

Clients & Friends Memo

The CFPB and NCSLT TRUSTS Saga: Movement on the Third Circuit Case and a Second CFPB Enforcement Action

May 7, 2024

As we reported in our [Client and Friends memo last month](#), the Third Circuit published an opinion on March 19th finding that statutory trusts such as those that make up the National Collegiate Student Loan Trusts (the “NCSLT Trusts”) are “covered persons” for purposes of the Consumer Financial Protection Act (“CFPA”). We warned that this decision would likely be a precursor to more enforcement actions by the Consumer Financial Protection Bureau (“CFPB”) against statutory trust structures.

Yesterday, May 6th, the CFPB and the NCSLT Trusts both petitioned the United States District Court of Delaware to accept a Stipulation and [Proposed] Order Continuing Adjournment of Scheduling Order Deadlines and Continuing to Hold in Abeyance Plaintiff’s Motion to Strike Intervenor’s Answers in the underlying original CFPB enforcement action against the NCSLT Trusts. The reason given to the court for both parties agreeing to this order is “to allow the parties to engage in settlement discussions” until May 20, 2024.

Also yesterday, May 6th, the NCSLT Trusts and one intervening party petitioned the Third Circuit for a rehearing and for a rehearing en banc on the narrow decision the Third Circuit reached in March regarding the NCSLT Trusts being covered persons under the CFPA, even though the NCSLT Trusts consist only of statutory trusts.

Although it may seem strange for both of these steps to be taken on the same day, because the CFPB’s underlying enforcement action is continuing against the NCSLT Trusts, it makes sense that the parties, which have reached resolution on a separate enforcement action described below, would be looking to resolve the original enforcement action at long last. It is significant that the NCSLT Trusts admitted that they are “covered persons” for purposes of the second enforcement action. Doing so allows them and the intervening party to retain the ability to address the Third Circuit’s narrow decision, explaining in their petition that “[t]he panel dramatically expanded the regulatory power of the CFPB, going considerably further than the agency itself requested.”

Meanwhile, also yesterday, May 6th, less than two months since the Third Circuit's decision, the CFPB [announced](#) a second enforcement action against NCSLT Trusts, as well as against their servicer, the Pennsylvania Higher Education Assistance Agency ("PHEAA"). In this case, the CFPB published its complaint against both the NCSLT Trusts and PHEAA, as well as two stipulated proposed consent orders, all filed in the U.S. District Court for the Middle District of Pennsylvania. This likely means that both the NCSLT Trusts and PHEAA have negotiated with the CFPB enough to agree to the consent orders, in lieu of the CFPB pursuing litigation. As a reminder, in the original action the CFPB took against the NCSLT Trusts, it was at this stage of the enforcement process that intervenors got involved, leading to the United States District Court of Delaware refusing to enter the stipulated final judgment.

This new [CFPB complaint](#) covers a time period from 2015 to 2021 during which the CFPB alleges there was an exception process for managing borrower inquiries involving requests to release co-signers, to extend forbearances or to compromise or settle outstanding loan balances ("Exception Requests") that fell apart due to "disputes [that] arose between various stakeholders in the NCSLT Trusts" such that PHEAA referred these requests to the NCSLT Trusts and the NCSLT Trusts were non-responsive. In addition, while PHEAA had the ability, per servicing guidelines approved by the NCSLT Trusts, to approve temporary forbearance requests during the pandemic, the CFPB alleges that PHEAA did not follow those guidelines, such that approvals were unevenly given and not extended at all starting in the fall of 2020.

Much of the alleged malfeasance described in the complaint originated through actions taken (or not taken) by PHEAA. However, according to the CFPB complaint, in late 2015, the NCSLT Trusts (each Trust was acting through the same Owner Trustee) exchanged several communications with PHEAA that caused PHEAA to conclude that the NCSLT Trusts had denied PHEAA's ability to respond to Exception Requests. PHEAA then began to simply forward those requests by email to the Owner Trustee. At about this same time in 2015, the NCSLT Trusts were involved in litigation among themselves and the then-Administrator regarding various issues. Accordingly, the then-Administrator was not involved in the discussions between the Owner Trustee and PHEAA, and the Owner Trustee proceeded to do nothing with the emails it had been receiving for years. This means, of course, that the NCSLT Trusts also did nothing for years about those Exception Requests. Meanwhile, from 2015 until 2021, the CFPB alleges that PHEAA "[misled] consumers to believe that their Exception Requests would receive a substantive response and that efforts to make an Exception Request and contact [the Owner Trustee and/or the Administrator] were not wastes of time."

In November 2020, the NCSLT Trusts, acting through the Owner Trustee, sent a letter to PHEAA directing it to send the Exception Requests instead to the Administrator. Nevertheless, in April 2021, the Administrator rejected the NCSLT Trusts' November 2020 direction letter and stated that the Administrator would not be taking action to process the Exception Requests, and

observed that “many of the situations PHEAA has labeled as Exception Requests are not exceptions or are expressly prohibited by the transaction documents and can be handled directly by PHEAA without the involvement of any other transaction party.” Finally, by May 2021, PHEAA overhauled its processes and started to handle Exception Requests.

Accordingly, the CFPB’s complaint alleges that while PHEAA has direct liability for both unfair and deceptive acts or practices, the NCSLT Trusts have vicarious liability for PHEAA’s alleged material misrepresentations to consumers, and therefore has also committed deceptive acts or practices. The CFPB also alleges that the NCSLT Trusts have direct liability for unfair acts or practices because they failed to ensure that there was a working process to manage Exception Requests

Next, in the [stipulated proposed judgment for PHEAA](#), in addition to comprehensive conduct provisions and requirements to improve its compliance management systems, PHEAA is directed to pay around \$2.89MM in consumer redress and \$1.75MM as a civil money penalty.

The NCSLT Trusts, in [their stipulated proposed judgment](#), are prohibited from continuing to violate the CFPB by engaging in unfair or deceptive acts or practices and are obligated to ensure that PHEAA’s conduct and compliance management systems are sufficiently supporting consumers with student loans in the NCSLT Trusts. In addition, the NCSLT Trusts must revise and submit for approval its own policies regarding servicing and Exception Request processing. The individual trusts that make up the NCSLT Trusts must reserve, in total, \$2.89MM for consumer redress (this amount is in addition to the \$2.89MM that PHEAA must pay for consumer redress) and then distribute such funds in accordance with the stipulated judgment. Finally, the NCSLT Trusts must pay \$400,000 as a civil money penalty. All amounts owed by the NCSLT Trusts are allocated to the individual underlying statutory trusts according to a methodology described in the stipulated proposed judgment. As may be necessary, the NCSLT Trusts are permitted to transfer or assign their responsibilities to carry out the actions required by the judgment, but only if such transferee or assignee agrees in writing to comply with all applicable terms of the judgment.

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

Mercedes Kelley Tunstall	+1 202 862 2266	Mercedes.Tunstall@cwt.com
Sophie K. Cuthbertson	+1 202 862 2341	sophie.cuthbertson@cwt.com
Michael S. Gambro	+1 212 504 6825	michael.gambro@cwt.com
David Samuel Gingold	+1 212 504 6386	david.gingold@cwt.com
Stuart N. Goldstein	+1 704 348 5258	stuart.goldstein@cwt.com