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Yes, the President's Words Do Matter, Even for Student Loan Litigation

BY JOSEPH CIOFFI

Maintaining a federal class action concerning consumer rights has been historically difficult when there is a pending, competing government action. The difficulty arises from the so-called "superiority" requirement, which requires federal class action litigants to demonstrate the superiority of a class action relative to other available means of adjudication.

This obstacle, however, may soon be easier to overcome if courts begin taking notice of the president's desire to dismantle the Consumer Financial Protection Bureau (CFPB) and to scale back regulations designed to protect consumers. Specifically, with regard to student loan borrowers, the president's campaign rhetoric and post-election plans may support a decision that a class action lawsuit is a more reliable and superior way to enforce borrower rights relative to a competing action by a weakened CFPB or an inherently weak successor agency.

Even before any of the Trump administration's proposals become law, in the CFPB's pending action against Navient, the nation's largest student loan servicer, Navient is seeking to have the case dismissed on the basis that the CFPB "is not permitted to bring an enforcement action for unfair, deceptive or abusive acts or practices . . . without first promulgating regulations defining *what* is unlawful."

If the court accepts Navient's position, the result could be a boon to plaintiffs seeking to maintain class actions against Navient. It appears Navient is poised to accept that consequence. However, beyond the issue of the CFPB's current authority, if the regulatory landscape changes in ways proposed by the new administration, ironically, Navient and other defendants will likely find they need to defend against similar and possibly stronger arguments by plaintiffs seeking to maintain class actions in the wake of weakened or compromised enforcement power of the CFPB or its potential successor.

President Trump certainly appears poised to follow through on his campaign promises of less regulation and reducing the CFPB's enforcement power. In fact, the continued existence of the CFPB is not at all certain given that the House Financial Services Committee recently approved the president's bid to replace what he called the "horrendous Dodd-Frank regulations." In its current form, the Financial CHOICE Act would rename the CFPB the "Consumer Law Enforcement Agency" and prohibit the agency from commencing any enforcement actions against financial institutions without congressional approval.

Further, the head of the agency could be removed "at will" by the president. Although passage of the Act by both houses of Congress may require some scaling back of these proposed "reforms," any final version could nevertheless preserve the original intent of stripping power from the agency and reducing its independence, thus creating more uncertainty as to whether government action is the preferred means of protecting student loan borrowers and consumers relative to class action lawsuits.

The president and his administration, in turn, at best have been sending mixed signals to the student loan industry. For example, Secretary of Education, Betsy DeVos, seemed to acknowledge the issue of high expense/low income prospects at certain vocational schools when she expressed support for the "gainful employment" rule, which makes for-profit schools' eligibility for federal student aid programs contingent on graduates earning sufficient income relative to their student loans.

DeVos's comments, however, are not easily squared with President Trump's recent unqualified support for for-profit vocational schools, several of which have been the target of CFPB actions for deceptive trade practices and predatory lending: speaking at Snap-on Tools in Kenosha, Wisconsin, the president stated: "we're bringing [vocational schools] back . . . vocational schools are going to be a big factor in the Trump administration."

Furthermore, while the president has trumpeted certain plans to assist student loan borrowers, such as, reducing the amount of time borrowers would have to pay under income-based repayment plans before their loans could be forgiven, DeVos and the Department of Education (DOE) have suggested or taken action that could exacerbate the student debt crisis. For example, DeVos recently reversed a rule preventing student loan guarantee agencies from collecting default interest from borrowers who enter into a repayment agreement within 60 days after receiving an agency's default notice.

Additionally, the DOE recently suggested that the government could renege on approval letters qualifying certain borrowers for debt forgiveness under the Public Service Loan Forgiveness (PSLF) program. Under the PSLF program, individuals who have worked in qualifying public service jobs for ten years, and who made regular payments on their federal student loans, can have the remainder of their loans forgiven. Consequently, many students who borrowed money for their education and chose public service employers in reliance on the PSLF program may find themselves in a position where they do not in fact qualify for loan forgiveness.

On balance then, if one considers the totality of statements and proposals from the president and the administration, the direction seems to be one of less, not more, regulatory protection for student loan borrowers. This could lead to courts applying more favorably the judicial standards that would allow class actions to proceed, permitting an alternative means of regulation through litigation.

Joe Cioffi is chair of the insolvency, creditors' rights and financial products practice group at the New York-based law firm Davis & Gilbert LLP.