

CFPB Constitutional Fight Faces Tough Supreme Court Path

By **Evan Weinberger**

Law360, Washington (January 31, 2018, 9:05 PM EST) -- Although mortgage servicer PHH Corp. lost its constitutional challenge to the Consumer Financial Protection Bureau's structure on Wednesday at the D.C. Circuit, the path forward for any appeal to the U.S. Supreme Court remains extremely complicated, experts say.

The D.C. Circuit ruled 7-3 that the CFPB's single-director structure, which only allows the president to fire the director for cause rather than at will, is not a violation of the president's powers under Article II of the Constitution, despite PHH's challenge of the structure.

While the loss on that constitutional question could form the basis of an appeal to the Supreme Court, PHH also managed to overturn a \$109 million judgment the bureau's former director, Richard Cordray, slapped on the mortgage servicer. Add to that the government's support for PHH's constitutional challenge, and the picture of how this case moves forward is at best fuzzy.

"The path is not superclear. At the end of the day, PHH is the prevailing party," said Christopher Walker, a professor at the Ohio State University Moritz College of Law.

Wednesday's decision by an en banc D.C. Circuit panel overturned an October 2016 decision that found the CFPB's structure was unconstitutional. The remedy from that earlier decision, put forward by U.S. Circuit Judge Brett M. Kavanaugh, was to give the president the power to fire the CFPB director at will rather than for cause.

The CFPB, under Cordray and with the support of the Obama administration, sought an en banc review and on Wednesday won. That victory happened even after the Trump administration reversed course and supported PHH.

Existing precedent both at the D.C. Circuit and the Supreme Court found that the leader of an independent financial regulator can be protected from the president's desire to put new leadership in place, the majority ruled.

"The mild constraint on removal of the CFPB director contrasts with the cumbersome or encroaching removal restrictions that the Supreme Court has invalidated as depriving the president of his Article II authority or otherwise upsetting the separation of powers," U.S. Circuit Judge Cornelia T.L. Pillard wrote for the majority.

The D.C. Circuit's en banc panel ruled in PHH's favor on the question of whether the CFPB had ruled correctly on potential violations of anti-kickback requirements of the Real Estate Settlement Procedures Act.

That question was remanded back to the CFPB under Wednesday's ruling.

Given that state of affairs, what happens next is unclear.

PHH has not yet indicated whether it has any intention of bringing its constitutional challenge to the Supreme Court.

Instead, the Mount Laurel, New Jersey-based company said it was pleased that the \$109 million RESPA penalty was eliminated and that it would have a chance to make its case before the CFPB again.

A spokesman for PHH said that the company was still considering its options.

Having the CFPB under its disputed acting director, Office of Management and Budget Director Mick Mulvaney, may be appealing enough that PHH could elect to take its win and move along.

Many believe Mulvaney — an opponent of the CFPB during his time in Congress who recently sent a memo to the bureau's staff that the days of "pushing the envelope" on enforcement actions was over — would either significantly lower the penalty or eliminate it altogether.

"It's hard for me not to see this as a victory for them," said Covington & Burling LLP partner Eric Mogilnicki.

But there is pressure from some conservatives for PHH to continue its case at the Supreme Court.

House Financial Services Committee Chairman Jeb Hensarling, R-Texas, a Mulvaney ally, said in a statement that he was disappointed in the D.C. Circuit's ruling, adding that he hoped the Supreme Court would take up the case in short order.

"The bureau's consumer protection mission is important, but no government agency — no matter how well-intentioned — should be able to evade common-sense checks and balances that are necessary for accountability," he said.

That pressure could mount, and if PHH's counsel, Gibson Dunn & Crutcher LLP's Theodore Olson, would be willing to take on the case at minimal or no cost, the company could continue its fight, Walker said.

Even if PHH decides to take the case to the Supreme Court, the Supreme Court may not decide to take the case.

Many of the conditions that usually exist when the Supreme Court takes up a case do not exist in the PHH v. CFPB litigation, said Brianne Gorod, the chief counsel at the Constitutional Accountability Center.

Currently, there is no circuit split on the CFPB's constitutionality, and with PHH winning on the RESPA case, it's not clear that the Supreme Court would find that there is a harm that needs to be addressed.

"It's not at all clear that the Supreme Court would decide to weigh in on this," Gorod said.

Other challenges to the CFPB's constitutionality are still pending in other courts, so the Supreme Court may simply decide now is not the right time.

"Waiting should always be considered an option. [The Supreme Court] can wait until a case where the real-life facts matter more to open up this particular can of worms," said Brian Knight, the director of the Mercatus Center's program on financial regulation.

The other potential question hanging over the PHH decision is whether the Trump administration would even want to have the CFPB's constitutionality reviewed by the Supreme Court given the change in leadership in November.

With Mulvaney in charge of the CFPB, at least while the D.C. Circuit considers separate litigation challenging his appointment by President Donald Trump, the bureau is doing exactly what the administration wants.

And with the for-cause protection in place for any Senate-confirmed director, a Trump-appointed CFPB director would be able to stay in place for five years after confirmation without fear of being fired unless there was a valid problem with their work.

That could prevent a Democratic president from putting his or her choice atop the CFPB for years, Mogilnicki said.

Additionally, it may be difficult for the Trump administration to come up with a vehicle for an appeal, Walker added.

The administration or the CFPB could potentially challenge the D.C. Circuit's reading of RESPA, potentially opening up a cross-appeal for PHH. But the government would have to truly believe that the CFPB could take an aggressive RESPA stance; if it didn't, the petition for certiorari would be in bad faith. And a win could have an outcome that the government doesn't want, Walker said.

"To rule the other way on the RESPA issue would really, really expand the CFPB's power in a way that this administration would not be too excited about," he said.

Consumer advocates were in general pleased with the D.C. Circuit's ruling, in part due to the difficulty of the case making it to the Supreme Court. And they were resigned to the bureau's fate under a Republican presidency.

Preserving the CFPB's independence was more important, said Dennis Kelleher, the president and CEO of Better Markets.

"That's the law, and those were the foreseeable consequences. They will not be able to kill the CFPB," he said.

--Editing by Philip Shea and Katherine Rautenberg.