

Consumer Financial Protection Bureau Seeks Rehearing of D.C. Circuit Panel Ruling in PHH: What Now?

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The Consumer Financial Protection Bureau (Bureau) Friday filed a petition in the closely-watched *PHH* case, seeking to undo a ruling by a panel of judges for the D.C. Circuit Court that was highly critical of the Bureau's interpretation of the Real Estate Settlement Procedures Act (RESPA). The Bureau also seeks to challenge a ruling in the case that the Bureau's unusual structure is unconstitutional.

Key Issues

At issue is a June 2015 order by the director of the Bureau (Director) on an appeal of the Bureau's RESPA enforcement action against mortgage lender PHH Corp. (PHH). The Director ruled that PHH's "captive reinsurance" arrangements violated Section 8(a)'s prohibition on kickbacks because the mortgage insurers' payments were compensation for referrals and that such a violation could not be saved by RESPA Section 8(c)(2), which has long been understood to be a statutory exemption expressly authorizing payments for goods or services provided. The Director ordered PHH to disgorge \$109 million, and PHH appealed to the D.C. Circuit Court of Appeals.

[In October 2016, a three-judge panel ruled and vacated the Director's decision in a resounding victory for PHH.](#) The panel rejected the Director's view of Section 8(c). The court held that Section 8(c) creates a "safe harbor" against overly broad interpretations of Section 8(a) and confirmed that payment for a good, service, or facility provided is permissible, so long as the payment reflects reasonable market value. A majority of the panel also held that the Bureau's status as an independent agency headed by a single director violates Article II of the Constitution, striking the "removal for cause" provision in Title X of the Dodd-Frank Act so that the president could remove the Director at will and the Bureau could continue to operate constitutionally going forward.

Legal critics hailed the panel's interpretation of RESPA Section 8(c)(2) as a statutory exemption. The settlement services industry breathed a sigh of relief at the prospect of returning to an environment of basic regulatory certainty for reasonable business arrangements.

The D.C. Circuit ordered the clerk to withhold issuance of the mandate (*i.e.*, the device by which an appellate court closes an appeal and transfers jurisdiction for the case elsewhere) pending disposition of any timely petition for rehearing or for rehearing *en banc*.

The Bureau's Petition for *En Banc* Review

On November 18, 2016, the Bureau filed a petition for rehearing *en banc*, asking the entire D.C. Circuit Court of Appeals to review the RESPA and constitutional issues (as well as potentially the Bureau's authority to retroactively apply new RESPA interpretations). At this point, *en banc* review is the only procedure, other than the United States Supreme Court opting to accept review of the case, by which the Bureau could obtain relief from a final decision by the panel.

In petitioning for *en banc* review, the Bureau emphasizes its theory that PHH "tied" referrals of mortgage insurance business to required payments in the form of reinsurance premiums, which the Bureau argues flouts the core purpose of RESPA. The Bureau argues that Section 8(c)(2) is not a safe harbor but rather merely "clarifies" that the prohibition on kickbacks set for in Section 8(a) "does not interdict 'bona fide' compensation for goods 'actually provided' or for services 'actually performed.'" In essence, the Bureau continues to maintain that *any* compensation arrangement involving settlement service business referrals violates RESPA, regardless of the underlying actual services performed by the parties to the arrangement or whether the services were priced at fair market value. The Bureau contends that the panel's interpretation would undermine Section 8(a) enforcement "by making evasion easy."

The Bureau's Arguments Are Problematic

The Bureau's arguments face serious obstacles. The D.C. Circuit Court panel followed the plain language of the statute in finding that Section 8(c)(2) is a safe harbor. In fact, the court described this holding as "not a close call." The court's interpretation is consistent with the dual purposes of RESPA to prevent kickbacks while still fostering provider arrangements which can achieve efficiencies that benefit consumers. It is also consistent with the historic enforcement of RESPA Section 8 by the U.S. Department of Housing and Urban Development and the courts. This has been the regulatory environment for decades.

Moreover, the Bureau's desired Section 8(c) interpretation is not only at odds with the statute, but it would convert Section 8 into a hopelessly subjective inquiry into whether a payment was made or an arrangement entered into with the intent of obtaining referrals. [This exact approach has been considered and rejected by numerous courts.](#) Moreover, it could turn each of the permissible Section 8(c) categories into automatic Section 8(a) violations depending on the state of mind of the provider, regardless of whether the payment was reasonably related to the value of what was provided.

What Happens Next?

The Bureau's petition for rehearing functions as an automatic stay of the DC Circuit's mandate. PHH will not have to respond to the Bureau's *en banc* petition unless the court so orders. The court will not hear argument on the question of whether rehearing *en banc* should be granted.

For the Bureau's petition to be granted, an active judge of the court or a member of the original panel must request a vote and a majority of the court's active judges who are not recused must then vote to rehear the appeal. *En banc* review is "rarely granted," generally only occurring to ensure

consistency of the court's decisions or when a case involves a question of "exceptional importance."

If the petition is granted, the court will decide whether to order new briefing, schedule oral argument, or both.

If the Bureau's petition is either denied or granted and the DC Circuit's initial Order is upheld, the Bureau will be expected to ask the Supreme Court to hear the case. However, while the constitutional issue may be worthy of review, it is questionable whether the RESPA construction of Section 8 would qualify because (other than some Eleventh Circuit case law that was ultimately superseded), all the decisions of the Courts of Appeal construe Section 8 as the D.C. Circuit did. In any event, if the Bureau seeks *certiorari*, the Bureau will likely move the D.C. Circuit for a stay of the mandate pending resolution of the Supreme Court petition. Such a motion must set forth facts showing good cause for the stay, and in this case would likely be granted.

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