

BANKING ALERT

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Fifth Circuit Invalidates CFPB's Regulations Governing Payday Lenders and Calls Into Question Constitutionality of CFPB's Authority

In *CFSA v. CFPB*, No. 21-50826 (5th Cir. Oct. 19, 2022), the United States Court of Appeals for the Fifth Circuit struck down certain rules promulgated by the Consumer Financial Protection Bureau (“CFPB”) to regulate payday lenders. The rationale underlying the decision -- that the CFPB’s “self-funding” mechanism was unconstitutional – potentially calls into question the validity of other rules and regulations issued by the CFPB.

The case involved a challenge by a trade group, the Consumer Financial Services Association of America (“CFSA”), to the CFPB’s Payday Lending Rule, which among other things, prohibited lenders from directly withdrawing payments for loans from a borrower’s bank account after two unsuccessful withdrawal attempts. The crux of the lawsuit was that the CFPB, unlike other government agencies, is funded from the Federal Reserve, and not through the traditional congressional appropriations process, which the CFSA claimed violated the separation of powers doctrine and the Constitution’s Appropriations Clause.

On appeal, the Fifth Circuit held that the Payday Lending Rule was not arbitrary and capricious and, in turn, did not violate the Administrative Procedures Act, noting that the CFPB maintained a rational basis for determining that preventing preauthorized loan withdrawals after two missed payments was directly aimed at curbing abusive and unfair collection practices by payday lenders.

However, the Fifth Circuit sided with the CFSA on its argument that the CFPB’s funding mechanism was unconstitutional, holding that Congress, in creating the CFPB, improperly delegated its exclusive “power of the purse” to the agency itself, which is self-funded directly from the Federal Reserve. As a result, the Fifth Circuit stated, the CFPB was no longer accountable to Congress as Congress no longer controlled its funding.

The ramifications of this decision remain to be seen but it is likely that challenges to other CFPB regulations and rules governing banks and lenders will be waged on similar grounds as every rule, regulation or order issued by the CFPB is now called into question.

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New Jersey Appellate Division Affirms Summary Judgment Decision in Favor of Plaintiff in Residential Foreclosure Action

In *Lehman XS Trust Mortgage Pass-Through Certificates Series 2005-7N U.S. Bank National Association v. Campbell*, Docket No. A-3730-20 (N.J. App. Div. Oct. 4, 2022), the Appellate Division rejected a challenge by a residential borrower to a plaintiff's standing to proceed with a foreclosure.

The facts were largely undisputed. In September 2005, defendant Vincent Campbell ("Borrower") executed a note and mortgage in favor of the lender, IndyMac Bank, F.S.B. ("IndyMac"). The mortgage expressly stated that Mortgage Electronic Registration Systems, Inc. ("MERS") would serve as nominee for the lender, that MERS was a mortgagee, and that Borrower had mortgaged, granted, and conveyed the subject property to MERS and its successors and assigns. The following month, Deutsche Bank received the original note on behalf of the plaintiff. In 2011, Borrower executed a mortgage modification agreement with IndyMac Mortgage Services. An assignment of mortgage was subsequently recorded in 2014, with MERS as nominee for IndyMac. Thereafter, Borrower entered into two more modifications, both with Specialized Loan Servicing, LLC ("Specialized"), an entity representing the plaintiff. Specialized subsequently served a notice of default and intent to foreclose.

After initiation of the foreclosure action, the plaintiff filed a motion for summary judgment. In opposition, Borrower contended that the plaintiff was not in possession of the original note and that the assignment recorded in 2014 was ineffective because IndyMac ceased operations in 2018. The trial court disagreed with those arguments, finding that the plaintiff "presented the original note at oral argument" and a certification from a Specialized representative that the plaintiff had held the note since 2005. The trial court also held that the assignment was effective, stating that MERS was designated as mortgagee pursuant to the mortgage. As to that point, the trial court further held that, as of October 5, 2005, the plaintiff became the successor or assignee of IndyMac, the original lender, and as a result, in a position to direct the mortgage assignment to itself by MERS.

The Appellate Division, on appeal, agreed with the trial court's reasoning, finding that the plaintiff had adequately established that Borrower had executed the loan documents and had defaulted under the note, and that the plaintiff had established its right to foreclose by way of a duly recorded assignment of the mortgage and possession of the note.

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