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The principal issue in RD Legal Funding also merits attention

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We have blogged twice (here and here) about the conclusion in RD Legal Funding that Title X of Dodd-Frank is unconstitutional because it provides that the sole director of the CFPB can be removed only for cause. This post addresses the issue that took up 95 pages of the 101-page opinion—whether RD Legal Funding violated UDAAP and usury laws because purported asset purchases were in fact disguised loans. Before enforcement authorities or plaintiffs' attorneys get too excited that the court found against RD Legal Funding on this issue, the unusual facts of the case and the basis for the court's opinion need to be examined.

RD Legal Funding purchased at a discount, for immediate cash payments, benefits to which consumers were ultimately entitled under the NFL Concussion Litigation Settlement Agreement (the "NFLSA") and the September 11th Victim Compensation Fund of 2001 (the "VCF"). In both situations, the court indicated, consistent with the complaint, that the consumer's right to a benefit and the amount of the benefit had been determined. The party responsible for payment (the NFL or the U.S. Government) was unquestionably willing and able to make the required payment. The only question was when payment would be made. Of course, this scenario differs greatly from the typical situation where a litigation funding company purchases an interest in a claim in ongoing personal injury or other litigation. Indeed, an industry trade group, *siding with the CFPB and NY AG against RD Legal Funding*, made exactly this point:

The pre-settlement legal funding transactions referenced in ALFA's amicus curiae brief differ in a crucial respect. (See ALFA Br.) In those transactions, the pre-settlement legal funding agreements are entered into before the claim is resolved. The ALFA Member's right to repayment is contingent on the consumer's ultimate success on his or her claim. (ALFA Br. 5.)

Opinion at p. 53.

For some reason, the CFPB and NY AG did not argue, and the court did not determine, that the payment of settlement benefits and subsequent payment to RD Legal Funding were assured and, hence, the advances functioned the same as loans. Accordingly, and because the decision was on a motion to dismiss, where all factual allegations are required to be accepted as true, the RD Legal Funding decision did not address whether benefit payments were certain.

Rather, the decision was based on the court's determination that the purported benefit assignments in question were void. In the case of the NFLSA benefits, the underlying settlement agreement expressly provided that any "assignment, or attempt to assign ... any rights or claims relating to the subject matter of the Class Action Complaint will be void, invalid, and of no force and effect." (Opinion at 20). As to the VCF benefits, the court pointed to three requirements under the federal Anti-Assignment Act, 31 U.S.C. § 3727, for the assignment of claims against the United States. It then observed that "neither party has argued that the RD Entities complied with the Anti-Assignment Act's three requirements under Section 3727(b)." (Opinion at 41). (The court did not address why the assignments to RD Legal Funding could not function as valid assignments of the *proceeds* of VCF benefits and why such assignments could not be enforced against the VCF beneficiaries.)

After concluding that the assignments before it were void, the court leaped to the conclusion that, as a result, the transactions were necessarily disguised loans. The basis for this conclusion was never articulated by the court.

Just because the underlying transactions are problematic does not mean that they meet the New York definition of usurious loans.

Remarkably, the decision never addressed the New York (or any other) definition of the term "loan." It ignored that, for over 150 years, New York courts have declared that "there can be no usury unless the principal sum advanced is repayable absolutely." *Pomeroy v. Ainsworth*, 22 Barb. 118 (1856). Even the NY AG has recognized this principle. In a February 2005 press release regarding litigation financing reforms, the Attorney General stated:

The cash advances provided by these firms are not considered "loans" under New York State law because there is no absolute obligation by a consumer to repay them. The contracts provide that, in the event the consumer receives no recovery from his or her claim, the consumer owes no money to the cash advance firm.

Maybe in the instant case, if it had confronted the issue, the court would have concluded that the assignments provided the requisite certainty of payment. In most other cases, however, this certainty will be lacking.

But even putting aside this glaring omission, it is clear that the decision applies to a narrow range of transactions, where the assignments of the underlying claims are void for some reason. That is not the case when the anticipated proceeds of lawsuit claims are sold on a non-recourse basis. *See Williams v. Ingersoll*, 89 N.Y. 508, 518-521 (1882). (binding authority in New York holding that the proceeds of personal injury claims may be assigned). Critically, "[i]f the assignments are valid … the entire basis of the Government's jurisdictional theory under the CFPA [that the transactions are loans' would fall apart." (Opinion at 19).

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