NAR Issue Brief
PHH Corp. v. CFPB

In its recently issued decision in *PHH v. CFPB*, the U.S. Court of Appeals for the D.C. Circuit supported the National Association of REALTORS® (NAR) position by offering much needed clarity on the legality of marketing service agreements, and rejecting recent unwarranted enforcement proceedings by the Consumer Financial Protection Bureau (CFPB) regarding such relationships.[1]

Background: PHH, a mortgage lending and servicing company, challenged a $109 million penalty administratively imposed by the CFPB for violating Section 8 of the *Real Estate Settlement Procedures Act* (RESPA) by allegedly paying for referrals.

The CFPB claimed PHH violated RESPA based on payments by mortgage insurers to PHH's reinsurance subsidiary, Atrium, for reinsurance. The CFPB alleged that PHH referred substantially more business to mortgage insurers who purchased reinsurance from Atrium. The CFPB contended this arrangement violated Section 8 because those payments included "disguised referral fees" even if the payments were fair and reasonable market value for such reinsurance – a substantial departure from previous interpretations of Section 8 of RESPA.

Issues Before the Court: The court's opinion addresses three issues: (1) the constitutionality of the structure of the CFPB and the Director's authority; (2) the CFPB's interpretation of Section 8 of RESPA; and (3) the scope of the statute of limitations applicable to CFPB administrative enforcement actions.

Ruling: On October 11, 2016, the U.S. Court of Appeals for the D.C. Circuit held in favor of PHH, stating that payments for bona fide services provided and made at fair market value do not violate Section 8 of RESPA.

(1) The constitutionality of the structure of the CFPB and the Director's authority – The court held the unilateral authority of the CFPB vested in a single person – the Director of the CFPB – was unconstitutional because the Director could be dismissed only "for cause," and not at the discretion of the President. The court ordered a restructure of the agency to be accountable directly to the President by eliminating the requirement that the Director be terminated by the President only for cause.

***(2) The CFPB's interpretation of Section 8 of RESPA* –** The court held Section 8(c)(2) of RESPA is a safe harbor that industry has been relying on for decades, in accordance the plain meaning of the statutory text and longstanding interpretations issued by the Department of Housing and Urban Development (HUD). The court rejected the CFPB's arguments that payments for services might violate Section 8 even if made at fair market value, stating Section 8 was clear and HUD's prior interpretation was reasonable. As applied to this case, payments by mortgage insurers to PHH's captive reinsurer are permissible as long as the amount paid by the mortgage insurer for the reinsurance does not exceed the fair market value of the reinsurance.

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[1] *For the full opinion, visit* *https://www.cadc.uscourts.gov/internet/opinions.nsf/AAC6BFFC4C42614C852580490053C38B/$file/15-1177-1640101.pdf*

In addition to holding that the CFPB's interpretation was unreasonable and inconsistent with prior HUD guidance, the court also found that the CFPB's retroactive application of its novel reading of the law violated PHH's due process rights. As a result, the court vacated the $109 million penalty imposed for the RESPA violations and remanded the case for further proceedings to determine whether the mortgage insurers paid more than fair market value to the reinsurer for the reinsurance.

***(3) The scope of the CFPB's statute of limitation authority* –** The court held that the statute of limitations for actions under Section 8 of RESPA is three years, rejecting the CFPB's interpretation that no statute of limitations period applied to agency administrative enforcement actions. As such, the court ordered the CFPB to reexamine any potential RESPA violations within this three-year period.
Next Steps: The CFPB will almost certainly appeal the case, either *en banc* to the full D.C. Circuit or directly to the Supreme Court.

Impact for Real Estate Professionals' Marketing Service Agreements

As NAR has long contended, this decision confirms that real estate marketing service agreements (MSAs) are permissible under RESPA, and that real estate professionals may be confident in entering into such arrangements, as long as they comply with the statute that payment is made for goods and services actually furnished or performed and are made at fair ("reasonable") market value.

MSAs must be carefully constructed to comply with the law, otherwise all parties involved could face civil and criminal liability. The court made clear that these arrangements are permissible if the payments made are: (1) for services actually furnished or for services performed and (2) are bona fide compensation that does not exceed the value of such services. *If payments are more than the reasonable market value, it is likely that the excess amount above fair market value will be presumed not to be a bona fide payment but instead "disguised payment for a referral."*

NAR recommends implementing best practices for these agreements such as: memorializing the MSA in writing; insuring that bona fide services are provided; disclosing the relationship to the consumer; obtaining independent valuations of the marketing, advertising, or other services provided; and documenting marketing fees and determinations of fair market value.

While the CFPB will likely continue enforcement actions with respect to payments tied directly to referrals, its efforts to challenge payments for services provided as disguised referral fees will be stymied in the near future because of this case and pending appeals.

For more best practices, see NAR's RESPA Do's & Don'ts for MSAs.

Read the full opinion here.