

# Banking and Finance Law Daily Wrap Up, TOP STORY—D.D.C.: Payday lenders’ ‘Operation Choke Point’ lawsuit against regulators coughs but breathes, (Sep. 28, 2015)

By Thomas G. Wolfe, J.D.

Addressing requests by the Federal Deposit Insurance Corporation, the Federal Reserve Board, and the Office of the Comptroller of the Currency to dismiss the “Operation Choke Point” related claims against them lodged by Community Financial Services Association of America, Ltd. (CFSA) and other payday lenders, the U.S. District Court for the District of Columbia has issued its ruling. The court dismissed the counts of the complaint pertaining to alleged violations of the federal Administrative Procedure Act (APA) but refused to dismiss the counts pertaining solely to the regulators’ alleged violations of the payday lenders’ procedural due process rights under the Fifth Amendment to the U.S. Constitution ([\*Community Financial Services Association of America, Ltd. v. Federal Deposit Insurance Corporation\*](#), Sept. 25, 2015, Kessler, G.).

On behalf of the payday lenders, CFSA, along with Advance America and Cash Advance Centers, Inc., sought declaratory and injunctive relief to set aside certain informal guidance documents and other actions by the FDIC, the Fed, and the OCC. In dismissing the lenders’ APA claims but allowing the constitutional due process claims to advance, the federal trial court determined that the payday lenders sufficiently alleged that “their liberty interests are implicated by Defendants’ alleged actions and that the alleged stigma has deprived them of their rights to bank accounts and their chosen line of business.”

**Backdrop.** According to the court’s opinion, the payday lenders’ claims center on the defendant federal agencies’ participation in the Department of Justice’s campaign known as “Operation Choke Point,” which has been the subject of a recent House Committee investigation and reporting.

In connection with Operation Choke Point, the lenders alleged that the federal agencies “forced banks to terminate relationships with Plaintiffs and Plaintiffs’ members by first promulgating regulatory guidance regarding ‘reputation risk,’ and by later relying on the reputation risk guidance “as the fulcrum for a campaign of backroom regulatory pressure seeking to coerce banks to terminate longstanding, mutually beneficial relationships with all payday lenders.”

The payday lenders maintained that the terms of the lending transactions with their customers allow the lenders to “deposit the post-dated check or to execute the debit authorization.” Consequently, in order to have that security, payday lenders “must have a deposit account with a

bank and/or access to the Automated Clearing House (ACH) network,” the court’s opinion related.

**Nature of claims.** In their complaint, CFSA, Advance America, and Cash Advance Centers sought declaratory and injunctive relief to set aside certain informal guidance documents and other actions by the FDIC, the Fed, and the OCC on the grounds that the federal agencies’ actions exceeded their statutory authority, were “arbitrary and capricious,” and were promulgated without following the requisite procedures under the federal APA. Further, the payday lenders claimed that the federal regulators deprived them of their “liberty interests” without due process of law—in violation of the Fifth Amendment to the U.S. Constitution.

Although the Consumer Financial Protection Bureau is authorized by the Dodd-Frank Act to supervise payday lenders and promulgate regulations concerning payday lending, the CFPB was not made a party to the case.

**Procedural context.** In July 2014, CFSA and the payday lenders filed their first amended complaint. In August 2014, the Fed asked the court to dismiss the complaint for lack of jurisdiction or, alternatively, for failure to state a claim; the FDIC and OCC filed similar motions.

Later, opposing the agencies’ request for dismissing their action, the payday lenders filed supplemental documents in support of their complaint, including a letter from an FDIC official to a depository institution and a House Committee Report about the FDIC’s involvement in Operation Choke Point. In April 2015, the lenders requested that the court grant them leave to file a second amended complaint.

**Standing.** The federal agencies argued that the payday lenders lacked standing to advance their claims. The court disagreed, determining that the payday lenders alleged sufficient facts to show that there was a “substantial likelihood that a favorable ruling by this Court would redress their injuries.”

Further, since the court found that it had proper jurisdiction to hear the lenders’ claims, the court denied the payday lenders’ “Motion for Jurisdictional Discovery” in support of their action as “moot.”

**APA claims.** According to the payday lenders, the federal agencies violated the APA by: promulgating binding rules without providing notice and comment, as required by law; exceeding their statutory authority to set standards for safety and soundness (conferred by 12 U.S.C. §1831p-1); and acting “arbitrarily and capriciously.”

Ultimately, in reviewing the pertinent agency actions and documents, the court concluded that these could not be considered “final agency actions” for purposes of the APA because “they do not determine any rights or obligations.” As a result, the court determined, “they are not subject to judicial review under the APA and all of Plaintiffs claims under the APA fail to state a claim.”

**Due process claims.** Next, the court addressed the payday lenders’ allegations that that the federal agencies “stigmatized them, deprived them of their bank accounts, and threatened their ability to engage in their chosen line of business, all without notice and opportunity to be heard, in violation of their procedural due process rights under the Fifth Amendment.”

Among other things, the federal regulators argued that, in keeping with Supreme Court precedent, due process protections “are not applicable to legislative activities of an administrative agency that are generalized in nature and affect a large number of parties.”

However, the trial court asserted that the Supreme Court also has recognized a distinction “between proceedings for the purpose of promulgating policy-type rules or standards, on the one hand, and proceedings designed to adjudicate disputed facts in particular cases on the other.” In the court’s view, the payday lenders’ allegations fell “somewhere in between the [Supreme] Court’s two opposing poles.”

Surveying case law on the issue, the court concluded that the federal agencies’ actions, “as alleged by Plaintiffs, are not legislative in nature and are more analogous to an adjudication of payday lenders right to do business. Nor are the effects of Defendants’ alleged actions indirect or incidental.” Moreover, the court determined that the lenders’ alleged “loss of a bank account as a result of stigma is sufficient to implicate a right to due process.”

Accordingly, the court ruled that the payday lenders sufficiently stated a claim for a violation of constitutional due process because they adequately alleged that their liberty interests were implicated by the federal agencies’ alleged actions, and that the alleged stigma deprived them of their rights to bank accounts and their chosen line of business.

**Final disposition.** Consequently, in her Sept. 25, 2015, [order](#), Judge Gladys Kessler, among other things:

- granted the payday lenders leave to file a “Second Amended Complaint”;
- denied the agencies’ motions to dismiss all of the counts of the complaint, based on a lack of standing;
- granted the agencies’ motions to dismiss those counts of the complaint pertaining to a failure to state a claim for violation of the APA;
- granted the agencies’ motions to dismiss the counts of the complaint pertaining to a failure to state a claim for violation of due process only to the extent that those claims are based on the APA; and
- denied the agencies’ motions to dismiss the counts of the complaint for a failure to state a claim for violation of the Fifth Amendment’s “Due Process Clause.”

The case is [No. 14-CV-953 \(GK\)](#).

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Mizusawa for the Federal Reserve Board. Peter Chadwell Koch for the Office of the Comptroller of the Currency and Thomas J. Curry in his official capacity as the Comptroller of the OCC.

Companies: Advance America; Cash Advance Centers, Inc.; Community Financial Services Association of America, Ltd.

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