HINSHAW

Is CFPB’s Constitutionality Headed for the U.S. Supreme Court?

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At the close of a 108 page decision filed in response to motions to dismiss a CFPB enforcement action, *Consumer Financial Protection Bureau v. RD Legal Funding, LLC,* C.A. No. 17-cv-890, Judge Loretta Preska of the U.S. District for the Southern District of New York (within Second Circuit jurisdiction) granted the motions by concluding the CFPB’s structure was unconstitutional. This is significant because the D.C. Circuit had determined *en banc* earlier this year that the CFPB was constitutional in *PHH Corp. v. CFPB*.

The CFPB and the New York State Attorney General filed suit in February 2017 against RD Legal Funding LLC, a number of affiliate entities, and Roni Dersovitz, as founder and owner of the entities. Both the CFPB and New York Attorney General alleged that RD Legal offered advances to consumers entitled to payouts from victims’ compensation funds or lawsuit settlements, many of whom were first responders from the World Trade Center attacks on September 11, 2001, or football players with brain injuries. Both agencies claimed a number of deceptive and abusive acts or practices related to the offering of settlement advances.

In just six pages of the decision, Judge Preska acknowledged the D.C. Circuit’s *en banc* decision in *PHH Corp. v. CFPB*, which upheld Title X of Dodd-Frank, noted that the decision was not binding on the Court, and disagreed with the holding. Instead, Preska joined with a dissent written to the D.C. Circuit’s *PHH* decision concluding that the CFPB “is unconstitutionally structured because it is an independent agency that exercises substantial executive power and is headed by a single Director.” Moreover, Judge Preska refused constitutionality of structure based upon the CFPB’s recently filed Notice of Ratification finding that Ratification does not address accurately the constitutional issues raised in the case. As a result, Judge Preska dismissed the CFPB from a case that was jointly brought with the New York Attorney General.

What we know for certain: The New York Attorney General will continue to pursue the case and has independent authority over the Consumer Financial Protection Act. There’s even a likelihood the NY AG’s office is, albeit not openly, relieved not to have an unpredictable partner in a case that is apparently important to New York consumers.

We also know that in order for this decision to have any lasting significant import, the CFPB needs to appeal it, and the Second Circuit likely needs to agree with the district court that the CFPB's structure is unconstitutional to create a circuit split.

What we don't know for certain: Whether the Mulvaney CFPB considers it a victory alone to simply exit from another enforcement action that the defendant (and perhaps Mulvaney) believes oversteps the Bureau's authority; or, whether CFPB leadership now wants to use the opportunity to push for a structural change. The latter course would contradict briefs it filed in the PHH case supporting the constitutionality of its structure. Here, it would be doing the same. Absent political pressure from Republicans who are committed to seeing the CFPB change into a commission, we think it doubtful the Bureau will want to re-argue PHH in the Second Circuit.

So, is the constitutionality of the CFPB's structure headed to the U.S. Supreme Court? Just like almost everything related to the CFPB saga, no one really knows. But, odds are the answer is no based on the posture of this case.

Topics

New York, D.C. Circuit Court Of Appeals, Supreme Court Of The United States, CFPB, Second Circuit Court Of Appeals, Consumer Financial Protection Bureau