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BANKING ALERT

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D.C. Circuit Court of Appeals, En Banc, Holds That CFPB Structure is Constitutional

In a decision issued on January 31, 2018 in *PHH Corporation v. Consumer Financial Protection Bureau*, United States Court of Appeals for the District of Columbia Circuit, No. 15-1177, the D.C. Circuit Court of Appeals, *en banc*, reversed the prior holding of a three-judge panel of the D.C. Circuit Court of Appeals that held that the leadership structure of the Consumer Financial Protection Bureau ("CFPB") – which has a single director that can only be removed for cause by the President – is unconstitutional because it violated the separation of powers set forth in Article II of the U.S. Constitution. The majority of the D.C. Circuit sitting *en banc* disagreed and held that the CFPB's structure does not violate the constitutional separation of powers and is, therefore, constitutional.

The case arose from an enforcement proceeding brought by the CFPB against PHH Corporation ("PHH") relating to PHH's referral of mortgage insurance business to mortgage insurers in exchange for reinsurance contracts with PHH's wholly-owned subsidiary. In January 2014, the CFPB charged PHH with violations of RESPA sections 8(a) and 8(b), alleging that the premiums for the reinsurance were not for services actually furnished or performed and greatly exceeded the value of the services – i.e., a "kickback" scheme. PHH claimed the arrangement was exempt under RESPA section 8(c)(2) because the payments were for actual services performed. PHH also claimed that the practices were the same as those deemed permitted by HUD in a 1997 letter interpretation of RESPA 8(c). The CFPB determined that PHH's reinsurance payments violated RESPA because they were tied to business referrals and ordered PHH to disgorge $109 million in premiums.

PHH appealed the CFPB's decision to the D.C. Circuit, arguing, among other things, that the structure of the CFPB is unconstitutional because the authority of the CFPB is vested in a single director who can only be removed by the President for cause and, thus, violates the separation of powers enumerated in Article II of the Constitution. In 2016, a three-judge panel of the D.C. Circuit agreed with PHH and held that the "for cause" protection of the CFPB director violates the separation of powers in the U.S. Constitution and vacated the CFPB's decision. The three-judge

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panel of the D.C. Circuit also overturned the CFPB's interpretation of RESPA. The CFPB petitioned the D.C. Circuit for a rehearing *en banc*.

The *en banc* court vacated the three-judge panel decision and held further argument in May 2017. On January 31, 2018 in its *en banc* decision, the majority of the D.C. Circuit held that the structure of the CFPB is constitutional, thereby reversing the decision of the three-judge panel. The majority held that the protection provided to the CFPB director does not violate constitutional separation of powers, reasoning that (i) Congress's establishment of an agency such as the CFPB with a director removable only for cause by the President is a valid exercise of its Article I legislative power, (ii) the "for cause" limitation of removable is consistent with the President's Article II executive authority, and (iii) this case demonstrates how the legislative and executive powers that establish and empower the CFPB are protected by resort to Article III courts. The majority further held that prior Supreme Court precedent and history supported the constitutionality of the structure of the CFPB and that the CFPB director is "protected by the very same standard, in the very same words – 'inefficiency, neglect of duty, or malfeasance in office' –" as previously sustained by the Supreme Court. The majority further rejected PHH's claims that the structure of the CFPB granted too much power to the director or that a multi-member structure would better protect against an abuse of the director's authority. Notwithstanding the reversal on the constitutional issue, the *en banc* panel did not address and reinstated the decision of the three-judge panel relating to the interpretation of RESPA and its application to PHH.

It bears watching to see whether PHH petitions the U.S. Supreme Court for certiorari.

New Jersey Appellate Division Finds Plaintiff is Not Holder in Due Course of Dishonored Check

In *Triffin v. Extensis Group, LLC, et al.*, Docket No. A-5512-15 (NJ. App. Div. Jan. 25, 2018), the New Jersey Appellate Division affirmed the trial court's decision that plaintiff Robert Triffin was not a holder in due course of a dishonored check and not entitled to recover against defendant Extensis Group LLC ("Extensis"). Triffin purchased a dishonored payroll check from Fair Lawn Financial Services d/b/a United Check Cashing, which was issued by Extensis to defendant Maria Pagan. The face of the check stated that "THE FACE OF THIS DOCUMENT HAS A COLORED BACKGROUND NOT A WHITE BACKGROUND." The copy of the check presented by Triffin had a white background. The check also stated on the back that it had a unique barcode and watermark. The check Triffin presented did not have a watermark or barcode. The face of the check also stated that it was void after 90 days. The check was dated August 7, 2014 and Triffin did not purchase it from United until October 15, 2015. Finally, the check stated VOID in numerous places. Based on the foregoing, the trial court found that a reasonable person inspecting the check would determine that it was a photocopy or altered check and, thus, Triffin was not a holder in due course. The trial court also rejected Triffin's argument that Extensis' president was liable to Triffin under New Jersey's Wage Payment Act because he failed to demonstrate that he was assigned any rights by Pagan.

The Appellate Division affirmed the trial court's decision as well reasoned and supported by adequate, substantial and credible evidence, finding no issue on appeal that warranted reversal.

New Jersey Appellate Division Affirms Final Judgment of Foreclosure

In *JP Morgan Chase Bank, Nat'l Ass'n v. Seward*, the borrowers defaulted on their mortgage loan in July 2004, and a foreclosure complaint was filed. However, after the borrowers were able to modify their payment terms, the foreclosure complaint was dismissed. The borrowers defaulted again in 2008 and vacated the premises in 2012. JP Morgan then filed a foreclosure complaint that resulted in a final judgment of foreclosure. The final judgment of foreclosure followed after the trial court rejected the borrowers' claims that JP Morgan lacked standing, that it was not in proper possession of the mortgage and note, and that it was not in compliance with the Fair Foreclosure Act.

The borrowers appealed, and the Appellate Division affirmed in an unreported decision. The Appellate Division determined that the borrowers' arguments lacked sufficient merit to warrant discussion in a written opinion, adding only brief comments about two arguments that the borrowers raised for the first time on appeal. First, the Appellate Division highlighted the well-established rule that the six-year statute of limitations does not apply to mortgage foreclosure cases. Second, federal regulations that require a lender to conduct a face-to-face meeting with a borrower prior to filing a foreclosure action and delay the institution of legal action do not apply if the property is vacant; in this case, the borrowers defaulted in 2008 and vacated the property in 2012. Thus, the regulations did not apply. Finally, the Appellate Division noted that, even so, those regulations do not establish an independent cause of action. Accordingly, the trial court's judgment was affirmed.

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