

Now It's Real: No Statute of Limitations for CFPB UDAAP Claims

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The Consumer Financial Protection Bureau is using an increasingly important interpretation of its enabling statute to bring unfair, deceptive, or abusive acts or practices cases that may not be subject to any statute of limitations. The CFPB asserts that, while a three-year statute of limitations applies when it brings cases in federal court, no period of limitations applies in its own administrative tribunal.

A recent decision by a CFPB administrative law judge demonstrates how important the CFPB views its potential power to avoid any statute of limitations defense by bringing enforcement actions in its administrative tribunal. On November 18, 2015, the Bureau announced its third-ever administrative lawsuit. The defendant, Integrity Advance, is an online lender that the Bureau accuses of deceiving consumers about the cost of short-term loans. The Notice of Charges asserts that the alleged violations took place between May 2008 and December 2012. Most of the alleged conduct is thus outside the three-year statute of limitations the Consumer Financial Protection Act applies to CFPB enforcement "actions." Recent developments in this case suggest that the Bureau chose to pursue this case administratively because it believes that the three-year statute of limitations in the CFPA for UDAAP claims does not apply to that forum. This decision has important ramifications for anyone subject to the CFPB's enforcement powers because the CFPB may seek the same remedies administratively as it can in federal court, including large penalties for novel UDAAP theories.

The D.C. Circuit could change all this soon in a case involving a related issue, but, for now, the ALJ's decision is the law of the land. Parties attempting to respond to civil investigative demands or settle threatened enforcement actions must grapple with this new reality.

What Does the ALJ's Ruling Say?

On April 22, the ALJ denied Integrity Advance's motion to dismiss on statute of limitations grounds. The ALJ relied on CFPB Director Richard Cordray's decision from *In the Matter of PHH Corp.*, in which the Director ruled that the three-year statute of limitations in the Real Estate Settlement Procedures Act has no bearing in a CFPB administrative case. Although that ruling involved RESPA - not UDAAP - claims, the ALJ said he is bound by that decision because the same statutory analysis applies.

The ALJ then proceeded to analyze why he believes that decision is correct. The ALJ's robust defense of the CFPB's position indicates that the CFPB Office of Enforcement may increasingly choose this forum over federal district court because of the substantial leeway it gives the agency. Without a ticking clock forcing the CFPB to file its claims before they expire, the Office of Enforcement can take its time to investigate and file such cases. But while the CFPB has more time, respondents have less. Administrative cases move very fast: after the filing of the Notice of Charges, a trial must occur within a few short months, and the ALJ must issue his or her recommended decision within a year. The Bureau's adjudication rules do not provide time and opportunity for discovery as in federal district court. In addition, the CFPB's rules of evidence are relaxed, giving the Office of Enforcement staff even more leeway to introduce hearsay or other information to prove its case. Respondents facing that already intense pressure must now defend more conduct covering a longer time period. Given this reality, companies facing investigation should be proactive in putting together their defense *before* the Bureau files a case. A 'wait and see' approach in this environment could be costly.

What Does the Word "Action" Mean?

The ALJ's rationale rests heavily on the structure of the statute. The ALJ adopted the Bureau's theory that the CFPA essentially sets out two rules of the road: one section guiding court actions (12 U.S.C. § 5564, titled "Litigation Authority") and another section guiding administrative proceedings (12 U.S.C. § 5563, titled "Hearings and Adjudication Proceedings"). The fact that each forum gets its own section indicated to the ALJ that each gets its own period of limitations: three years for court actions alleging UDAAP claims (because that is what is specified in the section titled "Litigation Authority") and no limitation for administrative proceedings (because none is mentioned in the section titled "Hearings and Adjudication Proceedings").

At first glance, the actual language of the statute seems quite broad with respect to the statute of limitations, suggesting that it can apply to any forum in which the CFPB operates. Here is what it says:

Except as otherwise permitted by law or equity, no action may be brought under this title more than 3 years after the date of discovery of the violation to which an action relates.

In denying Integrity Advance's motion to dismiss, the ALJ adopted the Director's ruling that an administrative proceeding is not an "action" within the meaning of 12 U.S.C. § 5564(g), and thus the Bureau is free to pursue enforcement in such proceedings without regard to any time limit.

Integrity Advance argued that construing "action" throughout the entire statute to mean only a civil action in federal court would mean that the CFPB could not bring UDAAP claims in its administrative tribunal at all because Section 1031 of the CFPA permits the Bureau to "take any *action* authorized under Subtitle E to prevent a covered person or service provider from committing or engaging in an unfair, deceptive, or abusive act or practice." (emphasis added) In other words, the CFPB can't have it both ways: if "action" only refers to federal court, then the Bureau cannot pursue UDAAP claims at all in

administrative proceedings. Yet the ALJ reconciled this seeming inconsistency by finding that the word "action" can have one meaning in ordinary parlance and a different meaning when used as a legal term of art. The ALJ concluded that "the ordinary legal definition of action does not include administrative proceedings such as this one" because to "take action" is not the same as to "file an action."

Regardless of whether the word "action" is a special legal term, how can one conclude that it only applies to court - and not administrative - proceedings? The ALJ conceded that the CFPB uses the word "action" with the modifier "administrative" several times to describe how "administrative actions" are to take place. In other words, it is possible that the word "action" contemplates *both* administrative *and* judicial proceedings. Nevertheless, the ALJ concluded that, rather than being consistent with the word "action" encompassing both judicial and administrative litigation, these provisions are "anomalies," and construing "action" as applying only to federal district court proceedings is the better reading of the statute.

The decision also relies on the principle that the government is afforded special leeway when construing statutes of limitations that might bind its action. To the extent the ALJ saw any ambiguity in the statute, he decided that the government deserves the benefit of the doubt: "statutes of limitations against the government are to be construed narrowly."

What Lies Ahead?

While the CFPB continues to use its administrative powers to advance its reading of the statute of limitations provision, a federal appellate court is poised to rule on this issue in the *PHH* case, which could have dramatic ramifications for the CFPB's enforcement powers. On April 12, the D.C. Circuit heard oral argument in *PHH Corporation v. Consumer Financial Protection Bureau*, and the panel seemed skeptical of the CFPB's argument that there is no statute of limitations whatsoever in its administrative forum.

Though the court did not delve into the details of the statutory language and structure, it did focus on the bigger picture: Why would Congress allow the CFPB to bring actions in its administrative forum with no time limitations but impose a three-year limit in federal court? Notably, the court appeared to view the CFPB's interpretation of the CFPB as unusual, describing the CFPB's position as one that, if adopted, would "allow the agency ... to go back decades ... and impose major liability on someone for something that happened a long time ago, which is something we don't usually see."

The CFPB pointed to other federal agencies that seemingly have no limitations period in administrative actions, citing the Federal Trade Commission in particular. However, that agency does not have the enormous power the CFPB does, with the ability to impose large penalties for first-time UDAAP violations. The panel, seemingly recognizing this distinction, appeared to assume that *some* limitations period should apply, repeatedly asking counsel why the court should not simply borrow another period of limitations if the CFPB is missing one.

After challenging counsel for the CFPB to name the reasons that statutes of limitations

exist - evidence grows stale, witnesses forget - the court asked him to identify which of those reasons were *not* applicable to an administrative proceeding. After the CFPB's counsel conceded that "they all might apply," the court asked: "So why would Congress put a statute of limitations only on a judicial proceeding?"

Given the importance of the RESPA issues in this case, PHH's challenge to the very constitutionality of the CFPB's structure, and the apparent skepticism of the appellate panel toward the CFPB's positions, the matter may be heard by the full D.C. Circuit after the current three-judge panel issues a ruling. Depending on the outcome, the case could conceivably end up in the Supreme Court. But unless and until the Director's decision on the statute of limitations is overturned, expect to see the Bureau file more cases in its administrative forum, with its many 'home court' advantages.

Conclusion

The constantly changing definition of what constitutes an unfair, deceptive, or abusive practice is already a compliance challenge. Today, the CFPB's ability to choose a forum where the bell tolls for no one gives it immense power over respondents. The Enforcement Office can take its time. Respondents cannot. Parties subject to investigation should prepare for longer and more burdensome investigations and be proactive about building a defense *before* the Bureau files a case.

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