

Banking and Finance Law Daily Wrap Up, TOP STORY—CFPB Director issues decision finding mortgage insurance kickback violations, (Jun. 4, 2015)

By Andrew A. Turner, J.D.

Consumer Financial Protection Bureau Director Richard Cordray has issued a decision in the first appeal of a CFPB administrative enforcement proceeding. The Director's decision concludes that PHH Corp., a mortgage lender, illegally referred consumers to mortgage insurers in exchange for kickbacks. He also issued a final order that prohibits PHH from violating the law and requires it to pay \$109 million to the bureau.

The [decision](#) upholds in part, and reverses in part, Administrative Law Judge Cameron Elliot's November 2014 Recommended Decision, which held that PHH violated the Real Estate Settlement Procedures Act (RESPA) when it accepted kickbacks for loans that closed on or after July 21, 2008. Those kickbacks took the form of mortgage reinsurance premiums that the mortgage insurers paid to a subsidiary of PHH.

PHH contended that a three-year statute of limitations applied to the CFPB, even in an administrative proceeding. PHH also disputed that it violated section 8 of RESPA, but contending that even if it did, section 8(c)(2) exempts it from liability.

Cordray rejected these arguments, as well as several other challenges PHH raised to the CFPB's authority. On the other side, the CFPB enforcement counsel advocated a "continuing violation" theory for conduct dating back to 1995. It also contended that PHH should be held liable for violating RESPA every time it accepted an illegal kickback payment on or after July 21, 2008, even though some of those payments were associated with loans that closed before that date.

Cordray disagreed with the continuing violation theory, but agreed that PHH was liable for every illegal payment it accepted on or after July 21, 2008. Cordray's decision that PHH violated RESPA every time it accepted a kickback payment went beyond Judge Elliot's ruling, which had limited PHH's violations to kickbacks that were connected with loans that closed on or after July 21, 2008.

Statute of limitations and retroactivity. Cordray found that no statute of limitations applies when the bureau challenges a RESPA violation in an administrative proceeding. The RESPA statute of limitations applies to the CFPB only if it brings an enforcement action in court, and because this proceeding was administrative, RESPA's time limit did not apply.

The CFPB took over enforcement authority for RESPA from the Department of Housing and Urban Development (HUD) under the Dodd-Frank Act on July 21, 2011. As of the last day that

HUD could enforce RESPA, it was limited to challenging violations that occurred no earlier than July 21, 2008. If the CFPB were to challenge violations that occurred prior to that date, this would be a retroactive application, Cordray said. Thus, the CFPB lacked authority to pursue violations that occurred before July 21, 2008.

Since RESPA did not authorize HUD to seek a civil money penalty, Cordray concluded that it would be an inappropriate retroactive application of the CFPB's authority for it to seek civil money penalties for violations that occurred before the bureau was created. As a result, the CFPB may seek civil money penalties only for violations that occurred on or after July 21, 2011.

RESPA violations. In Cordray's view, provisions in Section 8(c)(2), permitting compensation for services performed, clarified the prohibition against business referrals in Section 8(a), but did not provide an exemption. The goal of section 8 is "the elimination of kickbacks or referral fees that tend to increase unnecessarily the costs of certain settlement services" and reading Section 8(c)(2) as an exemption would substantially undermine the protections, he said. If section 8(c)(2) permitted compensated referrals, Cordray reasoned, this would distort the market in ways that the statute sought to prevent.

In this case, Cordray said, PHH agreed to make referrals to the mortgage insurers. The mortgage insurers agreed to pay PHH for those referrals by purchasing reinsurance from its wholly owned subsidiary, Atrium Insurance Corp. Regardless of whether the price that the mortgage insurers paid was inflated or was set at the fair market value of the reinsurance they received, PHH still benefited from the arrangement because Atrium received (profitable) business from the mortgage insurers that it would not otherwise have received. Accordingly, that agreement distorted the market for mortgage insurance, in direct contravention of RESPA's core provisions.

Section 8(c)(2) only becomes relevant if there is a question as to whether the parties actually did enter into an agreement to refer settlement service business, according to Cordray. Section 8(c)(2) was not relevant here, he said, in light of ample evidence in the record that PHH and the mortgage insurers entered into agreements for referrals of mortgage insurance business.

Separate violations. PHH committed a separate violation of RESPA every time it accepted a reinsurance payment from a mortgage insurer. That meant that PHH is liable for each payment it accepted on or after July 21, 2008, even if the loan with which that payment was associated had closed prior to that date.

Cordray said that it is the acceptance of a "fee, kickback, or thing of value pursuant to" a referral agreement that triggers a RESPA violation. Thus, PHH violated RESPA every time it accepted a reinsurance premium from a mortgage insurer pursuant to a captive reinsurance agreement because those reinsurance premiums were kickbacks.

Continuing violation. CFPB Enforcement argued that, because PHH's violations were part of a continuing course of unlawful conduct that occurred over an 18-year period, the "continuing violation" doctrine should apply. That would have made PHH liable for every RESPA violation that resulted from the captive reinsurance agreements, going all the way back to 1995. Cordray

concluded that the continuing violation was not applicable because violations of Section 8 of RESPA are individually actionable acts.

Sanctions. Cordray issued a [final order](#) that requires PHH to disgorge \$109 million—all the reinsurance premiums it received on or after July 21, 2008. The order also bars PHH from violating the provision of RESPA that forbids kickbacks. In addition, it prohibits PHH from referring any consumer to a provider of a real estate settlement service if that provider has agreed to purchase any service from, or make any payment to, PHH, and if that purchase or payment is triggered by the referral.

Companies: Atrium Insurance Corporation; Atrium Reinsurance Corporation; PHH Corporation; PHH Home Loans LLC; PHH Mortgage Corporation

MainStory: TopStory CFPB EnforcementActions Mortgages RESPA