

LENDERS UPDATE™

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October 26, 2016

THE PHH DECISION, A BRIEF RESPONSE FROM THE DIRECTOR

PHH CORP. V. CFPB

Many of us have been waiting for the decision from the three judge panel of the D.C. Circuit of the U.S. Court of Appeals in the *PHH Corp. v. CFPB* case. That occurred with the issuance of a 110 ten page decision by the court. We have also been waiting for the CFPB to publically respond. That happened yesterday.

To recap the situation, the Appeals Court heard an appeal of an enforcement action brought by the CFPB against PPH. While many issues were raised, there were two at the basis of the case. First, a CFPB interpretation of RESPA that has “chilled” the use and scope of “marketing services agreements” (“MSA’s”). Second, and perhaps legally more intriguing, was a challenge to the constitutionality of the CFPB.

The court found that “*the CFPB’s concentration of enormous executive power in a single, unaccountable, unchecked Director not only departs from settled historical*

practice, but also poses a far greater risk of arbitrary decision making and abuse of power...". The court's decision found that the provision allowing the Director to be replaced only "for cause" was unconstitutional. While finding many of the actions of the CFPB in this case disturbing, the court felt that this limited remedy would solve the immediate issue while allowing the CFPB to continue functioning.

RESPA

Next, as to the RESPA question, the panel decided that as long as services for such things as marketing bore a reasonable relationship to the fair market value of the services offered, the fact that there is tying of those services to the referral of a settlement service such as a loan, does not violate RESPA. The example we would suggest, is a position we have relayed to our clients as the CFPB position (which it was and probably still is). That is, assuming you can put together a MSA which is legal, you may not receive referrals in conjunction with the MSA, even if the referrals are uncompensated. The Appeals Court found this CFBB position to be incorrect. "Tying" is not prohibited.

NOTE: this is not yet the law of the land and so far nothing would indicate it is the position of the CFPB.

The court also found the following, among others issues:

- that the Bureau's conduct violated due process,
- that the CFPB was incorrect in the basis it used to determine the amount that PHH should have disgorged in response to its alleged violations, and
- that the 3 year statute of limitations applied not only in litigation but also to administrative enforcement actions.

The first public reaction of the CFPB came from Director Cordray's remarks to the MBA yesterday October 25. In what we would describe as little more than a footnote to the mainly self-laudatory comments about the CFPB, the Director makes these remarks at the end of his speech:

CC...“The third point relates to the recent ruling by a panel of the D.C. Circuit Court of Appeals in the PHH matter. The panel rendered a ruling on constitutional grounds and on statutory grounds applying the Real Estate Settlement Procedures Act to captive reinsurance. The case is not final at this point; the Bureau has made clear that it respectfully disagrees with the panel’s decision and is considering its options for seeking further review. In the meantime, we will continue to consider how best to apply the Real Estate Settlement Procedures Act to specific factual situations just as we always do. In particular, we continue to adhere to our 2015 bulletin identifying the substantial risks posed by marketing services agreements as we have encountered them in our enforcement actions and through our supervisory oversight.”

Just batting away at a bothersome fly!!

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