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D.C. Circuit Delivers First Blow to CFPB, Trump Win Delivers Second

The future of the Consumer Financial Protection Bureau (CFPB) is up for grabs following a landmark Court of Appeals Decision, *PHH Corporation v. Consumer Financial Protection Bureau*, and an election which has been widely referred to as a repudiation of the Obama administration's economic policies.

On October 11, 2016, the U.S. Court of Appeals for the District of Columbia Circuit issued a 2-1 opinion which, while declining to dismantle the CFPB, may have taken much of the wind out of its sails. In its blistering decision, the Court held that the CFPB is "unconstitutionally structured" and poses a "significant threat to individual liberty and to the constitutional system of separation of powers and checks and balances."

Historically, agencies created under Article II of the Constitution are led either by a multi-member commission, thus inherently subject to an internal set of checks and balances, or are established under the executive branch with a single director, removable "at will" of the President. Uniquely however, the CFPB, established in 2010 as a purported "watchdog" of the banking and mortgage industry by virtue of the Dodd-Frank Wall Street Reform and Consumer Protection Act, is headed by a single Director subject only to removal for cause. The Court in *PHH* rebuked the CFPB's centralization of authority, finding that its' Director "enjoys more unilateral authority than any other officer in any of the three branches of the U.S. Government, other than the President." The Court directed that the CFPB be brought under the executive branch, subjecting the agency to presidential oversight in order to curb its "massive" and unparalleled power.

The Court's holding, while monumental in its own right, gained exponentially greater consequence following the outcome of the 2016 election. Donald Trump, now President-elect of the United States,

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Hinshaw's Consumer and Class Action Litigation group effectively and efficiently defends individual and class action litigation across the United States. We routinely represent financial institutions in defending claims involving the FDCPA, TCPA, and FCRA, as well as state law claims. We have expertise in the latest industry trends and regularly advise clients on the impact of state and federal regulatory agencies, including the Consumer Financial Protection Bureau.

Hinshaw's national Mortgage Servicing and Lender Litigation practice provides sophisticated and extensive legal services to these businesses across the United States. We routinely defend banks, lenders, investors, servicers and trustees in mortgage-related litigation filed in state and federal district as well as bankruptcy courts.

has been emphatically critical of the Dodd-Frank Act and has publicly advocated for the dismantling of the CFPB. Further, Trump's recently announced "transitional team" is largely comprised of vocal opponents of Dodd-Frank and the CFPB, including Vice President-elect Mike Pence, RNC Chairman Reince Priebus, former mayor of New York Rudy Giuliani, and New Jersey Governor Chris Christie. Another Trump transitional team appointee, former Goldman Sachs partner Steve Mnuchin, famously purchased IndyMac and its parent, OneWest Bank, out of bankruptcy in 2008. Mnuchin is now considered a possible frontrunner for the position of Secretary of the Treasury. Undoubtedly, the political landscape is shifting in favor of lenders, mortgage servicers, and banking institutions.

In addition to its administrative impact, the *PHH* decision contains two holdings that are of practical and imminent importance for the banking and mortgage industry:

- **Statutes of Limitations Apply:** In any action or administrative proceeding, the CFPB is bound by the statutes of limitations set forth in the respective consumer protection statutes it seeks to enforce;
- **No Retroactive Penalties**: The CFPB may not retroactively penalize lenders or servicers for conduct that occurred prior to the CFPB's novel interpretation of statutory authority (including RESPA, TILA, etc.)

While a take-down of the consumer watchdog is unlikely, the impact of the Court's holding in *PHH v. CFPB* is unquestionably emboldened by the incoming administration's economic agenda.

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Post-*Spokeo* FCRA Ruling Granting Motion to Dismiss Because Risk of Future Harm ≠ Concrete Injury

***Kamal v. J. Crew Grp., Inc.*, No. 2:15-0190 (WJM), 2016 WL 6133827 (D.N.J. Oct. 20, 2016) – New Jersey District Court**

In *Kamal v. J. Crew, Grp.,* Plaintiff, Ahmed Kamal, brought a putative class action accusing clothing store J. Crew of printing too many credit card digits on customer receipts, in violation of the Fair and Accurate Credit Transactions Act (FACTA) amendment to the Fair Credit Reporting Act, 15 U.S.C. § 1681, *et seq.* After the New Jersey District Court denied Defendants' motion to dismiss under Federal Rule of Civil Procedure 12(b)(6), finding that Plaintiff had adequately stated a claim for a willful violation of FACTA's credit card number truncation provision, Defendants filed a motion to dismiss for lack of subject matter jurisdiction pursuant to Federal Rule of Civil Procedure 12(b)(1). Following supplemental briefing on the U.S. Supreme Court's *Spokeo decision*, the Court granted Defendants'

12(b)(1) motion to dismiss, ruling that a heightened risk of future harm was insufficient to establish a concrete injury as required by *Spokeo.*

Addressing the "injury in fact" issue, the Court stated, "[t]here is no evidence that anyone has accessed or attempted to access or will access plaintiff's credit card information. Nothing has been disclosed to third parties. Nor does the record indicate that anyone will actually obtain one of plaintiff's discarded J. Crew receipts, and — through means left entirely to the court's imagination — identify the remaining six digits of the card number and then proceed undetected to ransack plaintiff's Discover account." The Court went on to state that Plaintiff's claim is "akin to an increased risk of a data breach sometime in the future. That possibility is not sufficiently 'concrete' to qualify as an 'injury in fact.'"

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Failed Florida Foreclosure Does Not Trigger Statute of Limitations for Future Foreclosure on Subsequent Defaults

***Bartram v. U.S. Bank National Association*, et al., --- So. 2d. ---- (Fla. Nov. 3, 2016)**

In *Bartram*, the Supreme Court of Florida held that acceleration of payments due under a residential note and mortgage in a foreclosure action, which was involuntarily dismissed pursuant to Rule 1.420(b) of the Florida Rules of Civil Procedure, did *not trigger* application of the five-year statute of limitations set forth in Florida Statute § 95-11(c) to prevent a subsequent foreclosure action based on a separate and distinct payment default occurring after dismissal of the first foreclosure action.

On May 16, 2006, U.S. Bank National Association, as trustee and assignee, filed a complaint to foreclose a first mortgage on the borrower's property based on the borrower's failure to make payments due from January 2006 until the date of the complaint. On May 5, 2011, the foreclosure action was involuntarily dismissed for the plaintiff's failure to appear at a case management conference. The dismissal was pursuant to Rule 1.420(b) of the Florida Rules of Civil Procedure and, therefore, operated as an adjudication on the merits. Approximately one year later, the borrower filed a claim seeking a declaratory judgment to cancel the mortgage and quiet title to the property, arguing that the five-year limitations period precluded another foreclosure action. The trial court found in favor of the borrower, cancelled the note and mortgage, and released the first mortgage lien on the property. The Fifth District Court of Appeal agreed with U.S. Bank National Association, holding that a new cause of action is created by a default occurring after a failed foreclosure attempt for statute of limitations purposes, even where acceleration was previously triggered and the first case was dismissed on the merits. Accordingly, the Fifth District Court of Appeal reversed the trial court's judgment and remanded the case to the trial court. It also certified the issue to the Supreme Court of Florida.

The Supreme Court of Florida agreed with the Fifth District Court of Appeal and found that the unique nature of a mortgage compelled its above-stated decision on the (rephrased) certified question. In reaching its decision, the court explained that absent a contrary provision in the note and mortgage, the effect of an involuntary dismissal is to return the parties to their pre-foreclosure complaint status, such that the acceleration is revoked and both the mortgagor's right to continue to make installment payments on the note and the mortgagee's right to seek acceleration based on subsequent defaults are reinstated. Thus, with each new default after a failed foreclosure, the five-year statute of limitations begins to run and the mortgagee has the right, but not the obligation, to accelerate all sums then due under the note and mortgage.

Importantly, the court supported its ruling with the standard residential mortgage reinstatement provision that the lender's right to accelerate is subject to the borrower's continuing right to cure until entry of a final judgment of foreclosure. Thus, *Bartram* may not apply to a residential mortgage which does not contain a similar reinstatement provision.

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Noting Circuit Split, Ninth Circuit Holds That Trustee of a California Deed of Trust Was Not Debt Collector

The U.S. Court of Appeals for the Ninth Circuit held, in a split decision, that the trustee of a California deed of trust securing a real estate loan was not a "debt collector" under the Fair Debt Collection Practices Act (FDCPA). Disagreeing with the Fourth and Sixth Appellate Circuits, the majority focused its analysis on the purpose of a non-judicial foreclosure proceeding, namely to recover the property for the benefit of the lien holder, and not to collect money from the borrower.

In *Ho v. ReconTrust Co., NA, et al*., No. 10-56884, 2016 WL 6091564 (9th Cir. October 19, 2016), the appellate panel majority began by noting the three parties to a California deed of trust, namely the lender, the borrower and the trustee. The trustee serves as an agent for both the borrower and the lender, and is authorized to sell the property if the borrower defaults. In ReconTrust, the lender was Countywide Home Loans, Inc. (Countrywide), the trustee was ReconTrust Company, NA (ReconTrust) and the borrower was Vien-Phuong Thi Ho (Ho). The question address by the Court was whether ReconTrust was acting as a debt collector, as defined by the FDCPA, when it proceeded with a non-judicial foreclosure.

Looking to the statutory definitions of "debt collector" and "debt," the majority stated that "ReconTrust would only be liable if it attempted to collect money from Ho. And this it did not do, directly or otherwise. The object of a nonjudicial foreclosure is to retake and resell the security, not to collect money from the borrower. California law does not allow for a deficiency judgment following non-judicial foreclosure." In other words, the majority concluded that the point of a non-judicial foreclosure is not to coerce the payment of money from a borrower. Rather, pursuant to a proscribed statutory scheme, the purpose of a non-judicial foreclosure is to sell the property and recover funds from the purchaser at the foreclosure sale.

Significantly, the notices at issue did not request payment from Ho. "They merely informed Ho that the foreclosure process had begun, explained the foreclosure timeline, apprised her of her rights and stated that she could contact Countrywide (not ReconTrust) if she wished to make a payment." According to the majority, the fact that the required notices provided the amount owed and also noted Ho may have the right to bring her account current was meant to protect Ho, as opposed to "the harassing communications that the FDCPA was meant to stamp out."

The majority also reasoned that interpreting the FDCPA otherwise would interfere with California's statutory scheme. A federal statute should not be interpreted to preempt a state law absent a clear directive to do so. As the majority stated, "[w]hen one interpretation of an ambiguous federal statute would create a conflict with state foreclosure law and another plausible interpretation would not, we must adopt the latter interpretation . . . . Even courts holding that foreclosure is debt collection have recognized that the term 'debt collector' is cryptic."

Certain aspects of this holding may be unique to California's law on nonjudicial foreclosure (*e.g.,*no deficiency proceedings). In addition, as noted by the *ReconTrust* court, there is a split among the Circuits. Therefore, entities pursuing a foreclosure who find themselves as defendants in FDCPA lawsuits should be certain to consider the existing law and/or the statutory scheme of the applicable jurisdiction.

The *ReconTrust* court also left open the possibility of the definition of debt collector including entities whose principal purpose is to enforce security interests. Rather, it held "only that the enforcement of security interests is not always debt collection." Therefore, foreclosing entities should be particular of the wording of their notices only to be pursuing a foreclosure as opposed to collect on the debt from the borrower, to the extent appropriate and applicable.

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