arising from conduct predating Jan. 29, 2009.”[20] Later, in his recommended decision, the ALJ stated that PHH Corporation did “not raise 28 U.S.C. § 2462 as a defense, although I previously suggested that it might be applicable, and accordingly I find that disgorgement is available here.”[21] CFPB Director Richard Cordray did not specifically discuss whether Section 2462 is applicable to the CFPB in his decision.[22] As noted above, Judge Randolph again raised the applicability of Section 2462 at oral argument, and the D.C. Circuit may address its applicability to the CFPB in that matter.

Limits on Liability Imposed by Section 2462

If Section 2462 applies to a given category of enforcement cases, the next questions are (a) what relief it restricts and (b) how the limitations period is calculated.

Relief That Is Restricted

The Dodd-Frank Act grants the CFPB authority to seek a wide range of remedies in both administrative proceedings and federal district court, including: rescission or reformation of contracts, refund of moneys or real property, restitution, disgorgement or compensation for unjust enrichment, payment of damages or other monetary relief, public notification regarding the violation, limits on the activities or functions of a person, civil money penalties, and recovery of the bureau's costs.[23] CFPB complaints typically seek many of these remedies.[24]

Section 2462 applies to "any civil fine, penalty or forfeiture, pecuniary or otherwise ..."[25] Which of the CFPB's remedies qualify as such will be an important question. The most obvious example of a remedy that is covered by Section 2462 is a civil money penalty, but other remedies may also be covered.

In *Johnson v. SEC*, the D.C. Circuit defined a "penalty" for purposes of Section 2462 as "a form of punishment ... for unlawful or proscribed conduct, going beyond compensation of the wronged party." [26] The court held that a license suspension in that case represented a punishment, and contrasted it with relief that is "strictly remedial ... such as through a proceeding for restitution or disgorgement of ill-gotten profits." [27]

In *Proffitt*, the D.C. Circuit held that the removal of a bank employee from the banking industry represented a penalty because, although it "had the dual effect of protecting the public from a dishonest banker and punishing Proffitt for his misconduct, its punitive purpose plainly goes beyond compensation of the wronged party ... That the expulsion sanction is punitive is further manifested by the fact that the FDIC did not act for more than six years after Proffitt's misdeeds." [28] Taken together, *Johnson* and *Proffitt* suggest that enforcement cases seeking various remedies may be subject to Section 2462, if the remedies are deemed to be punitive in nature.

Even if a particular remedy is not directly barred by Section 2462, because the remedy is held not to constitute a "civil fine, penalty or forfeiture," the remedy may be barred by the "concurrent remedy rule." That rule provides that "equity will withhold its relief where the applicable statute of limitations would bar the concurrent legal remedy," although some courts have stated that the rule "cannot properly be invoked against the government when it seeks equitable relief in its official enforcement capacity." [29]

Calculation of the Limitations Period

Section 2462 is generally triggered "five years from the date when the claim first accrued ..." [30] In *Gabelli v. SEC*, which was an investment adviser fraud case, the Supreme Court held that "a claim based on fraud accrues — and the five-year clock begins to tick — when a defendant's allegedly fraudulent conduct occurs," not "when the fraud is discovered" by the government. [31] This is because a claim accrues "when the plaintiff has a complete and present cause of action." [32] The Supreme Court's holding can be analogized to other types of violations.

As we noted in part 1, the Dodd-Frank Act itself contains a three-year statute of limitations on CFPB

actions “brought under” Title X.[33] That three-year statute of limitations, however, runs from “the date of discovery of the violation to which the action relates.”[34] In certain circumstances, therefore, the CFPB might prefer the three-year statute of limitations set forth in Title X to the five-year statute set forth in Section 2462, given the apparently different accrual rules. The CFPB’s eschewal of the Title X statute of limitations in various situations may therefore come back to haunt it if a court determines that Section 2462 applies instead.

Conclusion

In light of the CFPB’s repeated assertions that various statutes of limitation do not apply to its enforcement activities, the potential applicability of Section 2462 takes on extra importance. That section may well impose meaningful limits on the CFPB’s authority to pursue older violations of the statutes that it enforces, in circumstances where the CFPB asserts that no other statute of limitation applies. The exact contours of how Section 2462 applies to CFPB enforcement actions will likely take years to develop in the courts. The first indication, however, may come later this year when the D.C. Circuit is expected to issue its ruling in PHH. Entities subject to CFPB enforcement authority should pay attention to what, if anything, the court says about Section 2462. They should also make sure that statute-of-limitations defenses are raised now in any pending litigation in order to benefit from any future judicial resolution of the issue.

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[1] PHH Corp. v. CFPB, No. 15-1177 (D.C. Cir. argued April 12, 2016).

[2] 28 U.S.C. § 2462 (emphasis added).

[3] Gabelli v. SEC, 133 S. Ct. 1216, 1223 (2013) (quoting Adams v. Woods, 2 Cranch 336, 342 (1805)).

[4] 3M Co. (Minn. Mining & Mfg.) v. Browner, 17 F.3d 1453 (D.C. Cir. 1994).

[5] FEC v. Williams, 104 F.3d 237 (9th Cir. 1996).

[6] See 12 U.S.C. § 1818.

[7] For example, the board commented in a 1996 administrative decision that applying Section 2462’s five-year statute of limitations to proceedings against banks and their employees would be

“anomalous.” This was because Congress had provided a six-year statute of limitations for former employees of institutions, which would be longer than for current employees, and because there was a 10-year statute of limitations for criminal prosecutions under the banking laws, but no reason to “justify a longer period of hazard for a criminal prosecution than for an administrative proceeding.” In the Matter of Interamericas Investments Ltd., No. 94-064-B-HC, et al. (Fed. Reserve Bd. Apr. 9, 1996), reprinted in 82 Fed. Reserve Bulletin 607, 617 n.17 (June 1996), affirmed on other grounds, 111 F.3d 376 (5th Cir. 1997). None of these considerations are applicable to the CFPB.

[8] CFPB’s Opposition to ITT’s Motion to Dismiss the Complaint at 32, CFPB v. ITT Educational Services Inc., No. 1:14-cv-00292 (S.D. Ind. June 12, 2014), ECF No. 25 (quoting OCC Interpretive Letter, 1977 WL 23261 (Oct. 6, 1977)); see also Brief of Respondent at 28 n.38, PHH Corp. v. CFPB, No. 15-1177 (D.C. Cir. Dec. 4, 2015) (asserting that “No statute of limitations applies when the banking agencies use administrative proceedings to challenge violations of the laws they enforce”).

[9] Proffitt v. FDIC, 200 F.3d 855 (D.C. Cir. 2000).

[10] Id. at 859-62 (see in particular 860 n.5, discussing OCC amicus brief).

[11] De la Fuente v. FDIC, 332 F.3d 1208, 1219 (9th Cir. 2003) (quoting Simpson v. OTS, 29 F.3d 1418, 1425 (9th Cir. 1994)).

[12] See, e.g., In the Matter of De La Fuente, No. 97-31e (FDIC Feb. 17, 2004) (on remand from id., noting that “Before Proffitt ... the FDIC took the position that 28 U.S.C. § 2462 was not applicable to section 8(e) [removal] proceedings [under the FDI Act]”).

[13] See, e.g., United States v. Ancorp National Services Inc., 516 F.2d 198, 201 n.5 (2d Cir. 1975) (holding that 28 U.S.C. § 2462 applies to an action for civil penalties for violations of a cease-and-desist order under Section 5 of the Federal Trade Commission Act).

[14] United States v. Blake, 751 F. Supp. 951 (W.D. Okla. 1990). Like many FTC civil penalty actions, this action was filed in the name of the United States on behalf of the FTC.

[15] Id. The court did note certain ambiguities in the legislative history of ECOA’s general statute of limitations regarding its applicability to government agencies.

[16] Notice of Maine Exemption from the Fair Debt Collection Practices Act, 60 Fed. Reg. 66,972, 66,972 (Dec. 27, 1995); see also Notice of State Application for Exemption From the Provisions of the Fair Debt Collection Practices Act, 59 Fed. Reg. 24,159, 24,162 (proposed May 10, 1994) (“No remedy under the Federal Trade Commission Act is available for violations occurring more than five years before the civil action is brought. 28 U.S.C. 2462.”).

[17] 15 U.S.C. § 1692o (1994).

[18] 15 U.S.C. § 1692o.

[19] 60 Fed. Reg. at 66,972.

[20] Order on Dispositive Motions at 14 n.6, In the Matter of PHH. Corp., No. 2014-CFPB-0002 (May 22, 2014).

[21] Recommended Decision at 84, In the Matter of PHH. Corp., No. 2014-CFPB-0002 (Nov. 25, 2014).

[22] Cordray did cite 28 U.S.C. § 2462 in passing, in support of his argument that “when Congress wants to apply a statute of limitations to administrative proceedings as well as court actions, it specifically refers to ‘proceedings,’” but the director did not specifically comment on its applicability to the CFPB. In the Matter of PHH Corp., No. 2014-CFPB-0002, at 11 (June 4, 2015).

[23] 12 U.S.C. § 5565.

[24] See, e.g., Complaint at 13, CFPB v. Frederick J. Hanna & Associates PC, No. 1:14-cv-02211 (N.D. Ga. July 14, 2014); Notice of Charges at 14-15, In the Matter of Integrity Advance LLC, No. 2015-CFPB-0029 (Nov. 18, 2015).

[25] 28 U.S.C. § 2462.

[26] Johnson v. SEC, 87 F.3d 484, 491 (D.C. Cir. 1996).

[27] Id.

[28] Proffitt v. FDIC, 200 F.3d 855, 861 (D.C. Cir. 2000) (internal quotation marks omitted).

[29] United States v. Banks, 115 F.3d 916, 919 (11th Cir. 1997); but see FEC v. Williams, 104 F.3d 237, 240 (9th Cir. 1996).

[30] 28 U.S.C. § 2462.

[31] Gabelli v. SEC, 133 S. Ct. 1216, 1219-20 (2013).

[32] Id.

[33] 12 U.S.C. § 5564(g)(1).

[34] Id.
