

DC Circ. Could Punt On CFPB Constitutionality Question

By **Evan Weinberger**

Law360, New York (May 22, 2017, 3:43 PM EDT) -- The D.C. Circuit is set to hear arguments Wednesday in a case that could reshape the Consumer Financial Protection Bureau, but experts say the court could instead choose to answer a less fraught question about the bureau's interpretation of a fair lending law.

The full panel of D.C. Circuit judges will rehear a case challenging the CFPB's single-director leadership structure as unconstitutional after a split October ruling by a three-judge panel determined that the answer to that question was yes.

But the case also has a prong looking at the CFPB's interpretation of the Real Estate Settlement Procedures Act, which led to the \$109 million penalty the bureau leveled against mortgage servicer PHH Corp. and the current litigation over the CFPB's structure.

If the D.C. Circuit's en banc panel determines that the time is not ripe for answering whether the CFPB's organizational structure violates the Constitution's Separations of Powers clause, it could choose to take on the RESPA question.

Oral arguments could provide a clue about the court's direction, said Ori Lev, a partner at Mayer Brown LLP.

"If you're getting a lot of RESPA questions and not a lot of constitutional questions, or if you get a lot of questions about the court's need to reach the constitutional issue, that could indicate that they may not answer the constitutional question," Lev, a former deputy enforcement director at the CFPB, said.

Questions over the CFPB's constitutionality have dogged the bureau since its creation in the 2010 Dodd-Frank Act.

The legislation set the bureau up with a single director at its top that could only be fired for cause and gave it independent funding through the Federal Reserve rather than allowing Congress to set its budget.

Backers of the CFPB, including Sen. Elizabeth Warren, D-Mass., have said that that independence was necessary in order to prevent the bureau from being captured by industry and cowed by Republicans in Congress.

Industry critics and Republican lawmakers have decried the structure as unconstitutional and have vowed to change it.

Previous attempts to get courts to weigh in on the question have been fruitless, until a three-judge D.C. Circuit issued its blockbuster, 2-1 decision in the PHH case in October. That decision found that the CFPB's structure was unconstitutional and remedied that problem by giving the president the power to fire the CFPB director at will.

The CFPB asked for an en banc review of the case, with the support of the Obama administration, with that request being granted in February. As a result, the October decision was vacated.

Since then, the case has become more complicated, with the Justice Department under President Donald Trump and Attorney General Jeff Sessions turning on the CFPB and backing the October panel decision that declared the CFPB unconstitutional.

PHH for its part argued the October ruling did not go far enough, instead saying that the only way to cure the CFPB's constitutional problems is to eliminate the bureau entirely.

Those differences of opinion set up a complicated, three-way argument before the D.C. Circuit on Wednesday, with three different parties arguing for three different outcomes.

One thing they all want is for this question of the CFPB's constitutionality — which is pending in other courts across the country — to be settled.

"The parties disagree on much, but they agree on that one issue," said Joseph Palmore, the co-chair of Morrison & Foerster LLP's Appellate and Supreme Court practice.

Palmore, a former assistant solicitor general, was a co-author of an industry brief supporting PHH.

The parties might not get their wish, however.

Among the three questions that the court asked all parties to brief them on in its February order granting the full panel review is one that could allow the judges to escape deciding that key constitutional question.

"May the court appropriately avoid deciding that constitutional question given the panel's ruling on the statutory issues in this case?" question two of the order said.

The statutory question at issue is the CFPB's interpretation of RESPA in relation to alleged violations of mortgage reinsurance regulations, which differed from the way the U.S. Department of Housing and Urban Development interpreted the regulation when it had authority to oversee the law prior to the CFPB's doors opening.

CFPB Director Richard Cordray used that interpretation to bump up a \$6.5 million disgorgement order from an administrative law judge to \$109 million when PHH appealed the initial 2008 ruling.

If the full panel of judges elects to address that second question, or spends a great deal of time asking whether a decision on constitutionality is necessary at this point, the CFPB's constitutionality could be put off for another day.

“I think the threshold issue, if that gets the most attention, it will suggest that the court is likely to pull back rather than extend the ruling in PHH,” said Eric Mogilnicki, a partner at Covington & Burling LLP.

But with the question of the CFPB’s constitutionality looming in courts across the country and in the halls of Congress, the bureau, PHH and the Justice Department are likely to push the D.C. Circuit to take the tough question head on.

“All the parties will try to talk them out of that. This is an issue that’s not going to go away,” Palmore said.

Judges Brett M. Kavanaugh, A. Raymond Randolph and Karen LeCraft Henderson sat on the initial panel for the D.C. Circuit.

The CFPB is represented in-house by Mary McLeod, John R. Coleman, Steven Y. Bressler and Lawrence DeMille-Wagman.

PHH is represented by Theodore B. Olson, Helgi C. Walker and Lucas Townsend of Gibson Dunn, Mitchel H. Kider, David M. Souders, Sandra B. Vipond and Michael S. Trabon of Weiner Brodsky Kider PC, and Thomas M. Hefferon and William M. Jay of Goodwin Procter LLP.

The DOJ is represented in-house by Chad A. Reading, Douglas N. Letter, Mark B. Stern, Daniel Tenny and Tara S. Morrissey.

The case is PHH Corp. et al. v. Consumer Financial Protection Bureau, case number 15-1177, in the U.S. Court of Appeals for the District of Columbia Circuit.

--Editing by Rebecca Flanagan and Kelly Duncan.