

DC Circ. Single-Director Ruling May Hinder CFPB Enforcement

By **Evan Weinberger**

Law360, New York (October 12, 2016, 6:57 PM EDT) -- The D.C. Circuit on Tuesday made it more complicated for the Consumer Financial Protection Bureau to bring some enforcement actions in both federal court and through administrative proceedings, and may have strengthened companies' hands in trying to fend off certain claims, experts say.

Although the D.C. Circuit's decision in PHH Corp.'s appeal of a \$109 million penalty assessed by the CFPB grabbed headlines for the court's declaration that the bureau's structure was unconstitutional, the decision also invalidated the bureau's penalty against the company. In doing so, the D.C. Circuit laid out what it found were major problems in the way the agency violated PHH's due process rights and laid out prescriptions to prevent such problems in the future.

Because the CFPB has wide latitude to bring a host of claims, the bureau will still wield a heavy enforcement hammer. But the prescriptions set forth by the D.C. Circuit will eliminate the bureau's ability to bring cases for a broad swath of conduct that occurred prior to the CFPB's creation, should the opinion survive an inevitable CFPB appeal.

"I think that the decision has potential to really hamstring that practice by the bureau," said Andrew Arculin, counsel at Venable LLP and a former top CFPB attorney.

The genesis of PHH's case was an appeal of a \$109 million disgorgement order over allegations the company referred consumers to mortgage insurers in exchange for reinsurance orders with its subsidiaries and reinsurance fees. The conduct, according to the CFPB, violated the Real Estate Settlement Procedures Act.

CFPB Director Richard Cordray, who ruled on an appeal of an administrative judge's initial, smaller penalty, retroactively applied a CFPB interpretation of RESPA's Section 8 that was not in effect when the rule was overseen by the U.S. Department of Housing and Urban Development.

U.S. District Judge Brett Kavanaugh said in the split opinion that retroactively applying a new standard on a regulation that had previously been interpreted and enforced differently by HUD without warning violated PHH's right to due process under the constitution.

"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,” Judge Kavanaugh wrote.

Although Judge Kavanaugh was writing specifically about the CFPB’s interpretation of RESPA’s Section 8 and its enforcement of the statute, the concerns about due process will go beyond that narrow portion of the fair housing law.

The CFPB has taken a tough line on the use of marketing services agreements, which are agreements among firms that provide closing services on real estate transactions. The CFPB in guidance issued last October said such deals pose the risk of lenders engaging in illegal kickbacks.

That interpretation is a change from previous enforcement of RESPA, and the CFPB has gone after such penalties in the past.

If the D.C. Circuit opinion stands, the bureau will not be able to assess retroactive penalties on those agreements moving forward, said Laurence Platt, a partner at Mayer Brown LLP.

“Companies have to be reasonably apprised of what’s prohibited before they can be found in violation of a provision,” Platt said.

Attorneys at Mayer Brown wrote an amicus brief on behalf of the U.S. Chamber of Commerce supporting PHH. Platt said he was not speaking on behalf of the Chamber for this article.

Judge Kavanaugh’s opinion also requires the CFPB to abide by the statute of limitations in all of the 19 laws it oversees when it brings administrative cases, rejecting arguments from the bureau that those limitations did not apply in administrative cases.

Moving beyond RESPA-specific instances, the CFPB is going to have to abide by all guidance and interpretations of regulations that were in place before the bureau came on the scene. All of the 19 such laws were enforced by other regulators, ranging from HUD to the Federal Trade Commission to the Federal Reserve.

That means the CFPB is going to have to go through the exhaustive process of reviewing all guidance and letters those agencies sent to companies stretching back decades, assuming Tuesday’s decision stands, said Brian Marshall of Americans for Financial Reform.

“That’s a pretty considerable procedural hoop to ask any agency to jump through, but I think the CFPB will do it. It will take some time to ensure that they looked back through what their predecessors have done,” Marshall said.

Even as the CFPB reviews that existing guidance, it will remain a potent enforcement agency in part due to the power Congress gave the bureau to bring claims against companies using a new and novel Unfair, Deceptive and Abusive Acts or Practices authority.

The abusive part of that standard is new, as other agencies have typically only been able to bring claims for unfair or deceptive acts.

The CFPB has yet to fully define what constitutes an abusive practice, and the D.C. Circuit ruling Tuesday could give more fuel to any defenses companies bring when they face such a claim, Platt said.

“That could quite frankly be the legacy issue of this case. To what extent, if at all, can the CFPB bring UDAAP claims when the private party could not have reasonably known that the CFPB considered a practice to be unfair or deceptive or abusive,” he said.

While Platt conceded that Congress did not give firm parameters about what would constitute an abusive practice, Judge Kavanaugh’s opinion should give “legs” to a due process defense.

Those legs may not go very far, Marshall said.

UDAAP is intended to be decided based on facts specific to each case, giving the CFPB wide latitude to bring enforcement actions, he said.

“There’s no reason in this decision or otherwise to believe that this decision stands for the idea that case-by-case adjudication is not permissible,” he said.

Even if the CFPB’s UDAAP power remains intact, the bureau will be somewhat constrained in bringing new cases based on old actions by companies, Arculin said.

“I think that the decision has the potential to really hamstring that practice by the bureau,” he said.

--Editing by Philip Shea and Emily Kokoll.