



CFPB's Limitless Statute of Limitations?*

Katie Wechsler

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I. CFPB's Limitless Statute of Limitations?

Questions have been raised recently regarding whether the Consumer Financial Protection Bureau (CFPB) has a statute of limitations for administrative enforcement proceedings. This article examines those questions and their implications.

The Consumer Financial Protection Act (CFPA) (Title X of the Dodd-Frank Act) provides the CFPB with a few different avenues to address possible violations of the CFPA or other federal consumer financial law (subject to some exceptions). The CFPB may: (1) engage in investigations and administrative discovery, including issuing subpoenas and civil investigative demands (section 1052 of the CFPA); (2) conduct hearings and adjudication proceedings (section 1053); or (3) bring a civil action in court (section 1054). Of these, only one contains a statute of limitations. Section 1054, which outlines CFPB's litigation authority, prohibits the CFPB from bringing an action more than 3 years after the date of discovery of the violation (except as otherwise permitted by law). There is no similar statute of limitations in section 1053, which outlines CFPB's administrative proceedings authority. Also, the relief and civil money penalties that the CFPB may seek in a court action or administrative proceeding is identical, as outlined in section 1055 of the CFPA. Those sections of the CFPA were effective July 21, 2011.

*The information contained in this newsletter does not constitute legal advice. This newsletter is intended for educational and informational purposes only.

II. Challenging CFPB's SOL

There have been some challenges to the application of CFPB's statute of limitations. Most recently, in November 2015, CFPB filed an administrative proceeding, using its section 1053 authority, against Integrity Advance, an online lender, alleging that the company deceived consumers about the cost of short-term loans.¹ CFPB alleges that the company violated TILA, EFTA, and the CFPA's prohibition against unfair and deceptive acts and practices. Notably, the actions at issue took place from May 2008 through December 2012. In its response,² Integrity Advance argues that the claims of violating the CFPA are barred by the three year statute of limitations, noting other uses of the word "action" in the CFPA.³ The Bureau argues that the statute of limitations only applies to actions brought in court, under its section 1054 authority, not administrative proceedings under section 1053, and thus does not apply to the proceeding at hand.⁴ The CFPB relies on Director Cordray's decision in the PHH case (discussed below), in which he found that no statute of limitations applies to administrative proceedings. It appears, therefore, that this case may be resolved over the meaning of the term "action." This proceeding is ongoing and should be watched closely, especially to see whether the administrative law judge rules on the question of whether the CFPA statute of limitations applies to administrative proceedings.

Separately, in another administrative proceeding under section 1053, a similar argument is being made in regards to the statute of limitations under the CFPA. In that proceeding, PHH is appealing an administrative judge ruling and subsequent ruling by Director Cordray. In his ruling, Director Cordray, agreeing with the administrative law judge, found that the CFPA statute of limitations applies only to civil actions not administrative proceedings.⁵ PHH has appealed this ruling to the Court of Appeals for the D.C. Circuit, and while the statute of limitations is only one issue, if the judge rules on that issue, it would likely have a profound impact on future actions and proceedings by the CFPB. Oral arguments are scheduled for April 12.

III. Conduct that Occurred before the CFPB Existed

A separate, but related, question is what, if any, authority the CFPB has for bringing actions regarding conduct that occurred before the CFPB was effective. As noted above, the authority of the CFPB to bring civil actions and administrative proceedings, as well as its authority to prohibit unfair, deceptive or abusive acts or practices became effective on July 21, 2011. Integrity Advance raised this issue as one of its defenses, arguing that the CFPB has no UDAAP authority over conduct

¹*CFPB Notice of Charges: Integrity Advance, LLC and James R. Carnes.*

²*CFPB Answer and Affirmative Defenses: Integrity Advance, LLC and James R. Carnes.*

³Similarly, the company argues that the claims under TILA and EFTA are barred by the one year statute of limitations that applies to actions arising under those statutes.

⁴*CFPB Opposition to Respondent's Motion to Dismiss: Integrity Advance, LLC and James R. Carnes.*

⁵*CFPB Decision by Director Cordray (Redacted).*

that occurred prior to July 21, 2011.⁶ The company argues that any other interpretation of the statute would impose new duties and burdens on persons after the fact, violating the retroactivity principles found in the Constitution. Interestingly, in response to that argument, the CFPB said that while it disagrees with Integrity Advance's argument, it nonetheless clarifies that the UDAAP violations alleged are limited to conduct that occurred on or after July 21, 2011.⁷ It is certainly interesting that the CFPB chose not to pursue the argument that the agency could enforce UDAAP for conduct that occurred prior to the agency receiving its authority.

IV. Implications

Under the CFPA, the CFPB may pursue an administrative proceeding or a civil action and the remedies available under either approach are identical. It is interesting to consider whether Congress fully intended to give the CFPB two avenues to pursue enforcement with identical remedies available, but only put significant limitations on one of those avenues. If courts agree with CFPB's approach to the statute of limitations, there are considerable ramifications for the financial services industry, including increased exposure to enforcement "actions" and penalties.

Katie Wechsler is an associate with the law firm of Barnett Sivon & Natter, P.C.

⁶ *CFPB Oral Argument Requested: Integrity Advance, LLC and James R. Carnes.*

⁷ *CFPB Opposition to Respondent's Motion to Dismiss: Integrity Advance, LLC and James R. Carnes.*