Banking and Finance Law Daily Wrap Up, TOP STORY—D. Md.: Attorney, structured settlement buyers fend off most of CFPB suit, (Sept. 14, 2017)

Banking and Finance Law Daily Wrap Up

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By Richard A. Roth, J.D.

Three related companies that bought structured settlements from consumers, three individuals who controlled the companies, and an associated attorney have convinced a U.S. district judge to dismiss four of the Consumer Financial Protection Bureau's five claims that their business activities included unfair, deceptive, or abusive acts or practices. However, the judge rejected their argument that state-court litigation and a state regulatory scheme called for the federal court to decline jurisdiction and left standing one abusive acts or practices claim against the companies and controlling individuals (*CFPB v. Access Funding, LLC*, Sept. 13, 2017, Motz, J.).

The CFPB sued Access Funding, LLC, its holding company Access Holding, LLC, and the funding company's successor Reliance Funding, LLC, (referred to as "Access") claiming that the companies' structured settlement factoring activities used unfair, deceptive, or abusive acts or practices to induce consumers to sell their structured settlements for lump-sum payments. The Bureau's specific charges include that the companies misrepresented that advances paid to consumers obligated them to complete the sales and that the attorney was giving them independent professional advice (see *Banking and Finance Law Daily*, Nov. 22, 2016).

The Bureau's allegations about the attorney's conduct perhaps are particularly disturbing. According to the judge's summary of the charges, the attorney was held out as an independent professional advisor, while his services in fact were arranged and paid for by Access. Access would tell the attorney when to call each consumer and instruct him to place the call on a prepaid cell phone that Access arranged to have delivered to the consumer. The attorney's independent professional advice consisted of little more than reading the contract to the consumer and then asking the consumer if he understood. The attorney then sent each consumer an affidavit for signature stating that the consumer had been advised to seek independent professional advice, had done so, and chose to proceed with the sale. Access paid Smith $200 for each transaction, the CFPB claims.

The Bureau's complaint included three counts against Smith, one each alleging unfair practices, deceptive practices, and abusive practices. The fourth count charged that Access and the individuals who controlled the companies substantially assisted the attorney. The final count alleged that Access and the controlling individuals used abusive practices to coerce consumers to complete sales.

Jurisdiction. The judge's first task was to decide whether he had jurisdiction over the Bureau's suit. Access and the individuals raised three objections to the judge's jurisdiction, but he rejected all three.

First, the judge said it was not appropriate for him to abstain from exercising jurisdiction due to the state of Maryland's activities. Abstention is appropriate in a limited number of situations under *Burford v. Sun Oil*, 319 U.S. 315 (1943), the judge said, but those situations were not present.

The case did not present any difficult questions about Maryland state law; in fact, it presented no state law questions at all. Neither would the case interfere with Maryland's efforts to "establish a coherent policy with respect to a matter of substantial public concern," the judge said. The Bureau's suit would not interfere with the state's law on the sale of structured settlements. Enforcing the Consumer Financial Protection Act's UDAAP provisions was consistent with state law.

Second, prior Maryland court decisions about the attorney's activities and the fairness of the structured settlement sales did not bind the federal court under the issue preclusion doctrine, the judge said. The state court decisions were not binding on the CFPB because it was neither a party nor in privity with a party and therefore had never had a fair chance to be heard.

Third, because the Bureau was not in privity with a party to the state court litigation, its suit was not a prohibited collateral attack on the state court decisions, the judge decided.

Was attorney subject to the act? The Consumer Financial Protection Act does not apply to everyone. Rather, it applies to a "covered person." The Act defines a "covered person" as one who "engages in offering or providing a consumer financial product or service," and the attorney met that criterion, the judge determined.

Under the plain language of the CFPA, Smith was a covered person because he provided financial advisory services to consumers on individual financial matters. Whether to exchange structured settlement payments for a lump sum was an individual financial matter, and Smith advised consumers to complete the sales. The consumers' affidavits swore that he acted as an independent professional advisor, the judge added.

Attorney exclusion. However, the CFPA excludes from coverage an attorney who was engaged in the practice of law, the judge continued. That shielded the attorney from the Bureau's suit.

Smith's activities, as described by the CFPB, were acting as an independent professional advisor. That included telling consumers about the legal implications of selling their structured settlements. The Bureau conceded that he was a licensed attorney. As a result, he was protected by the practice of law exclusion.

The Bureau's claims about the perfunctory nature of Smith's services were relevant to their quality, not their nature. "Bad legal advice is still legal advice," the judge noted.

Neither of the two exceptions from the practice of law saved the CFPB's case, the judge continued. The financial advice the attorney offered was at least incidental to his legal advice, and it was within the scope of an attorney-client relationship.

Since Smith was protected by the practicing attorney exclusion, none of his activities could have violated the CFPA, the judge concluded. That meant the companies and the controlling individuals would not have violated the CFPA by assisting him.

Advances and abusive practices. The Bureau's remaining claim was that Access and the controlling individuals engaged in abusive practices by giving consumers advances against their buyouts and then using the resulting debt to coerce the consumers into completing the transactions. The Bureau's complaint did adequately describe how that could have been abusive, the judge determined.

According to the companies, there was nothing abusive about expecting a consumer who changed his mind about the sale to repay the advance. However, the Bureau had alleged more than that, the judge observed. Consumers who changed their minds but could not repay advances were told they were obligated to complete the sale even if they believed it was not in their best interests. The CFPB also claimed that consumers did not understand the nature of the advances or that they actually were not obligated to complete the sales. If proved, that would be abusive, the judge said.

The case is No. 16-cv-03759-JFM.

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Companies: Access Funding, LLC; Access Holding, LLC; Reliance Funding, LLC

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