

Clients & Friends Memo

U.S. Court of Appeals for the Third Circuit Agrees to Hear Interlocutory Appeal in CFPB Enforcement Action against Student Loan Trusts

May 3, 2022

On April 29, 2022, the U.S. Court of Appeals for the Third Circuit granted a petition for permission to appeal in *Consumer Financial Protection Bureau v. The National Collegiate Master Student Loan Trusts* filed by defendants The National Collegiate Student Loan Trusts (the “Trusts”) and certain interveners in the action.¹ The Third Circuit agreed to hear two certified questions from the district court in the appeal: (1) whether, under the Consumer Financial Protection Act (“CFPA”), the Trusts are “covered persons” subject to the CFPB enforcement authority; and (2) whether, after *Collins v. Yellen*, the CFPB was required to ratify the enforcement action before the three-year statute of limitations ran out.²

The Third Circuit’s grant of permission to appeal allows the Trusts’ appeal to be docketed and the issues will be fully briefed over the coming months. The district court has stayed the CFPB’s enforcement action pending the Third Circuit’s review.³

As discussed in previous articles,⁴ the CFPB initiated an enforcement action directly against the Trusts in 2017, alleging that the Trusts had violated the CFPA by engaging in unfair and deceptive

¹ Order at 2, No. 22-8010, ECF No. 19 (3d Cir. Apr. 29, 2022).

² Petition for Permission to Appeal at 2, N. 22-8010, ECF No. 1 (3d Cir. Feb. 2, 2022); Order at 1, No. 17-1323, ECF No. 397 (D. Del. Feb. 11, 2022).

³ Order, *supra* note 2, at 1.

⁴ See, e.g., Ellen Holloman *et al.*, *District Court Grants Interlocutory Appeal in CFPB Enforcement Action against Student Loan Trusts and Stays Case Pending Appellate Review*, CADWALADER, WICKERSHAM & TAFT LLP (Feb. 16, 2022), <https://www.cadwalader.com/resources/clients-friends-memos/district-court-grants-interlocutory-appeal-in-cfpb-enforcement-action-against-student-loan-trusts-and-stays-case-pending-appellate-review>; Ellen Holloman *et al.*, *Federal Court Holds That Student Loan Trusts Are Subject to CFPB Enforcement Authority: What This Means for Consumer Securitizations and Other Whole Loan Buyers*, CADWALADER, WICKERSHAM & TAFT LLP (Dec. 15, 2021), https://www.cadwalader.com/resources/clients-friends-memos/federal-court-holds-that-student-loan-trusts-are-subject-to-cfpb-enforcement-authority-what-this-means-for-consumer-securitizations-and-other-whole-loan-buyers#_ftnref2; Ellen Holloman *et al.*, *CFPB Suit Against Student Loan Trusts Dismissed*, CADWALADER, WICKERSHAM & TAFT LLP (Apr. 1, 2021), https://www.cadwalader.com/resources/clients-friends-memos/cfpb-suit-against-student-loan-trusts-dismissed#_ftnref7; Ellen Holloman *et al.*, *Forward Movement in the Bureau of Consumer Financial Protection’s Student Loan Litigation: What This Means for Securitization*, CADWALADER, WICKERSHAM & TAFT LLP (Nov. 2, 2018),

This memorandum has been prepared by Cadwalader, Wickersham & Taft LLP (Cadwalader) for informational purposes only and does not constitute advertising or solicitation and should not be used or taken as legal advice. Those seeking legal advice should contact a member of the Firm or legal counsel licensed in their jurisdiction. Transmission of this information is not intended to create, and receipt does not constitute, an attorney-client relationship. Confidential information should not be sent to Cadwalader without first communicating directly with a member of the Firm about establishing an attorney-client relationship. ©2022 Cadwalader, Wickersham & Taft LLP. All rights reserved.

practices in connection with the servicing and collection of student loans. The Trusts and certain interveners in the action filed a motion to dismiss, arguing that the Trusts are not “covered persons” under the CFPA because they are “passive securitization vehicles that take no action related to the servicing of student loans or collecting debt” and, thus, are not subject to the CFPB’s enforcement authority.⁵ The Trusts further argued that the action was untimely because the CFPB failed to ratify the suit before the statute of limitations expired, rendering the action time-barred.⁶

Judge Stephanos Bibas, a visiting judge from the Third Circuit sitting by designation in the District of Delaware, rejected both arguments and denied the motion to dismiss. On December 23, 2021, the Trusts and certain interveners filed a motion for interlocutory appeal of the district court’s order denying the motion to dismiss. On February 11, 2022, the district court granted the motion, ruling that (1) the questions raised in the Trusts’ motion involve “a controlling question of law”; (2) there is “substantial ground” for a difference of opinion in the interpretation of the controlling law; and (3) the interlocutory appeal would “advance the ultimate termination of the litigation.”⁷

As we have previously noted,⁸ the district court’s interpretation of “covered person” under the CFPA is noteworthy and creates a new line of potential exposure for entities, including securitization trusts and other whole loan buyers, that acquire consumer loans on a servicing-retained basis or enter into servicing agreements with third-party services acting as independent contractors. If interlocutory review is granted, the Third Circuit will be the first federal court of appeals to opine on the scope of the CFPA’s “covered person” definition as applied to securitization trusts, with important implications for any secondary market purchaser of a loan, including hedge funds and institutional investors (e.g., pension plans), with the possibility that all of them could become subject to the CFPB supervisory and enforcement jurisdiction to the extent such entities purchase consumer loans.

We will continue to monitor this action and others for legal developments under the CFPA affecting the secondary market.

* * *

<https://www.cadwalader.com/resources/clients-friends-memos/forward-movement-in-the-bureau-of-consumer-financial-protections-student-loan-litigation-what-this-means-for-securitization>.

⁵ Memorandum Opinion at 8, No. 17-1323, ECF No. 380 (D. Del. Dec. 13, 2022).

⁶ *Id.* at 5-6.

⁷ *Id.* at 3-4, 6-7. Further supporting this conclusion, Judge Bibas recalled that the previously assigned judge, Judge Maryellen Noreika, “expressed ‘some doubt’ that the Trusts are covered persons ‘under the plain language of the statute.’” *Id.* at 5.

⁸ Holloman, *Federal Court Holds That Student Loan Trusts Are Subject to CFPB Enforcement Authority: What This Means for Consumer Securitizations and Other Whole Loan Buyers*, *supra* note 4.

If you have any questions, please feel free to contact any of the following Cadwalader attorneys.

Rachel Rodman	+1 202 862 2210	Rachel.Rodman@cwt.com
Ellen Holloman	+1 212 504 6200	Ellen.Holloman@cwt.com
Sophie Cuthbertson	+1 202 862 2341	Sophie.Cuthbertson@cwt.com
Cheryl Barnes	+1 202 862 2340	Cheryl.Barnes@cwt.com
Chris Gavin	+1 212 504 6760	Chris.Gavin@cwt.com
Stuart Goldstein	+1 704 348-5258	Stuart.Goldstein@cwt.com
Victor Celis	+1 202 504 6024	Victor.Celis@cwt.com