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Sometimes It Pays To Litigate Against The CFPB

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October 13, 2017, 11:54 AM EDT

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Since its formation in 2011, the Consumer Financial Protection Bureau has racked up some impressive settlements. Charged with enforcing 18 different consumer protection statutes, and armed with expansive new unfair, deceptive, or abusive acts or practices (UDAAP) power under Title X of the Dodd Frank Wall Street Reform and Consumer Protection Act,[1] the bureau has launched investigations and brought enforcement actions across many areas, such as credit card add-on products, student loans and loan servicing, mortgages and mortgage servicing, debt collection, and consumer credit reporting. It has racked up more than $600 million in penalties alone. In 2015, Citibank acquiesced to a $35 million penalty; a year later, the bureau achieved its high-water mark when Wells Fargo agreed to a $100 million penalty. When consumer redress is factored in, the amounts skyrocket. In a recent speech at the AFL-CIO Labor Day picnic in Ohio, CFPB Director Richard Cordray touted “about $12 billion in relief to 30 million people who were cheated or mistreated.”

These results reflect two related factors: companies’ reluctance to litigate and a young, aggressive agency willing to assert its impressive enforcement authority to extract large settlements that reflect the agency’s own expansive view of its legal and remedial authority. As one might expect from a new agency — particularly one charged with the mission of consumer protection in the wake of the most devastating financial crisis since the Great Depression — the bureau has asserted claims that test the limits of its authority. It has adopted expansive views of its jurisdiction, taking investigative or enforcement forays into indirect auto lending and for-profit college accreditation practices.[2] It has retroactively pursued claims for conduct that occurred before the bureau was established in July 2011,[3] and has contended that its administrative enforcement actions are not subject to any statute of limitations.[4] It has utilized its general UDAAP authority to bring countless enforcement actions in the absence of formal rulemakings.

The bureau’s aggressive positions on the law are backed up by an enforcement arsenal that is calculated to shock and awe. The bureau has the power to seek up to $1 million per day in civil money penalties plus its litigation costs, but unlike prudential regulators has yet to publicize any matrix explaining how it calculates the

civil money penalties it demands.[5] The Dodd Frank Act authorizes the bureau not only to seek equitable and prospective injunctive relief (such as, “without limitation,” rescission or reformation of contracts, refund of moneys or return of real property, restitution, disgorgement or compensation for unjust enrichment), but also payment of “damages or other monetary relief.”[6] During settlement negotiations, the bureau presents consent agreements that reflect its view of the law and frequently one-sided “factual recitals” that, at best, tell only part of the story. The price of avoiding litigation means neither admitting nor denying those factual recitals or the alleged violations, and being subject to a five-year monitoring period where any violation of the consent agreement can be met with sanctions.

Rarely has the bureau had to litigate the merits of its assertions. Despite the downsides, few companies choose to fight the bureau, and even fewer have the wherewithal to stay the litigation course. Nearly 80 percent of the time, companies that find themselves in the bureau’s crosshairs choose to settle rather than litigate the merits. Faced with massive exposure and erstwhile pressure from prudential regulators, most public companies prefer the finality and certainty of even an overpriced settlement to the uncertainty of litigation. But this reluctance to litigate also has a price — it has allowed the bureau to establish a value for its claims based on what it can extract from companies seeking peace rather than what it can prove in a neutral federal forum. Several recent examples demonstrate that litigating — particularly when there is reason to believe that the bureau has overreached — can dramatically improve outcomes compared to settlement.

Take, for example, the case of PHH Corporation. The bureau claimed that PHH violated the Real Estate Settlement Procedures Act’s anti-kickback protections by tying mortgage insurance referrals to its captive reinsurer. Although its settlement demand is not public, the bureau sought $109 million in disgorgement in its enforcement action. PHH refused to capitulate. It contended that the bureau’s interpretation of RESPA was incorrect and at odds with the U.S. Department of Housing and Urban Development’s prior guidance. Although it suffered a setback before the administrative law judge, who agreed with the bureau on the merits of the RESPA violation, PHH persuaded the ALJ to limit disgorgement to $6 million. Not surprisingly, Cordray accepted the RESPA violation holding but refused to accept the ALJ’s disgorgement calculation. Instead, he adopted the bureau’s $109 million calculation.

A panel of the D.C. Circuit overruled the decision entirely.[7] The PHH case is perhaps best known for the now-vacated ruling by the D.C. Circuit panel holding the bureau’s structure to be unconstitutional. What gets far less attention, though, is the panel’s decision on the merits that there was no RESPA violation and that the bureau violated due process by retroactively imposing its new interpretation of RESPA. Although both the constitutional and merits questions are being reconsidered by the en banc court, during oral argument none of the judges expressed any interest in revisiting the panel’s RESPA holding. PHH’s litigation path has been long and undoubtedly expensive, but likely far cheaper than what the bureau demanded in settlement. And now, on the verge of an outright win on the merits of RESPA, PHH’s litigation decision appears even wiser.

PHH has been joined by other companies who have chosen to litigate rather than accept a bad deal. Their decisions appear to be paying off as they expose instances of bureau overreach. For example, in June 2016, the CFPB sued a payment processor called Intercept Corporation claiming that it violated the prohibition against unfair, deceptive, and abusive acts and practices by processing payments for clients without adequately investigating, monitoring or responding to red flags that indicated some clients were breaking the law or deceiving customers.[8] Intercept chose to fight the bureau’s lawsuit and earlier this year persuaded a federal judge to dismiss the case based on the conclusory nature of the bureau’s complaint.[9] The bureau did not amend its complaint or appeal the decision.

Last month's decision in the Nationwide Biweekly Administration case is the most recent example of a defendant whose litigation choice paid off.[10] In that case, the bureau, following a seven-day bench trial, secured a $7.93 million penalty as well as injunctive relief against Nationwide. Although the bureau may spin it as a win, in reality it is a significant setback.

The essence of the CFPB's case was that Nationwide's advertising for its accelerated mortgage loan repayment service was unfair, deceptive and abusive within the meaning of the applicable statutes. Nationwide promoted its service as a way to save money on interest payments over the life of the loan; the bureau alleged that Nationwide did not clearly disclose that there was a fee for its service, and also misled consumers about the amount of money that they would save. While the CFPB argued that it would be nine years before a borrower who took the service would break even on the fee, Nationwide asserted that savings were properly viewed over the life of the loan.

The court found that the CFPB's case was not all it was cracked up to be, although it did not exonerate Nationwide completely. The court rejected the bureau's arguments that the company concealed facts relating to its services from consumers, ruling that Nationwide's advertising had disclosed that the company charged a fee for its service, and that the savings were over the life of the loan. However, it concluded that Nationwide created some misleading impressions notwithstanding the literal truth of what was conveyed (such as mailers that suggested they were coming from the lender, when in fact Nationwide had no affiliation with the lender).

In weighing the bureau's demand for nearly $74 million in restitution and $24 million in penalties, the court found that Nationwide's conduct was neither reckless nor intentional, and that there was evidence demonstrating that the defendants "took affirmative steps such as training, quality control, and seeking legal counsel, in an effort to stay on the right side of the line."[11] Ultimately, the court rejected the bureau's argument that restitution should be awarded, and chose instead to impose only a single penalty of $7.93 million (calculated as the maximum amount of a tier-one violation, or $5,000 a day from July 21, 2011, through Nov. 23, 2015).[12] Thus, in a case where the bureau demanded nearly $100 million at trial (and most likely tens of millions of dollars in settlement negotiations), the bureau actually achieved less than 10 cents on the dollar.

The PHH, Intercept and Nationwide cases illustrate the advantage in litigating against the CFPB when a company has sound defenses. These companies refused to yield, even when confronted with the bureau's arsenal of remedies, and achieved a markedly better outcome through litigation than they likely ever could have reached through settlement. The lesson is clear: Defendants threatened with CFPB enforcement actions should carefully weigh their options (and the merits of their legal and factual defenses) and not assume that settlement will result in the best outcome. At a minimum, targets should factor in the bureau's likely recovery at trial when valuing the bureau's prelitigation settlement demands — and right now, the bureau's track record suggests that its claims may be worth far less than the bureau's asking price.

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[1] See 12 U.S.C. § 5301 et seq.

[2] See, e.g., In re: Ally Financial Inc., et al., No. 2013-CFPB-010 (Dec. 20, 2013) (consent order with indirect auto lender Ally Financial and Ally Bank); Consumer Fin. Prot. Bureau v. Accrediting Council for Ind. Colleges and Sch., 854 F.3d 683 (D.C. Cir. 2017) (upholding a district court order quashing CFPB civil investigative demand issued to college accrediting company).

[3] Consumer Fin. Prot. Bureau v. TCF National Bank, 17-cv-00166-RHK-DTS, Dkt. No. 89 (Order granting in part motion to dismiss) (D. Minn. Sept. 8, 2017).

[4] PHH Corp. v. Consumer Fin. Prot. Bureau, 839 F.3d 1, 50 (D.C. Cir. 2016).

[5] See 12 U.S.C. § 5565(b), (c).

[6] See id. § 5565(a)(2).

[7] See PHH, 839 F.3d at 36 (holding that the CFPB "is unconstitutionally structured because it is an independent agency headed by a single director."). The D.C. Circuit thereafter granted the bureau's petition for rehearing en banc and vacated the panel decision. On May 24, 2017, the en banc court heard oral argument in the case, which is currently under advisement.

[8] Consumer Fin. Prot. Bureau v. Intercept Corp., 3:16-cv-00144-RRE-ARS, Dkt. No. 1 (Compl.) (D.N.D. June 6, 2016).

[9] Intercept, 3:16-cv-00144-RRE-ARS, 2017 WL3774379 at *4.

[10] Consumer Fin. Prot. Bureau v. Nationwide Biweekly Administration Inc., No. 15-cv-02106-RS, 2017 WL 3948396 (N.D. Calif. Sept. 8, 2017).

[11] Id. at *13.

[12] Id. at *12–13.

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