

## Ambac, Others Beat CFPB Suit Over Student Loan Trusts

By Hailey Konnath

*Law360 (March 26, 2021, 11:21 PM EDT)* -- A Delaware federal judge on Friday dismissed the Consumer Financial Protection Bureau's suit over the collections practices of a group of student loan trusts, agreeing with intervenor Ambac Assurance Corp.'s argument that the agency didn't have the authority to bring the action back when its structure was unconstitutional.

The CFPB claimed in its enforcement action that the trusts had filed thousands of collections lawsuits falsely claiming personal knowledge of account records and consumers' debts. On top of that, at least 2,000 collections lawsuits were filed without the documentation necessary to prove that the trust owned the debt, the agency alleged.

In their motion to dismiss, Ambac, Pennsylvania Higher Education Assistance Agency and Wilmington Trust Co. said that the CFPB director attempted to ratify the agency's decision to bring its enforcement action shortly after the U.S. Supreme Court found that its structure was illegal. But the ratification came more than three years after the initial complaint was filed in September 2017, meaning that the agency missed its window, they argued.

Ambac and the other entities were referring to the Supreme Court's **June 2020 decision** finding that the bureau's structure was unconstitutional. In that decision, the high court held that the CFPB's structure — which restricted the removal of a single, independent director — violated the separation of powers.

U.S. District Judge Maryellen Noreika agreed Friday, saying the court "cannot disregard the timeliness requirement for ratification."

She also rejected CFPB's request for equitable tolling, noting that the bureau "could not identify a single act that it took to preserve its rights in this case in anticipation of the constitutional challenges that could have reasonably ended with an unfavorable ruling from the Supreme Court."

"In other words, it is difficult to interpret the bureau's passivity in the face of the inevitable constitutional challenge as diligence," Judge Noreika said.

"Thus, on the current pleading, the court cannot find that equitable tolling applied to the statute of limitations for the purposes of ratification and as a result, the bureau did not, at the time of ratification, still have the authority to take the action to be ratified," she added.

The judge declined to weigh in on the entities' argument that the trusts aren't "covered persons" under consumer protection law because they are paper entities without management or employees.

"Although the court harbors some doubt that the trusts are 'covered persons' under the plain language of the statute, it does not agree that whether the trusts are 'covered persons' is a jurisdictional requirement," Judge Noreika said.

The CFPB has until April 26 to lodge an amended complaint.

According to Friday's order, the trusts were created between 2001 and 2007 to acquire private student loans, collect payments from borrowers and distribute gains to the holders of notes. The trusts don't have employees or internal management and instead use trust-related agreements for their operating structures.

The CFPB hit the trusts with the enforcement action in September 2017. The suit also claimed that the trusts' servicers had notarized more than 25,000 affidavits even though they didn't witness the actual signatures.

Alongside the complaint, the bureau lodged a proposed consent judgment, but the court rejected that motion, finding that a firm purporting to represent the trusts wasn't actually authorized to execute the proposed judgment. Consequently, the CFPB has had to litigate the case along a more typical route, the judge said Friday.

Counsel for the parties didn't immediately return requests for comment late Friday.

The CFPB is represented in-house by Gabriel S.H. Hopkins, Jane M.E. Peterson and Stephen C. Jacques.

Ambac is represented by Kurt M. Heyman and Melissa N. Donmirski of Heyman Enerio Gattuso & Hirzel LLP, and Erik W. Haas, Peter W. Tomlinson, Joshua Kipnees, George A. LoBiondo, Jared Buszin, Devon Hercher and Peter Shakro of Patterson Belknap Webb & Tyler LLP.

Pennsylvania Higher Education Assistance Agency is represented by Stacey A. Scrivani, Nicholas H. Pennington and Elizabeth A. Ware of Stevens & Lee PC.

Wilmington Trust Co. is represented by Stephen B. Brauerman, Jason C. Jowers and Elizabeth A. Powers of Bayard PA.

The case is Consumer Financial Protection Bureau v. National Collegiate Master Student Loan Trust et al., case number 1:17-cv-01323, in the U.S. District Court for the District of Delaware.

--Additional reporting by Jeff Montgomery. Editing by Breda Lund.