

Chapman Client Alert

February 22, 2017

Current Issues Relevant to Our Clients

D.C. Circuit Court of Appeals Breathes New Life into the CFPB

The U.S. Court of Appeals for the D.C. Circuit made headlines around the country following its decision in the *PHH Corporation et al. v. Consumer Financial Protection Bureau* case.¹ In that landmark decision, the Court of Appeals considered arguments about the Consumer Financial Protection Bureau's ("CFPB") enforcement action against PHH, which involved an alleged violation of the Real Estate Settlement Procedures Act ("RESPA"). During the litigation, PHH argued, among other things, that the CFPB was unconstitutional. After oral argument, the Court found that the CFPB's single-director, removable-only-for-cause structure was unconstitutional. However, the Court has now vacated that order, in its entirety and set the case to be heard again *en banc*.

After the Court's initial decision, the CFPB vowed to fight the ruling, explaining that it almost entirely disagreed with the Court's rationale and findings. On November 18, 2016, the CFPB petitioned the Court for a rehearing *en banc* before all the judges sitting on U.S. Court of Appeals for the D.C. Circuit.² In its Motion for Rehearing, the CFPB called the decision "unprecedented," and argued that the Court's take on the structure of the CFPB contravened both the history of independent agencies and legal authority.³

On February 16, 2017, after reviewing all briefing, including an amicus by the United States which was invited by the Court, the Court agreed to rehear the case *en banc*.⁴ While the Court did not otherwise limit the briefs, it directed the parties to address the following issues: "(1) Is the CFPB's structure as a single-Director independent agency consistent with Article II of the Constitution and, if not, is the proper remedy to sever the for-cause provision of the statute; (2) May the court appropriately avoid deciding that constitutional question given the panel's ruling on the statutory issues in this case; and (3) If the *en banc* court, which has today separately ordered *en banc* consideration of *Lucia v. SEC*, 832 F.3d 277 (D.C. Cir. 2016), concludes in that case that the administrative law judge who handled that case was an inferior officer rather than an employee, what is the appropriate disposition of this case?"

Interestingly, the Court will hear argument on the second question above: whether addressing the constitutionality of the CFPB's structure was necessary, in light of the long-standing

principle that if a case can be resolved on grounds that do not involve a determination of constitutionality, it should be so resolved.⁵

The Court's decision to allow rehearing *en banc* and to vacate its earlier ruling that the CFPB's structure was unconstitutional appears to be a positive development for the CFPB. It will be important to follow this next round of argument closely to see how the Court will decide the fate of the CFPB.

Briefing is scheduled to be completed on April 10, 2017, with oral argument before the *en banc* court to be heard on Wednesday, May 24, 2017.

For More Information

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1 More detail regarding that decision can be found in this previous Chapman Client Alert: "[Adverse CFPB Ruling By D.C. Circuit](#)" (October 19, 2016).

2 See Case No. 15-1177, ECF No. 1646917.

- 3 *Id.* at 1, 6.
- 4 Case No. 15-1177, ECF No. 1661681.
- 5 See *Greater New Orleans Broad. Ass'n v. United States*, 527 U.S. 173, 184 (1999); Case No. 15-1177.

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