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LITIGATION

The CFPB's Amicus Program - Friend or Foe?

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The Consumer Financial Protection Bureau ("CFPB") is no stranger to ingenuity in the name of regulatory reform. From its novel approaches to consumer research to its creative use of age-old legal strategies, the CFPB is vigorously pursuing its broad mission of making consumer financial products and services work for Americans.

The CFPB's active amicus program provides yet another example of the Bureau's use of a familiar legal tool in a new way. Amicus briefs have been used in U.S. litigation for nearly 200 years. And in recent decades, these "friend of the court" briefs have evolved into important tools for litigants and judges alike. Studies indicate that amicus briefs affect success rates in a variety of contexts, but historically prudential banking regulators have used amicus briefs sparingly. Instead, those regulators typically chose to effect change by promulgating formal regulations, rather than advocating in connection with pending litigation.

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The CFPB has bucked the trend set by its predecessor agencies by establishing its amicus program. Since October 2011, the CFPB has submitted briefs addressing a wide range of issues related to consumer financial products and services, and interestingly, the CFPB has not limited its attention to Supreme Court cases. Rather, the Bureau also has filed briefs in the federal courts of appeals and—on at least one occasion—in a federal district court.[1] The CFPB's past activity, combined with its announced intention to remain involved in cases to come, could add a layer of complexity to cases addressing issues within the Bureau's jurisdiction. This article discusses the CFPB's amicus efforts to date and what may lie ahead.

The CFPB's Method & Objectives

Although the CFPB began filing amicus briefs in October 2011 (shortly after the agency was formally established in July 2011), it did not publicly launch its amicus program until August 2012. At that point, the CFPB not only indicated that it would continue to file amicus briefs, but also solicited suggestions for potential cases in which to file. In particular, the Bureau explained that it was looking broadly for any cases "with one or more legal questions about the interpretation or application of a federal consumer financial protection statute or regulation that [the Bureau] interpret[s] and enforce[s]."[2] Moreover, although all of the CFPB's amicus filings to date have been in federal courts, the Bureau has indicated that it also is looking for noteworthy cases in the highest state courts. Anyone is free to email the CFPB to suggest a case in which the CFPB may

[1] *See* Mem. of the United States of Am. in Support of the Constitutionality of § 1681c of the Fair Credit Reporting Act, *King v. Gen. Info. Servs., Inc.*, 903 F. Supp. 2d 303 (E.D. Pa. 2012) (No. 10-6850).

[2] *See* Meredith Fuchs, *Open for Amicus Suggestions*, CONSUMER FINANCIAL PROTECTION BUREAU BLOG (Aug. 2, 2012), http://www.consumerfinance.gov/blog/open-for-amicus-suggestions/.

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want to weigh in. Informally, the Bureau has said that it will accept suggestions from consumers and the industry alike.

The CFPB's amicus program is unique to say the least. While federal administrative agencies like the Department of Justice, Equal Employment Opportunity Commission, and Federal Trade Commission have been frequent amicus filers, prudential bank regulators have used amicus briefs infrequently to advance their views. These agencies have been more focused on amending implementing regulations and staff commentary. And they certainly were not engaged in actively soliciting opportunities for amicus filings.

Many have wondered why the CFPB has decided to engage in active amicus efforts. The agency has responded by explaining that the briefs ''allow [the Bureau] to share [its] position with courts considering significant questions about the interpretation of consumer finance laws or affecting [the CFPB's] responsibilities.''[3]

That may well be, but several other reasons for the program spring to mind. First, the program allows the Bureau to make an immediate—and in a limited sense, retroactive—impact on the interpretation of laws within its purview. The ordinary rulemaking process takes time: on average, more than 14 months from the notice of proposed rule to the final rule. Moreover, the process often is a cumbersome one, requiring long pages of discussion from the agency and extensive analysis of the comments received. The result is a rule that will govern conduct going forward, but rules typically are not retroactively applicable.

Appeals, on the other hand, typically involve only a single amicus brief. They move faster by comparison—averaging fewer than 10 months from start to finish. The holding in an appellate case can have an immediate impact on the parties and any cases that follow, cases which may involve conduct that predated the appellate ruling. Second, the CFPB's involvement may be designed to help address a perceived imbalance between consumer-side and lender-side advocacy, particularly when the agency intervenes on the side of the consumer. Actively soliciting opportunities for amicus filings may assist the Bureau in carrying out its mission of keeping a consumer protection focused ''ear to ground.'' Once involved in cases, Bureau lawyers can be expected to navigate the sometimes complex regulatory environment more easily than borrowers, whose legal representation may be hampered by limited means.

Without a doubt, the Bureau's involvement holds the potential to directly affect case outcomes, particularly when the agency gets involved in state courts and federal courts of appeals. From a practical perspective, judges often appreciate amicus briefs from government parties and may place great weight upon them. From a jurisprudential perspective, agency amicus briefs may be entitled to deference. So, when the CFPB files a brief, the discussion shifts—at least in part—to a discussion of whether the CFPB's position truly is worthy of deference.

The CFPB's Amicus Program in Action

Over the past two years, the CFPB either has filed or signed on to 11 different amicus briefs before the Supreme Court and the federal courts of appeals.[4] Thus far, the Bureau's briefs have covered a vast terrain, touching upon the Truth in Lending Act (''TILA''), Fair Debt Collection Practices Act (''FDCPA''), Real Estate Settlement Procedures Act (''RESPA''), and Interstate Land Sales Full Disclosure Act (''ILSFDA'').

Supreme Court Advocacy

Thus far, the Bureau had a mixed record before the Supreme Court. In two cases, the Court flatly rejected the Bureau's position. In the first, *Freeman v. Quicken Loans, Inc.*, the Court unanimously concluded that a plaintiff must demonstrate that a charge for settlement services was divided between at least two people to establish a violation of RESPA's fee-splitting provision, rejecting the Bureau's contention that this provision could reach a single provider's retention of an unearned fee.[5] In the second and more recent case, *Marx v. General Revenue Corp.*, the Court issued a 7-2 decision holding that a court may award costs to prevailing defendants in FDCPA cases without a finding that the plaintiff brought the claim ''in bad faith or for purposes of harassment,'' a standard which the CFPB argued was necessary before imposing costs.[6]

Although these two decisions went against the CFPB on the merits, the Bureau has enjoyed two limited victories before the Court. In an FDCPA case which examined whether communications from a debt collector to a debtor's attorney were actionable, the Supreme Court denied certiorari after the Solicitor General and the Bureau filed a brief recommending a denial.[7] In a RESPA matter related to standing, the Supreme Court dismissed the case as improvidently granted, leaving in place a lower court decision that the Bureau had asked the Court to affirm.[8]

Circuit Court Advocacy

At the circuit-court level, the Bureau's record also is mixed. The majority of the CFPB's briefs at this level have focused on a single question related to TILA's right of rescission. TILA establishes a three-year statute of repose for rescission claims. Courts are divided as to whether a consumer only must file a notice with her lender within three years to render her claim timely, or whether she also must file suit within three years. In the CFPB's view, a notice is sufficient, and the Bureau has refused to take any position on whether there is a limit on the time to file suit once a borrower files such a notice. The financial industry, however, has argued that the borrower must file suit within three years, regardless of when the borrower sends a notice to the lender.[9]

The CFPB has had varied success with its position on this interpretative issue. The CFPB and three bank-industry trade associations filed dueling briefs in the Third, Fourth, Eighth, and Tenth Circuits. The Third

[3] *Id.*

[4] At the Supreme Court, the Bureau simply signs briefs filed by the Solicitor General.

[5] 132 S. Ct. 2034, 2044 (2012).

[6] 133 S. Ct. 1166, 1171 (2013).

[7] *See Fein, Such, Kahn & Shepard, PC v. Allen*, 132 S. Ct. 1141 (2012).

[8] *See First Am. Fin. Corp. v. Edwards*, 132 S. Ct. 2536 (2012).

[9] BuckleySandler LLP has served as counsel to industry amicus curiae American Bankers Association, Consumer Bankers Association, and Consumer Mortgage Coalition in the cases in which the CFPB has filed an amicus brief.

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Circuit took the CFPB's position,[10] while the Eighth and Tenth Circuits agreed with the industry.[11] These decisions suggest that the amicus submissions are having some genuine impact, as both courts specifically commented on them. Indeed, the Third Circuit actually invited the Bureau (along with the industry amici) to participate in oral argument.

The TILA cases also illustrate the imperfect nature of attempting to make law through amicus submissions. In two circuits—the Fourth and the Ninth—the Bureau failed to submit briefs to the panel that ultimately decided the issue, evidently having failed to identify the earliest cases in those courts to take up the issue. The Bureau also has had no success in avoiding a circuit split.

While the Bureau seems to be placing significant emphasis on cases involving interpretations of TILA's statute of limitations, its circuit court amicus efforts to date have not been limited to TILA. In the FDCPA context, the Bureau has filed at least two briefs. In one case, the Bureau's position, that debt collection includes enforcing a security interest, was consistent with that of the winning party.[12] However, the Bureau's position on different issues, the definition of ''communication'' under § 1692a(2) and the standard for awarding costs, failed to carry the day in another case.[13]

The Bureau also has had some success in advancing its interpretation of certain provisions of the ILSFDA. The CFPB's position was consistent with that of the prevailing party in a case addressing whether a single-floor condominium unit in a multistory building meets the definition of ''lot'' under the ILSFDA, but this decision was not without some controversy.[14] While two judges relied upon the CFPB's interpretation of an ''ambiguous'' regulation and sided with the Bureau, one dissenting judge refused to defer to the Bureau's position. In the dissenting opinion, the judge made reference to the CFPB's interpretation as a ''gravity-defying'' statutory ''misunderstanding.''[15]

The CFPB's Amicus Program in the Future

The CFPB's amicus program presents a number of questions for those affected by the cases in which it is filing briefs.

First, it is not yet clear how transparent the Bureau will be in operating its amicus program. The CFPB has not indicated, for instance, whether it will disclose the requests for amicus assistance that it receives through its amicus email address. Nor has it said whether it will consult with parties in the case in which it plans to file a brief or otherwise accept comments on the positions that it takes within amicus briefs.

Because it is a government agency, the Bureau can file an amicus brief without consent of the parties or permission from the court, so parties may not receive any warning or signal before the CFPB gets involved. As a result, the agency might take significant policy positions without the benefit of outside advice from interested parties. That approach contrasts significantly with the ordinary notice-and-comment rulemaking process.

Second, it is not obvious how the Bureau plans to exercise its ''amicus power'' in the near future. The agency has suggested, albeit informally, that it would be willing to side with the financial services industry in the proper case. Whether the CFPB will do so remains to be seen. It also remains to be seen how the agency will respond if it continues to enjoy mixed success. Will it abandon the program? Will it abide by the rulings? Or will it use its rulemaking power to ''reverse'' (where possible) unfavorable court decisions? Thus far, the Bureau has responded to relevant case outcomes with silence.

Third, and finally, there is some uncertainty as to how much courts will defer to the CFPB's amicus briefs. The level of deference given likely will depend on what the brief actually discusses, including in particular, whether the brief addresses a statute or a regulation. The deference question is a nuanced issue so complex that the Third Circuit requested supplemental briefing focusing only on deference in its TILA rescission case. These same questions likely will challenge other litigants and courts in the months to come.

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The potential impact of the CFPB's amicus program should not be underestimated. Although amicus briefs are now a familiar feature in litigation, the arrival of a new, active government litigant could be a significant shift in the landscape. ''The friend-of-the-court brief sounds like a decidedly collateral, and perhaps unnecessary, document—one which one scholar has characterized as possessing 'delusive innocuousness.' ''[16] Some federal agencies, however, have recognized that an amicus brief can serve as a ''policy making tool of great importance''[17] and have used them accordingly. Savvy litigants should keep the same in mind if the CFPB decides to make friends with the court in their matters.

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[10] *See generally Sherzer v. Homestar Mortg. Servs.*, 707 F.3d 255 (3d Cir. 2013).

[11] *See generally Keiran v. Home Capital, Inc.*, No. 11-3878 (8th Cir. Jul. 12, 2013); *Rosenfield v. HSBC Bank, USA*, 681 F.3d 1172 (10th Cir. 2012).

[12] *See Birster v. Am. Home Mortg. Servicing, Inc.*, 481 F. App'x 579 (11th Cir. 2012).

[13] *See Marx v. Gen. Revenue Corp.*, 668 F.3d 1174 (10th Cir. 2011).

[14] *See Berlin v. Renaissance Rental Partners*, No. 12-2213, 2013 BL 121076 (2d Cir. May 6, 2013).

[15] *Id.* at 10 (Jacobs, C.J., dissenting).

[16] David S. Ruder, *The Development of Legal Doctrine Through Amicus Participation: The SEC Experience*, 1989 WIS. L. REV. 1167, 1168 (1989).

[17] *Id.*