
CFPB is Constitutional, But Makes \$100 Million Mistake In Interpreting the Law

By Thomas A. Brooks, Jane C. Luxton, Joann Needleman / Feb 01, 2018

The D.C. Circuit Court of Appeals issued its long awaited decision in *PHH v. Consumer Financial Protection Bureau*, holding by a 7-3 decision that the Consumer Financial Protection Bureau's (CFPB or Bureau) single-Director structure, which provides that its Director can be removed only "for cause," is constitutional. What has received scant recognition, however, is the court's confirmation that the Bureau was wrong on several grounds in its imposition of a \$109 million penalty against PHH. With this second holding, the ruling is far from a sweeping win for the CFPB, and its implications are profound for curtailing widely criticized Bureau practices of regulating by enforcement and retroactive imposition of new interpretations of the law.

Buried in the 250-page opinion is a reinstatement of the previously vacated Court of Appeals panel ruling that the CFPB's interpretation of the Real Estate Settlement Procedures Act (RESPA) and its application to mortgage lender PHH was invalid in two ways: (1) the Bureau incorrectly interpreted Section 8 of RESPA and retroactively imposed its new interpretation on PHH, depriving the lender of its constitutional due process rights and (2) the CFPB was bound by the three-year RESPA statute of limitations. While the Bureau may have won the right to live another day with its current structure, its ways of conducting business and discharging its duties have significantly changed going forward.

The ultimate dispute in the case stems from the guidance issued by the Department of Housing and Urban Development (HUD) which clarified the applicability of Section 8 of RESPA to captive reinsurance programs. HUD's guidance stated that under Section 8(c)(2) of RESPA various exemptions from the statute's prohibitions against paying for referrals and splitting fees were available. One exemption included payments for reinsurance under captive reinsurance arrangements that are solely for "payment for goods or facilities actually furnished or for services actually performed". In addition, the statute of limitations for RESPA claims is three years. Industry members, including PHH, relied on HUD's guidance for decades.

In January 2014, the CFPB brought a notice of charges against PHH and its affiliates alleging they took improper referral fees, in the form of reinsurance premiums from PHH's captive mortgage insurer, in violation of RESPA. In an administrative proceeding later that year, an Administrative Law Judge (ALJ) found that PHH had violated Section 8(a) of RESPA and that the violations occurred each time a loan was closed. The ALJ ordered a disgorgement of \$6.4 million. Both sides appealed and pursuant to Dodd-Frank the matter was returned to the CFPB for disposition. In that proceeding, Director Cordray affirmed PHH's RESPA violation but found that the violation occurred with each PHH acceptance of a reinsurance payment from a mortgage insurer, an interpretation that was contrary to the HUD guidance. The Director also concluded that no statute of limitations applied to the proceeding and imposed penalties as far back as 2008, even if the loan closed prior to that date. Based on this new interpretation, PHH was ordered to disgorge \$109 million dollars.

The matter was appealed to a three-judge panel of the D.C. Circuit Court of Appeals which in October 2016 soundly rejected and even rebuked the CFPB's interpretation of RESPA and the statute of limitations. The Court found that the CFPB violated "bedrock principles of due process," as reported in a prior [alert](#). In the January 2018 opinion, the full Circuit agreed and affirmed that substantive ruling but with little to no fanfare. The Court's decision on these issues has at least as much import as the voluminous parts of the opinions focusing on the constitutionality of the Bureau's structure. Those who have long objected on due process grounds to the Bureau's practices – and the vast sums the Bureau has collected – no doubt feel vindicated by the Court's ruling. Enforcement actions in process that are based on these approaches are now under a cloud of suspicion.

These practices and the antics that have followed the midnight resignation of Richard Cordray, also previously [reported](#), further confirm that regardless of whether the Bureau structure is legally sound, its practices have been open to question and will be tested for consistency with the rule of law.