

UNITED STATES OF AMERICA  
Before the  
CONSUMER FINANCIAL PROTECTION BUREAU  
July 12, 2013

ADMINISTRATIVE PROCEEDING  
File No. 2013-CFPB-0002

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In the Matter of :  
: ORDER ON AFFIRMATIVE  
3D Resorts-Bluegrass, LLC : DEFENSES  
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On June 14, 2013, the Consumer Financial Protection Bureau (CFPB) filed a Notice of Charges Seeking Rescission, Restitution, Civil Money Penalties, and Other Legal and Equitable Relief (Notice of Charges), which alleges that 3D Resorts-Bluegrass, LLC (3D Resorts-Bluegrass), violated various provisions of the Interstate Land Sales Full Disclosure Act (ILSA), 15 U.S.C. §§ 1701-1720. 3D Resorts-Bluegrass filed a petition under Chapter 7 of the Bankruptcy Code in the United States Bankruptcy Court, Western District of Texas, on November 16, 2011, 3D Resorts-Bluegrass, LLC, No. 11-5401. The proceeding was transferred to the U.S. Bankruptcy Court for the Western District of Kentucky, No. 11-4159, and converted to a Chapter 11 proceeding on December 8, 2011.

A scheduling conference was held on July 2, 2013, where we agreed that the administrative hearing in this action will begin on August 14, 2013, in the United States District Court for District of Kentucky, Louisville, Kentucky. See 12 C.F.R. § 1081.203(b)(1).

**Issues**

Thomas M. Duddy, Chapter 11 Trustee of the bankruptcy estate (Trustee), and William Palmer (Palmer), attorney for 3D Resorts-Bluegrass, each filed Answers to the Notice of Charges on July 1, 2013. Both Answers advanced affirmative defenses. The Trustee filed a Supplemental Statement of Authorities Supporting Respondent's Affirmative Defenses on July 5, 2013.

An affirmative defense is a "defendant's assertion raising new facts and arguments that, if true, will defeat the plaintiff's or prosecution's claim, even if all the allegations in the complaint are true." Black's Law Dictionary 430 (7th ed. 1999). There is at least one administrative ruling that an affirmative defense that would not constitute a valid defense should be struck to avoid unnecessary argument and delay at the hearing. Jeffrey L. Feldman, Administrative Proceedings Rulings Release No. 403 (Jan. 14, 1994), 1994 SEC Lexis 186 (Kingsley, Jennison, McNulty & Morse, Inc., Administrative Proceeding No. 3-7446 (Apr. 9, 1991)). This Order will deal with the following affirmative defenses:

**Trustee**

1. Under 28 U.S.C. § 1334(e), the CFPB lacks subject matter jurisdiction with respect to contracts or monies which constitute property of the bankruptcy estate;
2. The Notice of Charges was issued in violation of 11 U.S.C. § 362;
3. The claims asserted are barred by the limitation period set by 15 U.S.C. § 1711;
4. The CFPB has waived its right to assert the claims by virtue of its participation in 3D Resorts-Bluegrass's bankruptcy case, including the filing of a proof of claim and engaging in court-ordered mediation;
5. The CFPB is estopped from seeking the same relief which it and Resort Property lot owners sought through the filing of proofs of claim in 3D Resorts-Bluegrass's bankruptcy case; and
6. The CFPB claims are barred by the doctrine of laches.

Trustee's Answer at 21-22.

**Palmer**

1. The CFPB does not have subject matter jurisdiction to seek restitution of monies or rescission of contracts relating to property which is part of the bankruptcy estate;
2. The Notice of Charges violates 11 U.S.C. § 362 and is void;
3. The CFPB claims are barred by the statute of limitations;
4. The CFPB claims are barred by doctrines of estoppel and laches; and
5. Permitting the CFPB to maintain actions in the bankruptcy case and in this administrative proceeding would result in the same issues being adjudicated in two separate forums with the likelihood of conflicting rulings.

Palmer's Answer at 26-27.

**Rulings**

**Notice of Charges was issued in violation of 11 U.S.C. § 362**

In Bilzerian v. SEC, 146 B.R. 871 (M.D. Fla. 1992), the court cited Title 11 Bankruptcy, Section 362, and noted that the filing of a petition under Section 301, 302, or 303 of Title 11 operates as an automatic stay except as provided in Section 362(b). Section 362(b)(4) excepts "the commencement or continuation of an action or proceeding by a governmental unit . . . to enforce such governmental unit's or organization's police or regulatory power."

The Notice of Charges by the CFPB is a proceeding by a governmental unit to enforce its regulatory authority and comes within the exceptions to Section 362; thus, there is no basis for finding that the Notice of Charges is void and that the CFPB lacks subject matter jurisdiction.. The three cases that the Trustee cites are inapplicable to this situation.

**Subject matter jurisdiction**

The Trustee contends that because of 28 U.S.C. § 1334(e), which provides that the district courts shall have original and exclusive jurisdiction of all debtor estate property, the CFPB lacks subject matter jurisdiction.

The CFPB cites Sections 1053 and 1055 of the Consumer Financial Protection Act of 2010 (CFPA), 12 U.S.C. §§ 5563, 5565, for its subject matter jurisdiction in this matter. Notice of Charges at 1. Section 5563 of the CFPA authorizes the CFPB to conduct hearings and adjudication proceedings in order to ensure or enforce compliance with any Federal law it is authorized to enforce. See 12 U.S.C. § 5563(a). The CFPB's position that it is attempting to enforce the consumer protection provisions of ILSA seems to come within the scope of its Congressional mandate. See Notice of Charges at 1. Section 1055 of the CFPA specifies the relief possible with respect to a violation of Federal consumer financial law and these measures of relief include most of what the CFPB seeks here. See Notice of Charges at 28.

Contrary to the Trustees' position, the exclusivity of the bankruptcy court's jurisdiction covers only actions covered by the automatic stay provision of 11 U.S.C. § 362. Chao v. Hospital Staffing Servs., Inc., 270 F.3d 374, 383 (6th Cir. 2001). The automatic stay provision of Section 362 does not apply to this situation and a court or agency with concurrent jurisdiction may, inter alia, enter an injunction order or a money judgment. Id. at 386. My reading of the statutes is that the CFPB can bring a fraud action and request the relief specified in the Notice of Charges, and the relief requested could be ordered; however, enforcement of any order would be by the bankruptcy court.

For the reasons stated, there does not appear to be a lack of subject matter jurisdiction.

#### **The limitation period set forth in 15 U.S.C. § 1711**

Section 1711 of ILSA provides that any action under Section 1709 must occur within three years from the violation, however Section 1709 applies to a "purchaser or lessee." The CFPA states that the CFPB must follow the statute of limitations of the statute it is enforcing, "as applicable," and there does not appear to be a specific statute of limitations within ILSA for government enforcement actions. See 12 U.S.C. § 5564(g)(2). In general, the CFPA provides that the CFPB must bring any action within three years of the "date of discovery of the violation to which an action relates." See 12 U.S.C. § 5564(g)(1). The CFPB was established on July 21, 2011, less than two years ago, so any discoveries would have occurred since that date.

The two cases cited by the Trustee are unpersuasive. There is no violation of the applicable statute of limitations.

#### **The CFPB has waived its rights to bring this action by filing in the bankruptcy proceeding, and it is estopped from seeking the same relief here that it and another party are seeking in the bankruptcy proceeding.**

A similar situation appears to have occurred in Board of Governors of Federal Reserve System v. MCorp Financial, Inc., 502 U.S. 32, 41 (1991). There, MCorp, which had filed a voluntary bankruptcy petition, filed in the district court to enjoin the prosecution of two pending administrative proceedings. The Supreme Court held that, "We are not persuaded, however, that the automatic stay provisions of the Bankruptcy Code have any application to ongoing, nonfinal

administrative proceedings.” MCorp, 502 at 41. The Court noted that the Board of Governors of the Federal Reserve System (Board) had only issued Notices of Charges and Hearing with the intent of determining whether MCorp had violated statutory and regulatory provisions. The statutory provisions primarily at issue in MCorp, the Financial Institutions Supervisory Act of 1966, authorized the Board to initiate administrative proceedings. Here, Section 5563 of the CFPB authorizes the CFPB to commence actions against persons who violated Federal consumer financial law.

In addition, Section 5563(d)(2) of the CFPB states that, “[e]xcept as otherwise provided in this subsection, no court shall have jurisdiction to . . . set aside any such notice or order.” In Sunshine Development, Inc. v. FDIC, 33 F.3d 106, 115-16 (1st Cir. 1994), the court rejected the proposition that the Federal Deposit Insurance Corporation (FDIC), which was operating under a statute that had an anti-injunction provision, which I take to be similar to Section 5563(d)(2), was subject to an injunction by the bankruptcy court. “Here, Congress exercised that very power, limiting the authority of all courts - the bankruptcy court included - to enjoin the FDIC.” Sunshine, 33 F.3d at 116. The FDIC had filed proof of claims and was litigating in the bankruptcy court.

Finally, the cases cited by the Trustee are not persuasive. For example, Langenkamp v. Culp, 498 U.S. 42 (1990), held that depositors, who submitted claims against debtors’ bankruptcy estates, had no Seventh Amendment right to a jury trial when sued by a bankruptcy trustee to recover allegedly preferential transfers. That is inapplicable to this situation. There is nothing I know of that shows that the CFPB has waived its rights or that it should be estopped from proceeding.

If the allegations are found to be true, and relief is granted, the bankruptcy court would make sure that relief was granted only once. The courts and administrative agencies have a long standing practice of resolving restitution (civil courts) and disgorgement (Securities and Exchange Commission) orders arising out of the same facts. I expect that would happen here also.

### Laches

The prevailing case law is that the doctrine of laches, i.e., “[u]nreasonable delay or negligence in pursuing a right or claim – almost always an equitable one – in a way that prejudices the party against whom relief is sought,”<sup>1</sup> does not apply to an enforcement action by a government agency. “[T]he United States is not bound by state statutes of limitations or subject to the defense of laches in enforcing its rights.” United States v. Summerlin, 310 U.S. 414, 416 (1940). On July 7, 2013, Shepard’s Citations showed that Summerlin was followed sixty times, criticized three times and distinguished twenty-one times.

For all the reasons stated, I DENY the relief sought by the affirmative defenses raised by the Trustee and Palmer.

  
Brenda P. Murray  
Administrative Law Judge

<sup>1</sup> Black’s Law Dictionary 879 (7th ed. 1999).