

Clients & Friends Memo

District Court Grants Interlocutory Appeal in CFPB Enforcement Action against Student Loan Trusts and Stays Case Pending Appellate Review

February 16, 2022

On February 11, 2022, the U.S. District Court for the District of Delaware granted a motion for interlocutory 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 district court certified two questions for review by the U.S. Court of Appeals for the Third Circuit: (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

Appellate review of the certified questions is not automatic, however. As a next step, the Third Circuit will decide—in its discretion—whether to take up the appeal.³ If the Third Circuit grants review, an appeal will be docketed, and the court of appeals will consider the merits of the certified questions. If instead the Third Circuit denies review, no appeal will be docketed, and the enforcement action against the Trusts will proceed in district court. The district court has stayed the CFPB’s enforcement action pending the Third Circuit’s review.⁴

As discussed in previous articles,⁵ 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 Memorandum Opinion at 2, No. 17-1323, ECF No. 397 (D. Del. Feb. 11, 2022).

² Order at 1, No. 17-1323, ECF No. 398 (D. Del. Feb. 11, 2022).

³ See 28 U.S.C. § 1292(b).

⁴ Order, *supra* note 2, at 1.

⁵ See, e.g., 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),

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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.⁶ 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.⁷

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.”⁸

As we have previously noted,⁹ 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 servicers 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.

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<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>.

⁶ Memorandum Opinion at 8, No. 17-1323, ECF No. 380 (D. Del. Dec. 13, 2022).

⁷ *Id.* at 5-6.

⁸ Memorandum Opinion, *supra* note 1, 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.

⁹ 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.

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