Our Perspectives:
Commentary on the economy & regulatory policies affecting financial companies

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To the Courts*

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It is to be expected that many policy decisions that have been created by the Dodd-Frank Act will head to the courts for final decisions. Recognizing their inability to analyze all of the complicated issues in the detail necessary to provide robust guidance to the public, Congress punted that guidance to the regulators in many cases. One can argue whether that could have been avoided had its reach not been so great, it nevertheless is what it is. That being the case, many of the ambiguities left like hanging chads here and there in the statute will be clarified in lawsuits. Those cases will take some time to wind their way through the courts as the regulations are first finalized, the public begins operating under them, arguments ensue, and cases are filed.

In the meantime, we have the unusual situation of the U.S. Supreme Court agreeing to decide two important cases affecting banking in the next term. One case is that of Mount Holly v. Mt. Holly Gardens Citizens in Action, Inc., 638 F. 3d 375 (3d Cir. 2011), *cert. granted* (U.S. June 17, 2013) (No. 11-1507), a case reminiscent of the Magner v. Gallagher case voluntarily withdrawn during the previous term, apparently at the urging and assistance of the Administration. The other case before the Court next term is not technically a banking case, but rather a constitutional case of the first order, National Labor Relations Board v. Noel Canning, 705 F.3d 490 (D.C.Cir. 2013), *cert. granted* (U.S. June 24, 2013) (No. 12-1281).

Mt. Holly

The parties in the Mt. Holly case have filed motions permitting a delay in the briefing schedule as the parties attempt to settle their differences. This suggests that there is the strong possibility that once again, just as in the *Magner* case, the Court may be denied the opportunity to opine on the questions of whether a disparate impact claim may be brought under the Fair Housing Act.

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It is interesting to note that the Petitioner had asked that two questions be certified, the first being the one that the Court chose to certify, and a second that raised the question, assuming a disparate impact case could be brought under the Fair Housing Act, what tests should be used to determine if the burdens of proof had been met. The Petitioner had subdivided that second test into a series of subordinate questions, but the Court concluded that it would not address the issues in the second set of questions. The only issue before the Court, therefore, is the basic question — whether disparate impact claims are cognizable under the Fair Housing Act.

If the case proceeds and is not settled, it would probably be heard in the fourth quarter of this year and an opinion rendered near the end of the second term of the Court.

The opinion is significant against the backdrop of concern the industry has on the scope of the disparate impact doctrine. A group of trade associations representing the lending industry sent a letter to Secretary Donovan and Director Cordray expressing their concern that the combination of the Ability to Repay rule (with its Qualified Mortgage safe harbor) would cause lenders to originate primarily or exclusively QM loans, and that might well result in discrimination based upon a statistical analysis of those receiving loans and those not receiving them under a disparate impact analysis. They asked for guidance from the agencies to avoid this result, and requested the opportunity to discuss the conundrum with the two officers. The agencies responded that they were considering the issue.

A determination by the Supreme Court that disparate impact claims are not cognizable under the Fair Housing Act would resolve the dilemma for the industry. A determination that they are recognizable would intensify the problem for the industry. The agencies have so far not provided any guidance, and Director Cordray has voiced his opinion that the potential crisis is overstated since it is unlikely that many lawsuits will be brought under the Ability to Repay regulations. At this point, however, neither he nor Secretary Donovan have said that their enforcement attorneys will refrain from bringing enforcement actions on a disparate impact basis against lenders that only make QM loans.

NLRB v. Canning The *Canning* case presents the interesting constitutional law case concerning recess appointments by the President of the United States. The President appointed three members of the National Labor Relations Board at a time when the Senate was operating on a *pro forma*

basis during which (by consent of the two parties) no legislative business was to be conducted. A three judge panel of the U.S. Court of Appeals for the District of Columbia Circuit held that the recess appointments were invalid, and that the Recess Appointments clause of the Constitution only applies during intersession recesses of the Senate.[1]

This decision was at odds with a practice that had developed over the years by Presidents and Senates of both parties. While there were disputes about how long the intrasession periods must be, the consensus had formed around an assumption that recess appointments could be made in intra session recesses. The Court has granted cert in this case, and in addition to the questions raised in the petition, at the request of the respondent in the case, Mr. Canning, the court has asked the parties to brief and argue whether the President's recess appointment power may be exercised when the Senate is convening every three days in *pro forma* session.

As potentially exciting as the results of this case might be, the chances of it being decided by the U.S. Supreme Court have become muddled. Media reports as this note goes to print are that the recess appointees in this case will be removed by the President and two new nominees appointed, each of which will probably be approved by the Senate under the agreement not to filibuster their appointment. Whether that moots the case for the Court, what retroactive actions might then be taken by the NLRB with its new appointees in place, and the timing of these actions is to be determined.

In addition, Richard Cordray has now been confirmed by the Senate as Director of CFPB, so his recess appointment is no longer relevant for the future activity of the CFPB and its Director, nor would a decision in the *Canning* case be relevant to future actions by CFPB.

There is a lingering question whether actions he and the Bureau took when he was operating under the recess appointment are valid, but that requires substantially more review, and may depend in part on actions the Bureau might take with its duly appointed Director in place. Courts may be asked to address those issues in one or more of the cases that are noted below. At the same time, a compromise on Director Cordray does not resolve the larger issue for the President, so the Administration may be unwilling to compromise when the larger issue could decide everything in the President's

[1] See *Implications of Canning Case on CFPB Rules* by Raymond Natter, Our Perspectives, February 2013.

favor.

Other cases

There is another case that has been filed that raises disparate impact analysis under the Fair Housing Act, this time for insurance purposes. The American Insurance Association and the National Association of Mutual Insurance Companies have sued HUD and Secretary Donovan for violations of the Administrative Procedures Act and the Fair Housing Act for extending the theory of disparate impact analysis to the pricing of homeowner's insurance.[2]

There is also a case wending its way through the courts in California in which the CFPB has sued a law firm under Dodd Frank, and in its response to the complaint, and again in a recent summary judgment motion, the law firm has raised the recess appointment argument, contending that the reasoning of the *Canning* case should lead the Court in its case to conclude that Cordray was not a validly appointed Director and therefore the Bureau has no jurisdiction over his firm as a nonbank party.[3] Motions for summary judgment were scheduled to be heard in late June.

Finally, there is a case in Washington D.C. in which a Texas bank and a variety of other plaintiffs are suing CFPB, Director Cordray and a number of others on a variety of bases, one of which is that his appointment was unconstitutional and hence illegal.[4] Defendants are challenging the standing of the plaintiffs to bring suit.

Finally, there was an enforcement action that was settled prior to it becoming a case, in which the Community National Bank of Pikesville, Maryland was ordered to pay a number of borrowers amounts based on discrimination alleged to have occurred because of a program that provided favorable terms to minority borrowers but not to white or married borrowers. The theory used by the OCC was a disparate impact theory.

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[2] American Insurance Association and National Association of Mutual Insurance Companies v. U.S. Department of Housing and Urban Development and Shaun Donovan, Case 1:13-cv-00966-RJL Filed O6/26/13 (D. Ct. District of Columbia).

[3] CFPB v. Chance Edward Gordon

[4] State National Bank of Big Spring, Texas, et. al. v. Geithner, et. al, No. 1:12-cv-01032-esh (D.Ct. District of Columbia).