

DC Circ. CFPB Decision Is A Big Win For Industry

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There was something for everyone in Jan. 31's long-awaited decision from the en banc D.C. Circuit in *PHH Corp. v. CFPB*. In the part of the decision that has garnered widespread attention, the D.C. Circuit held that the structure of the Consumer Financial Protection Bureau is constitutional. At the same time, however, the court reinstated an earlier panel decision that soundly rejected every statutory argument advanced by the CFPB in the underlying adjudication while also holding that the agency had violated constitutional fair-notice principles.

Separation of Powers. In a 7-3 vote, the en banc court held that the CFPB director's for-cause tenure protections did not unconstitutionally restrict the president's removal power, even in light of the CFPB's single-director structure. Rejecting the PHH panel's finding of a constitutional violation, the en banc court held that for-cause tenure protections were a "wholly ordinary" means of insulating independent agencies from political influence (which also left the president with ample oversight authority), and that such removal protections were especially appropriate for the CFPB director because the CFPB is a financial regulator — which traditionally calls for political independence — rather than an officer exercising "core" executive functions, like the secretary of state, for example. The en banc court also rejected the idea that the CFPB's structure is constitutionally suspect simply because it is headed by a single official rather than a multimember body, like the Federal Trade Commission, U.S. Securities and Exchange Commission and other independent agencies. In the court's view, that distinction was contrary to constitutional precedent and historical practice in part because the U.S. Supreme Court had already upheld the constitutionality of tenure protections for at least one other single-director independent agency (i.e., the independent counsel statute in *Morrison v. Olson*). And the court also found the single-member/multimember distinction untenable on the theory that the internal dynamics of an agency do not impact the president's ultimate duty to ensure that the laws are faithfully executed. If anything, the en banc court stated, an agency headed by a single person might be even more accountable to the president since it is easier to assign blame and replace one person than it is when many different officials are involved.



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RESPA & Fair Notice. A different part of the decision, however, will likely prove to be of greater day-to-day significance to the mortgage industry — and it was a big blow to the CFPB. First, the en banc court agreed that the CFPB’s \$109 million disgorgement penalty imposed on PHH rested on a misreading of Section 8(c) of the Real Estate Settlement Procedures Act of 1974 (RESPA). In particular, the en banc court reinstated the panel’s conclusion that Section 8(c) of RESPA was a real safe harbor that allows captive reinsurance arrangements in exchange for “bona fide payments” — i.e., payments reflecting the reasonable market value of the reinsurance. The now-reinstated panel decision also held that the CFPB was bound by RESPA’s three-year statute of limitations rather than the general five-year limitations period under 28 U.S.C. § 2462.

In addition, the en banc court reinstated the panel’s conclusion that imposing a \$109 million disgorgement penalty against PHH was inconsistent with fair notice principles because the government had never before found similar conduct to violate RESPA. Indeed, all members of the en banc court appeared to agree “that the Bureau ran afoul of the due process clause by failing to give PHH adequate notice in advance of imposing penalties for past conduct.” *Id.* (slip op. at 5) (Tatel, J., concurring); see *id.* (slip op. at 60) (maj. op.) (same); *id.* (slip op. at 43 n.13) (Kavanaugh, J., dissenting) (same); *id.* (slip op. at 1 n.1) (Griffith, J., concurring in the judgment) (concurring in everything but the majority’s reasons for finding a separation-of-powers violation).

Although they are easily overlooked amidst the understandable focus on the court’s separation-of-powers holding, the impact of the statutory and fair-notice rulings is significant. Former CFPB Director Richard Cordray’s imposition of a \$109 million penalty on PHH rested on a dramatically new reading of RESPA that was contrary to decades of regulatory guidance and thus deeply unsettling to players in the massive mortgage market. The PHH panel decision concluded that Cordray had misread RESPA and also violated due process fair-notice principles by penalizing PHH for past conduct that was affirmatively permitted under previous regulatory guidance. By reinstating that portion of the panel decision, the en banc D.C. Circuit has provided certainty for the mortgage industry on the meaning of RESPA. And by readopting the panel’s fair-notice holding, the D.C. Circuit has served notice on all agencies — not just the CFPB — that they cannot penalize conduct without providing clear notice that it is prohibited.

What’s Next for PHH and the CFPB?

The PHH case is not necessarily over. In addition to reinstating the panel’s statutory and due process rulings, the en banc court remanded the case to the CFPB for further proceedings. On remand, the CFPB could still attempt to impose some kind of penalty on PHH, but it would have to do so within the limits imposed by the D.C. Circuit’s reading of RESPA and the court’s articulation of fair-notice principles. But it is unknown whether the CFPB, now led by Trump-appointed Acting Director Mick Mulvaney, will proceed with the case.

Aside from agency proceedings, there is also the question of whether the parties will seek Supreme Court review of the issues on which they lost. PHH, for example, could file a certiorari petition to challenge the en banc court’s separation-of-powers ruling upholding the constitutionality of the CFPB’s structure. But given that PHH succeeded in vacating the \$109 million disgorgement penalty, it may instead choose to forgo further review in the Supreme Court and instead focus on remand proceedings (if the CFPB pursues them). The CFPB, for its part, could in theory seek review of the RESPA and fair-notice holdings on which it lost. But those matters (while significant for regulated entities) have not divided federal courts of appeals and do not otherwise seem worthy of Supreme Court review. And, in any event, it seems unlikely that the post-Cordray CFPB would have any interest in asking the Supreme Court to address those issues.

The U.S. Department of Justice filed an amicus brief with the en banc court arguing that the CFPB's structure is unconstitutional. (The department did not address the RESPA or fair-notice issues.) The en banc court rejected that position, but the department will likely look for ways to continue pressing it in order to ultimately secure Supreme Court review. It is not clear whether PHH will provide such an opportunity, however. If PHH does not seek review itself, DOJ's path to the Supreme Court in this case would be complicated by the fact that it was only an amicus, meaning that it would likely have to move to intervene and obtain party status. In addition, the Supreme Court might be reluctant to consider this issue in a case where the party most affected by it (PHH) was not seeking review.

Because arguments about the constitutionality of the CFPB are being advanced in many other cases, such as *CFPB v. Future Income Payments, LLC*, 252 F. Supp. 3d 961 (C.D. Cal. 2017), order stayed pending appeal by *CFPB v. Future Income Payments LLC*, No. 17-55721 (9th Cir. June 1, 2017), stronger candidates for Supreme Court review may emerge. Whether in PHH or one of those cases, it seems likely that the high court will ultimately have the last word on this important separation-of-powers question. No matter how that issue comes out, however, the D.C. Circuit's RESPA and fair-notice holdings will very likely stand — thus providing continued certainty to the mortgage industry.

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DISCLOSURE: *The authors of this article filed amici briefs on behalf of financial and other trade associations in support of PHH at the panel and en banc stages before the D.C. Circuit.*

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