

Is There Really No Statute of Limitations for Many CFPB Enforcement Cases?

The oral argument before the DC Circuit in the Consumer Financial Protection Bureau's (CFPB or Bureau) case against PHH Corporation¹ has garnered a fair amount of coverage, in light of the panel's apparent interest in arguments about the constitutionality of the CFPB's structure and the CFPB's interpretation of the Real Estate Settlement Procedures Act (RESPA). (Mayer Brown summarized the oral arguments in *PHH in a Consumer Financial Services Review* [blog post](#).)

One of the key issues raised in *PHH* that has received relatively less notice is the question of whether a statute of limitations applies to the matter. CFPB Director Richard Cordray had concluded that no statute of limitations applies "when the Bureau challenges a RESPA violation in an administrative proceeding."² This is one of a number of circumstances in which the CFPB has asserted that an enforcement case is not limited by any statute of limitations.

The DC Circuit panel asked skeptical questions about this contention, and one question in particular is especially relevant for all CFPB-regulated entities. Counsel for the Bureau argued that finding no statute of limitations applicable to the CFPB in administrative proceedings would not be unusual, asserting that there is no statute of limitations for administrative proceedings brought by the federal banking agencies or by the Federal Trade

Commission (FTC). This moved Judge A. Raymond Randolph to ask: "Can they collect fines? Can they collect forfeitures? Can they collect civil penalties?... There is a statute of limitations. It's 28 U.S.C. 2462 that covers it.... It covers every agency in the federal government, unless Congress provides otherwise, and silence has never been construed as providing otherwise.... Otherwise the statute would make no sense."³

The statute cited by Judge Randolph 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."⁴

Section 2462 could be a significant constraint on the CFPB's authority to reach back in time to punish companies for older violations of numerous statutes. In this Legal Update, we provide an overview of: (i) the situations in which the CFPB has asserted that Congress was silent regarding the applicable statute of limitations, so that none applies; (ii) whether Section 2462 might apply to those situations; and (iii) what limits are imposed by Section 2462 if it does apply.

Situations Where the CFPB Has Asserted That Congressional Silence Regarding the Statute of Limitations Means None Applies

Title X of the Dodd-Frank Act authorizes the CFPB to bring enforcement cases either (a) through a “civil action” filed in federal district court or (b) through an “administrative proceeding” like *PHH* before an administrative law judge (ALJ), with an appeal to the CFPB Director.⁵ Notably, the CFPB can obtain the same remedies—including disgorgement, restitution, injunctive relief, and civil money penalties—in either forum. The CFPB has taken the position that Congress was silent regarding the statute of limitations in certain civil actions and administrative proceedings.

CERTAIN CIVIL ACTIONS IN FEDERAL DISTRICT COURT

Title X of the Dodd-Frank Act provides that generally “no action may be brought under this title more than 3 years after the date of discovery of the violation to which an action relates.”⁶ However, an “action arising under this title does not include claims arising solely under *enumerated consumer laws*,” which is a defined term that includes an alphabet soup of statutes including RESPA, TILA, FDCPA, ECOA, EFTA, and HMDA.⁷ The Bureau has taken the position that if the Bureau “brings an action under one of the enumerated consumer laws,” then “the Bureau has to use the limitations period in that law.”⁸

In two cases litigated in district court, one involving TILA claims and the other FDCPA claims, the CFPB argued that certain one-year statutes of limitations found in those statutes apply only to private suits, not government enforcement actions.⁹ The implication was that Congress was silent regarding the statute of limitations applicable to the CFPB when it enforces TILA or the FDCPA in district court. In the TILA case, the district court disagreed and

held that the one-year statute of limitations was applicable to the CFPB’s action.¹⁰ The Bureau later characterized the court’s conclusion as “wrong.”¹¹ In the FDCPA case, a different district court “reject[ed] the Bureau’s argument that no statute of limitations should apply,” on the grounds that “Congress envisioned *some* statute of limitations applying when the Bureau brings an action.”¹² But the court postponed ruling on what statute of limitations was applicable, and the case was settled before the issue was resolved.¹³

Despite these setbacks in court, the CFPB shows no sign of abandoning its position that Congress was silent regarding the statute of limitations for CFPB actions in district court to enforce TILA and the FDCPA. The Bureau is likely to take a similar position with respect to ECOA, EFTA, and various other statutes that contain statutes of limitation.¹⁴

ADMINISTRATIVE PROCEEDINGS

The CFPB also maintains that no statute of limitations applies to claims it brings in administrative proceedings, because of Congress’s alleged silence on the issue.

In the *PHH* case, the parties dispute whether RESPA’s three-year statute of limitations on “any action” applies to a CFPB administrative proceeding.¹⁵ CFPB Director Cordray held that an administrative proceeding is not an “action” for these purposes, so he “agree[d]” with the ALJ that “no statute of limitations applies.”¹⁶ The matter now rests with the DC Circuit.

The CFPB has also brought an administrative proceeding against another set of defendants to enforce TILA, EFTA, and the prohibition on unfair, deceptive, or abusive acts or practices (UDAAPs) found in Title X of the Dodd-Frank Act.¹⁷ The ALJ recently ruled in favor of the enforcement staff’s argument that none of these three statutes imposes any statute of limitations on an administrative proceeding.¹⁸

If accepted by the courts, these theories might allow the CFPB to avoid most or all of the statutes of limitations that are contained in the laws that it administers, by choosing to use an administrative forum rather than district court.

Applicability of Section 2462

Judge Randolph suggested that, to the extent that the statutes administered by the CFPB are silent regarding the statute of limitations, Section 2462 should govern.

In a recent unanimous decision that interpreted Section 2462 in a Securities and Exchange Commission case, the 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.’”¹⁹ 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 Environmental Protection Agency.²⁰ It has also been applied, for example, to the Federal Election Commission.²¹ But perhaps most relevant to the CFPB is that Section 2462 has been applied to the federal banking agencies and to the FTC.

FEDERAL BANKING AGENCIES

The federal banking agencies—the Federal Reserve Board (Board), Federal Deposit Insurance Corporation (FDIC), and Office of the Comptroller of the Currency (OCC)—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.²²

In the past, the federal banking agencies tended to dispute the idea that administrative proceedings under the FDI Act were subject to Section 2462.²³ 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].”²⁴

But a turning point was *Proffitt v. FDIC*,²⁵ a DC Circuit decision by Judge Karen LeCraft Henderson—who, like Judge Randolph, is on the *PHH* panel. *Proffitt* held that Section 2462 was applicable to certain administrative proceedings under the FDI Act.²⁶ 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.²⁷ Since these rulings, it appears that the federal banking agencies have not attempted to assert that Section 2462 is inapplicable to them.²⁸

FTC

The FTC has long enforced many of the “enumerated consumer laws” against non-banks. 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.²⁹

In a 1990 case, a court agreed with the FTC that it was subject to Section 2462 in an action for civil penalties for ECOA violations.³⁰ The court ruled that ECOA’s general statute of limitations was not applicable to the FTC.³¹

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.”³² 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.³³ This authority is now vested in

the Bureau.³⁴ In granting an exemption to Maine, the FTC compared Maine’s statute of limitations to Section 2462.³⁵

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 January 29, 2009.”³⁶ 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.”³⁷ Director Cordray did not specifically discuss whether Section 2462 is applicable to the CFPB in his decision.³⁸ As noted above, Judge Randolph again raised the applicability of Section 2462 at oral argument, and the DC 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.³⁹ CFPB complaints typically seek many of these remedies.⁴⁰

Section 2462 applies to “any civil fine, penalty, or forfeiture, pecuniary or otherwise....”⁴¹ 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 DC 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.”⁴² 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.”⁴³

In *Proffitt*, the DC 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.”⁴⁴ 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.”⁴⁵

CALCULATION OF THE LIMITATIONS PERIOD

Section 2462 is generally triggered “five years from the date when the claim first accrued....”⁴⁶ 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.⁴⁷ This is because a claim accrues “when the plaintiff has a complete and present cause of action.”⁴⁸ The Supreme Court’s holding can be analogized to other types of violations.

As noted above, the Dodd-Frank Act itself contains a three-year statute of limitations on CFPB actions “brought under” Title X.⁴⁹ That three-year statute of limitations, however, runs from “the date of discovery of the violation to which the action relates.”⁵⁰ 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 DC 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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Endnotes

¹ *PHH Corp. v. CFPB*, No. 15-1177 (D.C. Cir. argued Apr. 12, 2016).

² *In the Matter of PHH. Corp.*, No. 2014-CFPB-0002, at 10 (June 4, 2015).

³ Oral Argument at 50:50, *PHH Corp. v. CFPB*, No. 15-1177 (D.C. Cir. Apr. 12, 2016), <https://www.cadc.uscourts.gov/recordings/recordings.nsf/DocsByRDate?OpenView&count=100&SKey=201604>.

⁴ 28 U.S.C. § 2462 (emphasis added).

⁵ 12 U.S.C. §§ 5563-65.

⁶ 12 U.S.C. § 5564(g)(1).

⁷ 12 U.S.C. § 5564(g)(2)(A) (emphasis added); 12 U.S.C. § 5481(12) (defining “enumerated consumer laws” to include the Real Estate Settlement Procedures Act, Truth in Lending Act, Fair Debt Collection Practices Act, Equal Credit Opportunity Act, Electronic Fund Transfer Act, Home Mortgage Disclosure Act, and certain other statutes); *see also* 12 U.S.C. § 5564(g)(2)(B) (“In any action arising solely under an enumerated consumer law, the Bureau may commence, defend, or intervene in the action in accordance with the requirements of that provision of law, as applicable.”).

⁸ *See, e.g.*, Transcript of Motion to Dismiss Proceedings at 29, *CFPB v. Frederick J. Hanna & Assocs., P.C.*, No. 1:14-cv-02211 (N.D. Ga. June 3, 2015), ECF No. 40.

- ⁹ CFPB's Opposition to ITT's Motion to Dismiss the Complaint at 32, *CFPB v. ITT Educ. Servs., Inc.*, No. 1:14-cv-00292 (S.D. Ind. June 12, 2014), ECF No. 25; Plaintiff's Response to Defendants' Motion to Dismiss at 34-39, *CFPB v. Frederick J. Hanna & Assocs., P.C.*, No. 1:14-cv-02211 (Oct. 3, 2014), ECF No. 26.
- ¹⁰ *CFPB v. ITT Educ. Servs., Inc.*, No. 1:14-cv-00292, 2015 WL 1013508, at *33 (S.D. Ind. Mar. 6, 2015), *appeal dismissed on other grounds*, No. 15-1761 (7th Cir. Apr. 20, 2016).
- ¹¹ Plaintiff's Response to Defendants' Notice of Supplemental Authority at 1, *CFPB v. Frederick J. Hanna & Assocs., P.C.*, No. 1:14-cv-02211 (March 24, 2015), ECF No. 34 (discussing *ITT*).
- ¹² *CFPB v. Frederick J. Hanna & Assocs., P.C.*, 114 F. Supp. 3d 1342, 1375-80 (N.D. Ga. 2015) (emphasis in original).
- ¹³ *Id.*; Stipulated Final Judgment and Order, *CFPB v. Frederick J. Hanna & Assocs., P.C.*, No. 1:14-cv-02211 (Jan. 6, 2016), ECF No. 63.
- ¹⁴ See 15 U.S.C. §§ 1691c, 1691e(f) (ECOA); 15 U.S.C. §§ 1693m(g), 1693o (EFTA).
- ¹⁵ 12 U.S.C. § 2614.
- ¹⁶ *In the Matter of PHH Corp.*, No. 2014-CFPB-0002, at 10 (June 4, 2015). The Director did acknowledge that the CFPB could not obtain relief for RESPA claims against PHH that were already time-barred by the time that the Bureau was created in 2011. *Id.*
- ¹⁷ *In the Matter of Integrity Advance, LLC*, No. 2015-CFPB-0029 (filed Nov. 18, 2015).
- ¹⁸ Order Denying Motion to Dismiss at 19-29, *In the Matter of Integrity Advance, LLC*, No. 2015-CFPB-0029 (Apr. 22, 2016).
- ¹⁹ *Gabelli v. SEC*, 133 S. Ct. 1216, 1223 (2013) (quoting *Adams v. Woods*, 2 Cranch 336, 342 (1805)).
- ²⁰ *3M Co. (Minn. Mining & Mfg.) v. Browner*, 17 F.3d 1453 (D.C. Cir. 1994).
- ²¹ *FEC v. Williams*, 104 F.3d 237 (9th Cir. 1996).
- ²² See 12 U.S.C. § 1818.
- ²³ 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 ten-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), *aff'd on other grounds*, 111 F.3d 376 (5th Cir. 1997). None of these considerations are applicable to the CFPB.
- ²⁴ CFPB's Opposition to ITT's Motion to Dismiss the Complaint at 32, *CFPB v. ITT Educ. Servs., 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").
- ²⁵ *Proffitt v. FDIC*, 200 F.3d 855 (D.C. Cir. 2000).
- ²⁶ *Id.* at 859-62 (see in particular 860 n.5, discussing OCC amicus brief).
- ²⁷ *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)).
- ²⁸ 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]").
- ²⁹ See, e.g., *United States v. Ancorp Nat. Servs., 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).
- ³⁰ *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.
- ³¹ *Id.* The court did note certain ambiguities in the legislative history of ECOA's general statute of limitations regarding its applicability to government agencies.
- ³² 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 5 years before the civil action is brought. 28 U.S.C. 2462.").
- ³³ 15 U.S.C. § 1692o (1994).
- ³⁴ 15 U.S.C. § 1692o.
- ³⁵ 60 Fed. Reg. at 66,972.
- ³⁶ Order on Dispositive Motions at 14 n.6, *In the Matter of PHH Corp.*, No. 2014-CFPB-0002 (May 22, 2014).
- ³⁷ Recommended Decision at 84, *In the Matter of PHH Corp.*, No. 2014-CFPB-0002 (Nov. 25, 2014).
- ³⁸ Director 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).

³⁹ 12 U.S.C. § 5565.

⁴⁰ *See, e.g.*, Complaint at 13, *CFPB v. Frederick J. Hanna & Assocs., P.C.*, 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).

⁴¹ 28 U.S.C. § 2462.

⁴² *Johnson v. SEC*, 87 F.3d 484, 491 (D.C. Cir. 1996).

⁴³ *Id.*

⁴⁴ *Proffitt v. FDIC*, 200 F.3d 855, 861 (D.C. Cir. 2000) (internal quotation marks omitted).

⁴⁵ *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).

⁴⁶ 28 U.S.C. § 2462.

⁴⁷ *Gabelli v. SEC*, 133 S. Ct. 1216, 1219-20 (2013).

⁴⁸ *Id.*

⁴⁹ 12 U.S.C. § 5564(g)(1).

⁵⁰ *Id.*

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