

Oral Argument in PHH v. CFPB before Full D.C. Circuit Suggests Bureau Will Survive Constitutional Challenge

May 24, 2017 |

Earlier today, oral arguments were presented to the D.C. Circuit, sitting en banc, in the rehearing of *PHH Corporation v. CFPB* - a case challenging the constitutionality of the CFPB's single-Director, removal-for-cause-only structure. Questions from the bench suggest that this time around, the CFPB may survive the constitutional challenge.

The case stems from a \$109 million penalty levied by the CFPB against PHH for violations of the Real Estate Settlement Procedures Act (RESPA), but has morphed into an existential crisis for the Bureau. On October 11, 2016, the D.C. Circuit ruled that the CFPB's current structure was unconstitutional, but could be remedied by operating "as an executive agency akin to other executive agencies headed by a single person," removable at will by the President. On February 16, 2017, the D.C. Circuit granted the CFPB's petition for rehearing en banc and vacated its October 2016 decision.

The primary issue before the 11-member panel was whether the CFPB's structure as a single-Director independent agency is consistent with Article II of the Constitution (and, if not, whether the proper remedy is to sever the for-cause provision of the CFPB's enabling statute). The parties debated the contours of *Humphrey's Executor v. U.S.*, a 1935 dispute regarding the removal of an FTC Commissioner in which the Supreme Court established that a President can remove quasi-legislative or quasi-judicial officers for cause as described by the relevant statute. Such protections, the court believed, would insulate important independent agencies from undue political influence.

Attorneys for PHH and the Department of Justice (which had previously sided with the CFPB in the earlier phase of litigation under President Obama's administration) attempted to distinguish its case from *Humphrey's Executor* by focusing on how the CFPB is structurally distinct from other agencies, such as the FTC or the Federal Reserve Board, which have multi-member governing bodies. Counsel argued that the CFPB's single-Director structure, coupled with the political inability of a President to remove a Director "for cause" for any infraction shy of corruption, amounts to powerful, yet unchecked, CFPB Director.

These arguments did not appear to convince several judges, who failed to see how the CFPB's structural novelty amounted to an unconstitutional defect that diminished the President's power to enforce the law. Through a host of rhetorical questions demonstrating that PHH's concerns would remain even if the CFPB converted to a multi-member independent commission, the court suggested that the issues raised with the CFPB are essentially political, but not necessarily unconstitutional.

Even judges opposed to the CFPB's immense power asked questions that tended to support the

constitutionality of the CFPB's structure: Could policy differences between a CFPB Director and a President generate the "cause" needed for removal? Does a for-cause removal provision actually diminish the power of the President if the only practical recourse for a terminated Director is monetary damages?

Despite engaging in minimal discussion at argument on the underlying RESPA claims, the court could avoid answering the constitutional question altogether. Regardless of the outcome, we will continue to monitor this case and update you accordingly.

For questions, please contact Lucy Morris, lmorris@hudco.com, 202.327.9710.

Hudson Cook, LLP, provides articles, webinars and other content on its website from time to time provided both by attorneys with Hudson Cook, LLP, and by other outside authors, for information purposes only. Hudson Cook, LLP, does not warrant the accuracy or completeness of the content, and has no duty to correct or update information contained on its website. The views and opinions contained in the content provided on the Hudson Cook, LLP, website do not constitute the views and opinion of the firm. Such content does not constitute legal advice from such authors or from Hudson Cook, LLP. For legal advice on a matter, one should seek the advice of counsel.

SUBSCRIBE TO INSIGHTS

HUDSON COOK

Celebrating its 25th anniversary in 2022, Hudson Cook, LLP is a national law firm representing the financial services industry in compliance, privacy, litigation, regulatory and enforcement matters.

7037 Ridge Road, Suite 300, Hanover, Maryland 21076
410.684.3200

www.hudsoncook.com

© Hudson Cook, LLP. All rights reserved. Privacy Policy | Legal Notice
Attorney Advertising: Prior Results Do Not Guarantee a Similar Outcome

