

The CFPB's Enforcement Case against Ocwen Financial Corporation – 18 month Checkup

In the spring of last year, the Consumer Financial Protection Bureau (“CFPB”) filed an enforcement action against Ocwen Financial Corporation (“Ocwen”) and its subsidiaries for violation of mortgage servicing rules. The suit was filed in the U.S. District Court for the Southern District of Florida, naming Ocwen and two of its subsidiaries--Ocwen Mortgage Servicing, Inc. and Ocwen Loan Servicing, LLC--as defendants.¹ Close on the heels of that suit, the Attorney General for Florida brought a very similar action against Ocwen and its subsidiaries--filed the same day, in the same court, bearing the very next civil case number.² Around the same time, close to half the nation's state mortgage regulators let loose a coordinated broadside against Ocwen:

...22 state mortgage regulators...issued public regulatory orders or charges to subsidiaries of Ocwen...to address violations of state and federal laws, including the mishandling of consumer escrow accounts, unlicensed activity, and a deficient financial condition. The majority of the orders prohibit the acquisition of mortgage servicing rights and the origination of mortgage loans until the company is able to prove it can appropriately manage its existing mortgage escrow accounts. The orders are the culmination of several years of examinations and monitoring by multiple state regulatory agencies that revealed the company is mismanaging consumer mortgage escrow accounts.³

Subsequently, other state regulators piled on, with 31 states in the mix by year-end.

A year ago, I provided an analysis of the CFPB v. Ocwen enforcement case--where the case stood five months in--and, in this analysis, I included some background information on the mortgage servicing rules at issue, the rise of the nonbanks in the mortgage servicer arena, and Ocwen's dramatic growth in recent years.⁴ If you're not already familiar with the details of the CFPB v. Ocwen case and its background, I recommend clicking the link below for this article.

The purpose of this particular article is to highlight some of the developments surrounding the CFPB v. Ocwen case since my post last September. A year ago, there were 46 entries on the case docket. As of the date of this post, there are 175 entries. Many of these entries relate to discovery issues, notice of attorney appearances, and procedural housekeeping matters. Not that they're not relevant (for instance, there was a motion to intervene/certify class filed 02/27/2018 that was just denied by the court 09/27/2018), but it would be mind-numbing to try and summarize the motions, orders and other filings corresponding with these entries. Rather, I'm going to focus on three

¹ *CFPB v. Ocwen Financial Corporation et al*, U.S. District Court for the Southern District of Fla., Case No. 9:17-CV-80495 (filed 04/20/2017)

² *Office of the Attorney General et al v. Ocwen Financial Corporation et al*, U.S. District Court for the Southern District of Fla., Case No. 9:17-CV-80496

³ Conference of State Bank Supervisors 4/20/17 Media Release - <https://www.csbs.org/news/press-releases/pr2017/Pages/042017.aspx>

⁴ Link to 9/21/17 article: <https://www.nexsenpruet.com/insights/update-on-the-cfpbs-enforcement-case-against-ocwen-financial-corporation>

developments since late September 2017 which—singly and collectively—stand to have considerable influence on the course of the case. They are: the D.C. Circuit’s decision in January on the constitutionality of the CFPB; Mulvaney’s ratification of the CFPB’s position in the Ocwen enforcement case; and Ocwen’s settlement with state mortgage regulators over the past year.

1. Ocwen’s Motion to Dismiss (and the *PHH Corp. v. CFPB* case): In response to the CFPB’s complaint, Ocwen filed a Motion to Dismiss on 6-23-17 raising three primary defenses, first and foremost of which was that the CFPB’s Complaint must be dismissed on constitutional grounds. Ocwen based this argument in part on a decision by the U.S. Court of Appeals for the District of Columbia Circuit (by a three-judge panel) in October, 2016 in the *PHH Corp. v. CFPB* case which found the CFPB’s leadership structure (single director, removable only for cause) unconstitutional.⁵ The opening of Ocwen’s Motion to Dismiss includes the following:

[T]he entire Complaint must be dismissed on constitutional grounds because the CFPB violates the system of checks and balances that protects Ocwen, and every citizen, from an unbridled government agency. The 2010 Consumer Financial Protection Act (“CFPA”) that created the CFPB consolidated a massive amount of regulatory and enforcement power over virtually all of our nation’s consumer financial services laws in the hands of a single person, the CFPB’s Director, and then insulated that position from accountability to the only executive Article I recognizes, the President. This constitutional defect is exacerbated because the CFPB is insulated from any meaningful check by the second political branch of federal government, the Congress. Instead, the CFPB appropriates its own funds and faces no meaningful congressional oversight...⁶

However, the D.C. Circuit’s decision in *PHH Corp. v. CFPB* had already been vacated in February 2017 pending review by the full panel of judges in the circuit and a ruling by the full Court. On January 31, 2018, the full Court for the D.C. Circuit ruled that the CFPB is constitutionally structured. This was, to put it mildly, a closely watched and highly anticipated decision, characterized by HousingWire as a “stunning reversal of its previous decision” (as a quick aside, the CFPB did lose on the \$109 million disgorgement penalty but the spotlight was clearly on the issue of the CFPB’s constitutionality).⁷ Thereafter, the CFPB wasted no time filing a Notice of Supplemental Authority in the Ocwen enforcement case attaching the *PHH Corp. v. CFPB* decision (filed 02/05/18).⁸ Ocwen responded by filing a Motion to Strike the CFPB’s Notice of Supplemental Authority, arguing—and making reference to local rules—that it is “improper for a party to file additional briefing on a pending motion without leave of Court (and without conferring with the opposing party).”⁹ But the bottom line is that unless/until the U.S. Supreme Court deals decisively with this issue of whether the CFPB is constitutionally structured, Ocwen and other lenders/servicers are without an ace in the hole on this point.

⁵ *PHH Corp. et al v. Consumer Financial Protection Bureau*, case # 15-1177, in the U.S. Court of Appeals for the District of Columbia Circuit

⁶ CFPB v. Ocwen, Defendant’s Motion to Dismiss and Incorporated Memorandum of Law

⁷ HousingWire: *Stunner: Court of Appeals reverses earlier ruling, declares CFPB constitutional*; 01/31/18

⁸ CFPB’s Notice of Supplemental Authority: 02/05/18

⁹ Ocwen’s Motion to Strike: 02/27/18

The above said, the prospect that the U.S. Supreme Court will address this issue isn't so remote. This past June, in the CFPB's case against RD Legal Funding LLC, Chief District Judge Loretta Preska of the U.S. District Court for the Southern District of New York ruled that the CFPB was unconstitutional, dismissing the CFPB from the case (but ruling that the New York AG's case against RD Legal Funding can proceed). The CFPB filed its Notice of Appeal of Judge Preska's order on 9/14/18.¹⁰ And the issue of the CFPB's constitutionality is currently before the Fifth Circuit in the CFPB's case against All American Check Cashing, Incorporated.¹¹ So we may be looking at a circuit split in the not too distant future that the Supreme Court will be called upon to resolve.

2. Mulvaney's ratification: Readers may recall that Richard Cordray, the former director of the CFPB (appointed by President Obama), stepped down from the CFPB at the end of last November. Subsequent to his departure, there followed an odd and contentious period where President Trump's pick to be the interim head of the CFPB, Mick Mulvaney (Director of the OMB), and Cordray's pick, Leandra English (Cordray's Deputy Director prior to Cordray's departure), vied for the role of interim director of the CFPB. Without going into detail, the Trump administration won that skirmish and Mulvaney assumed the role of interim head. Thereafter, it was immediately assumed that Mulvaney--one of the CFPB's most vocal critics-- would take the CFPB's foot off the gas of pending enforcement cases. But that did not happen with the Ocwen case (or with a number of other pending CFPB enforcement cases). On the contrary, on February 5, 2018, Mulvaney signed a declaration stating "[i]n my capacity as the Bureau's Acting Director, I have reviewed the Bureau's decision to file a lawsuit against Ocwen..." and "[a]fter having been briefed by Bureau staff regarding this case, I ratified the Bureau's decision to file a lawsuit against Ocwen..."¹² Whether Mulvaney believes in the merits of the Ocwen case or simply realized it would be in his -- and the administration's -- political interest not to derail the case, we don't know. As noted above, Mulvaney has visibly remained on board with a number of the enforcement cases instituted by Cordray.

3. State regulators: Here's a bright spot for Ocwen. Last year, without delay, Ocwen started working to settle with various state regulators, and with good reason: The majority of the states' orders prohibited Ocwen from acquiring new mortgage servicing rights and originating new mortgage loans until Ocwen could "prove it can appropriately manage its existing mortgage escrow accounts."¹³ As noted in my article last year, in order for a mortgage servicer's business model to work, the servicer has to be able to continue to acquire new mortgage servicing rights while the existing mortgages it services mature or go into default. Without being able to "replenish" its pool of mortgage servicing rights, its source of revenue starts to dry up. As of this past February, Ocwen had reached settlement with nearly every one of the state regulators. Most of these settlements provided that the prohibition against Ocwen acquiring new mortgage servicing rights would expire April 30, 2018.

¹⁰ *CFPB v. RD Legal Funding LLC et al*, U.S. District Court for the Southern District of New York, Case No. 1:17-CV-00890

¹¹ *CFPB v. All American Check Cashing et al*, U.S. Court of Appeals, Fifth Circuit, Case No. 18-90015

¹² CFPB's Notice regarding Ratification: 02/05/18

¹³ Conference of State Bank Supervisors 4/20/17 Media Release - <https://www.csbs.org/news/press-releases/pr2017/Pages/042017.aspx>

Additionally, most of these settlements with the states called for Ocwen to move away from its proprietary system of record, REALServicing, which, in the CFPB's complaint, was alleged to have been the source of so many of Ocwen's servicing problems. Last Fall, Ocwen entered into a contract with Black Knight to use Black Knight's LoanSphere MSP loan servicing system. Additionally, this past February, Ocwen announced that it was buying PHH Corp. (yes, the same PHH Corp. in the *PHH Corp. v. CFPB* case), and this purchase, per Ocwen's CEO, should enable Ocwen to "migrate" from the REALServicing system to Black Knight's LoanSphere MSP system more quickly since PHH Corp. was already using that platform.¹⁴

A year ago, it appeared the state regulators presented the greatest existential threat to Ocwen as a going concern. Yet in less than 12 months, that front has largely been pacified. While Ocwen still has to deal with the CFPB, at least Ocwen doesn't have to worry about its lifeblood – new mortgage servicing rights – drying up in the meantime. On the negative side of the ledger, Kathy Kraniger, the Trump Administration's choice to be the next director of the CFPB, is, if confirmed by the full senate, not expected to diverge significantly from Mulvaney's positions at the CFPB (having worked under Mulvaney at OMB). Put another way, it's hard to imagine she's going to take a position at odds with Mulvaney's declaration ratifying the CFPB's decision to bring suit against Ocwen. And while the issue of the CFPB's constitutionality may reach the Supreme Court someday, the case is moving right along. Though the trial date is currently set for April, 2020, the Court entered an order in September setting a new deadline for dispositive motions for September 20, 2019. That is just around the corner.

¹⁴ HousingWire: *Ocwen buying PHH for \$360 million in cash; Deal comes after years of business hiccups for both companies*; 02/27/18