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PHH's hidden gem

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The long-awaited en banc decision in PHH Corp., v. CFPB[1] has finally been issued. The Court of Appeals for the D.C. Circuit upheld the constitutionality of the Consumer Financial Protection Bureau (CFPB) and reversed a prior finding that its structure is unlawful. This case has been discussed for years, with good reason.

First, in June 2015, the CFPB issued an unprecedented fine of $109 million against PHH Corporation related to allegations that it violated the anti-kickback provisions of the Real Estate Settlement Procedures Act (RESPA). On appeal in 2016, a three-judge panel of the D.C. Circuit declared the CFPB's structure to be unconstitutional. That ruling was a major blow to the bureau's prior regime and threatened the very existence of this young agency.

In PHH Corp. v. CFPB, the entire D.C. Court of Appeals reversed significant portions of that prior decision and declared that the CFPB's unique agency structure does meet constitutional requirements. This is a major decision and should not be ignored.

But what is truly notable is the underlying issue that was appealed in the first place: the CFPB's new interpretation of RESPA regarding payments for business referrals. The CFPB's interpretation rejected long-standing guidelines and led to an extraordinary enforcement action. The $109 million record-setting fine scared the daylights out of every bank, lender and settlement services provider and has chilled business opportunities for nearly three years.

So, let's focus on the hidden gems in what is otherwise a very long opinion about the agency's structure. The first piece of good news for banks and lenders is the part of the opinion confirming that payments between settlement services providers can be lawful, so long as they are based on the reasonable value of services provided, even if the services rendered are accompanied by a referral of business.

RESPA was created to provide guidelines for payments that might be made between settlement services providers. Unlawful kickbacks and payment for referrals lead to higher consumer costs and create conflicts of interest. Thus, Congress enacted civil and criminal prohibitions to prevent unlawful referral schemes.

For many years, RESPA Section 8(c)(2) was interpreted to provide a safe harbor for certain payments for services performed, even if there had been a referral between settlement services providers. Payments that reflected the reasonable market value for services rendered were previously lawful. In his 2015 ruling, former CFPB Director Richard Cordray rejected that safe harbor and, essentially, brought into question any and all payments for services between settlement services providers, regardless of the value of those services.

The D.C. Court of Appeals in PHH Corp. v. CFPB did not accept the CFPB's position regarding RESPA Section 8(c)(2). The court's opinion confirms the long-standing interpretation of Section 8(c)(2) to provide a safe harbor to settlement service providers who receive payments for referrals of business, so long as they are based on the reasonable value of services provided. This opinion provides much-needed guidance and confidence for lenders and industry participants.

To hold otherwise, and retroactively reject enduring precedent, would deny financial service companies their constitutional right of due process of law. The court did not buy the CFPB's arguments and has seemingly reinstated long-standing precedent.

The other good news is that the PHH Corp. court rejected the CFPB's assertion that it is not subject to statutes of limitations imposed by RESPA. Under Cordray's direction, the CFPB also asserted that RESPA's well-established statutes of limitations did not apply to the CFPB. This was a very dangerous proposition: the CFPB would not be subject to statutes of limitations for its enforcement actions, as those limits should only be applied to civil and criminal court actions.

Taken to its extreme, the CFPB's position was that it was not bound by any limitation period, unless expressly restricted by Congress. The bureau could, therefore, file administrative and enforcement actions against any financial institution for any wrongdoing, regardless of when the act had taken place. There would be no limits as to how far back it could reach.

The PHH Corp. court held that such a statutory interpretation was unprecedented and unlawful, and it soundly rejected the CFPB's position regarding statutes of limitations.

These two pieces of good news are the gems, even if the news media prefers to focus solely on the CFPB's structure and existence.

Where do we go from here? It is time for all companies to revisit their RESPA compliance strategies and guidelines. RESPA is still the law of the land, and unlawful kickbacks will still be scrutinized and penalized on both federal and state levels. However, future business activity should be guided by the law's original intent and how it has once again been interpreted by the courts.

We now have more clarity regarding RESPA. And, we have court-imposed limits to the CFPB's apparent thirst for unbridled power. 2018 is looking like it will be a good year, indeed.

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[1] No. 15-1177, U.S. Court of Appeals for the District of Columbia Circuit, January 31, 2018.