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PHH appeals its Kickback Penalty

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PHH Corp., the company made famous recently for its alleged mortgage insurance kickback scheme, is taking on the Behemoth Bureau with an attempt to overturn its \$109 million penalty. The theory? That the Bureau's ruling was an abuse of discretion.

Last Friday, PHH petitioned the appeals court to review the CFPB's order because it is "arbitrary, capricious, and an abuse of discretion within the meaning of the Administrative Procedure Act" and, if that is not enough, it is a violation of federal law, including the Real Estate Settlement Procedures Act and the Consumer Financial Protection Act of 2010.^[1]

In early June, Director Cordray supported the findings of the Administrative Law Judge Cameron Elliot on the point of its correctness; however, Mr. Cordray said that Judge Elliot incorrectly applied the law's provisions when assessing PHH's penalty.

Let's dig a little deeper. What Mr. Cordray was maintaining was the view that the penalty for RESPA kickbacks for mortgages that closed on or after July 21, 2008 – which, by the way, is exactly three years before the date when the Bureau assumed RESPA enforcement authority from HUD – should be penalized for each payment PHH received after that date.

Here was his reasoning. Mortgage reinsurance premiums are paid by borrowers each time they make monthly payments, not in one lump sum at the time of closing. Thus, to quote Mr. Cordray, "that means 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." So, using that way of figuring things out, the penalty PHH now faces was elevated to the draconian \$109 million.

Judge Elliott's calculation put the penalty at about \$6.4 million, which is based on the amount paid by borrowers on mortgages that closed on or after July 21, 2008. But Mr. Cordray's new calculation caused the penalty to rise to \$109 million, giving new meaning to the concept of geometric and exponential expansion of values!

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What a mess! And all this because the Bureau alleged that when PHH originated mortgages it referred consumers to mortgage insurers with which it partnered. Then, in exchange for this referral, these insurers purchased reinsurance from PHH's subsidiaries. Hence, PHH allegedly took the reinsurance fees as kickbacks. Somewhat convoluted, but easy to follow.

The Bureau asserted that PHH and its affiliates allegedly set up a systematic means whereby PHH received as much as 40 percent of the premiums that consumers paid to mortgage insurers, collecting hundreds of millions of dollars in kickbacks. Well, as Shakespeare wrote, "nothing comes amiss; so money comes withal."

But the Bureau's allegations did not stop there. It also claimed that PHH allegedly charged more money for loans to consumers who did not buy mortgage insurance from one of its kickback partners and, in general, charged consumers additional percentage points on their loans. So, from the vantage point of a regulatory violation, this is getting pretty serious.

But why stop when you're on a roll? The Bureau continued on to allege that PHH pressured mortgage insurers to "purchase" its reinsurance with the understanding or agreement that the insurers would then receive the borrower referrals from PHH. By the way, this fact pattern is otherwise known as "steering." So, the Bureau claimed that PHH allegedly steered business to its mortgage insurance partners even when it knew the prices its partners charged were higher than competitors' prices.

The presence of the Administrative Court is pertinent. The Bureau took the position that RESPA's statute of limitations for kickback claims applied only to cases the Bureau brought in federal courts, not administrative courts.

It's worth noting that the Bureau would have liked to reach back earlier than July 2008. But that would be a violation of provisions that bar an agency from bringing claims that came before the effective date of a statute. And the Consumer Financial Protection Act, which was included in the Dodd-Frank Act, only came into effect in July 2008. Therefore, the Bureau could only bring claims related to violations as of that date.

This case is going to be around for a while longer.

Yogi said it best: "It ain't over 'til it's over!"

[i] PHH Corp. et al. v. Consumer Financial Protection Bureau, 15-1177, U.S. Court of Appeals, District of Columbia



Labels: CFPB, Consumer Financial Protection Bureau, Kickbacks, PHH, RESPA, Richard Cordray

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