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ICBA v. NCUA: case dismissed, for now

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As discussed in Nixon Peabody's December 2016 Commercial Litigation Alert, both the 2003 and 2016 NCUA rules that lifted restrictions on purchasing participations in non-member business loans were challenged by the Independent Community Bankers of America in the United States District Court for the Eastern District of Virginia. The ICBA argued that the NCUA acted "arbitrarily and capriciously and without reasoned decision making in promulgating both rules." Were the rules permitted to stand, argued the ICBA, community banks would be at a competitive disadvantage in the financial-services marketplace.

The ruling

On January 24, 2017, after full briefing and oral argument, the district court dismissed the case in its entirety. The court held that:

- The ICBA did not have standing to sue on behalf of its members since the allegations of competitive injury were too speculative to sustain the case.
- The action was barred by the statute of limitations. The court reasoned that since the essence of the complaint was a challenge to the NCUA's 2003 rule, and since any challenge to that rule was subject to a six-year statute of limitations, the ICBA filed its suit too late.
- Most importantly, the court held that the NCUA's promulgation of the rules was not arbitrary and capricious, but rather was based on a deliberative process entitled to substantial deference.

Implications

For now, both rules stand. The ICBA has until February 23 to perfect an appeal to the United States Court of Appeals for the Fourth Circuit. If the ICBA prosecutes an appeal, credit unions subject to the Federal Credit Union Act (FCU Act or Act) are relieved of having participations in non-member loans count against the caps set forth in Section 1757a of the Act while the appeal is pending. But they should be mindful of the appeal's outcome, which could alter the law.

In the meantime, credit unions' participation interests will be subject to due diligence and proper underwriting under the new rule and the fiduciary duties officers owe their institutions. This is particularly important since participants in such investments are not the primary underwriters but can be held responsible for the outcome of the loans and their participations as though they are.

For the NCUA, the decision sustaining its new rule bodes well for further attempts to ease restrictions on credit-union lending practices. This is consonant with the increased growth and sophistication of credit-union lending. The direction the NCUA takes in this area remains to be seen.

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