CFPB Takes a Stance on Home Equity Contracts

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On January 15, 2025, the Consumer Financial Protection Bureau ("CPFB" or the "Bureau") took three coordinated actions related to home equity contracts (also referred to as "home equity investments," "home equity agreements," and "shared equity agreements"): (1) it filed an amicus brief in *Roberts v. Unlock Partnership Solutions AOI, Inc.*, No. 1:24-cv-1374 (D.N.J.); (2) it issued a consumer advisory on home equity contracts; and (3) it published an issue spotlight providing a market overview. The CFPB briefly summarized these actions in a blog post. Although none of the CFPB's actions are binding—and may not reflect the Bureau's views after the upcoming change in administration—they are informative. Most notably, in the amicus brief, the CFPB took the position that the specific product at issue in the litigation is a residential mortgage loan. The issue spotlight and consumer advisory focus primarily on consumer education, and do not opine on whether home equity contracts are mortgage loans subject to federal lending laws.

Amicus Brief

In its amicus brief in *Roberts v. Unlock Partnership Solutions AOI, Inc.*,[1] the CFPB takes the position that the product at issue is a residential mortgage loan because (1) it satisfies the statutory definition of "credit;" and (2) it does not qualify for a regulatory exemption that applies to certain investment products.

The CFPB states in the amicus brief that the product meets the definition of credit under the federal Truth in Lending Act ("TILA") because it grants a right to defer payment of a debt. (Neither TILA nor its regulations define "debt.") According to the CFPB, the debt element of the definition is met because Defendant was required to pay Plaintiff a lump sum payment, and in return, Plaintiff incurred an obligation to repay Defendant either 70% of her home's value or repay the lumpsum payment with 18% annual interest. The CFPB argues that this repayment was deferred because it was due upon a settlement event, or in 10 years. In the amicus brief, the CPFB states that the fact Defendant was not guaranteed to recover all its

capital is not determinative of whether the product is credit. The CFPB argues that all loans run the risk of not being repaid (particularly for nonrecourse debts like reverse mortgages). The CFPB also noted that there are forms of credit that are contingent on future events, such as contingent repayment obligations or variable rates, and so the contingency of the product in *Roberts* is not determinative. Further, the CFPB argued that the characterization of the product as an investment rather than a loan in the contract is not dispositive of whether the product is credit.

The commentary to Regulation Z, the regulation that implements TILA, states that certain investment plans are not credit under TILA. In the amicus brief, the CFPB argues that the product at issue is not an investment plan under this commentary because Defendant does not meaningfully risk loss of capital. According to the CFPB, the product is structured to ensure profit "in all but the most extraordinary circumstance." In support, the CFPB cites the fact that Plaintiff received a payment equal to 44% of her home value but is required to pay Defendant 70% of the home value. Under the terms, the CFPB argues, Defendant will recover its capital as long as the home does not depreciate by more than 39%, which, the CFPB asserts, would require an unprecedented decline in home values. The CFPB argues if the investment plan exception applies anytime a party advancing capital faces risk, the exception would swallow the rule—there is always a risk the consumer will default. Notably, the amicus brief provides some additional analysis of the Regulation Z commentary, stating that for the investment plan exception to apply "the investor must share in *any* loss of value." The CFPB states the investor does not so share in any loss of value in *Roberts* because in most instances where the home depreciates, Defendant would not lose money. According to the CFPB, the exception applies only if the party advancing capital is meaningfully invested in the asset—and not to "'investments' in name only."

The CFPB's assumptions in the amicus brief differ from the analysis by the US District Court for the Northern District of California in one of the few cases addressing whether a home equity contract is a loan under TILA, *Foster v. EquityKey*.[2] In *Foster*, the court concluded that Defendant risked the loss of the capital it advanced, Defendant could lose money on the deal (even if it may be unlikely to happen), and the intent of the parties to enter into a real estate option contract rather than a loan mattered to the analysis of whether the product was credit. The *Foster* court concluded the EquityKey home equity contract product was not credit under TILA. The structure of the products at issue in *Foster* and *Roberts* are distinct, as the product at issue in *Foster* was a real estate option contract and the product in *Roberts* is a forward sale contract.

Consumer Advisory and Issue Spotlight

The consumer advisory and issue spotlight do not make similar assertions regarding the applicability of TILA, focusing instead on potential risks to consumers who enter into home equity contracts.

The consumer advisory is brief and focuses entirely on the potential risks of home equity contracts. The advisory notes that home equity contracts may lack standard mortgage disclosures. Significantly, the consumer advisory states that although homeowners expect to receive certain protections in exchange for "put[ting] their house on the line," some home equity contract companies "say that they don't have to follow those laws." The CFPB, however, does not take a position in the advisory whether home equity contracts actually do have to comply with those laws. The consumer advisory also highlights origination expenses and the costs associated with the end of a home equity contract (which the CFPB says are often tens of thousands of dollars more than costs associated with loans). In addition, the consumer advisory states that entering into a home equity contract could result in a lien on the home or the need to sell the home to fulfill the financial terms of the contract. The CFPB directs consumers to submit complaints on home equity contracts to the Bureau, the Federal Trade Commission, state attorneys general. The CFPB also advises consumers who "got a bad deal" to seek the help of an attorney.

The issue spotlight provides significantly more detail on what home equity contracts are, how they function, and the potential risks to consumers. It includes an overview of the history of the home equity contract market and the current financial share of the market. The issue spotlight also details how home equity contracts work, including describing key features like multipliers, rate caps, and discounted starting home values. In addition, the issue spotlight provides detailed examples that illustrate potential costs to consumers, depending on the features of the home equity contract. The issue spotlight includes a lengthy section on potential risks to consumers and compares those risks to other home equity products, like home equity lines of credit and home equity conversion mortgages. The CFPB briefly notes actions some offerors of home equity contracts take to improve consumer understanding of the contracts. The spotlight concludes that the CPFB will continue to monitor and review compliance with federal laws (including new products targeted at homebuyers).

Conclusion

The CFPB's burst of activity on home equity contracts comes less than a week before the inauguration of President Donald Trump on January 20. Given a 2020 Supreme Court decision concluding that the CFPB director may be removed at will by the president, President Trump almost certainly will seek to replace current CFPB Director Rohit Chopra soon following his inauguration. Any new director likely will have different priorities and

views than the current director, and it remains to be seen whether a new director will take the same approach to these products. The consumer advisory and issue spotlight are nonbinding guidance documents. Moreover, the amicus brief filed by the CFPB does not have any binding effect, and the US District Court for the District of New Jersey, which is hearing the *Roberts* case, may not agree with the CFPB's views.

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[1] No. 1:24-cv-1374 (D.N.J.)

[2] 2017 WL 1862527 (N.D. Cal. May 9, 2017)