

D.C. Circuit Grants Rehearing En Banc in PHH v. CFPB

Thursday, February 16, 2017

The D.C. Circuit today granted rehearing *en banc* in *PHH Corp., et al. v. Consumer Financial Protection Bureau* (“PHH”), vacating the prior order that, among other things, found the Consumer Financial Protection Bureau’s (“CFPB”) structure unconstitutional. The court directed the parties to brief a set of questions related to: the constitutionality of the Bureau’s structure; whether the court could resolve the case solely on statutory grounds; and whether another case, involving the status of Administrative Law Judges (“ALJs”), should affect the outcome here. Oral argument is set for May 24. Briefs for PHH (and any *amici curiae* in support of PHH) are due March 10. Briefs for the CFPB (and any *amici curiae* in support of the CFPB) are due March 31.

A three judge panel of the D.C. Circuit in October ruled in favor of PHH, a mortgage lender, and overturned a \$109 million judgment. Most prominently, the court concluded that the combination of a single-Director structure and a limitation on Presidential authority to terminate the Director was unconstitutional under Article II of the U.S. Constitution. The court also found for PHH on issues related to the interpretation of the Real Estate Settlement Procedures Act (“RESPA”), the retroactive application of new interpretations of RESPA, and the statute of limitations for administrative proceedings brought by the CFPB.

The grant of rehearing *en banc* directed the parties to focus on three questions in their briefing:

1. Is the CFPB’s structure as a single-Director independent agency constitutional? 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 RESPA questions?
3. What is the appropriate disposition of this case if the court decides, in another case currently under reconsideration, that ALJs must be appointed in a process consistent with the Appointments Clause of the Constitution?

Notably, while the court did state that the parties are not limited to these questions, none of the questions concern the statutory issues decided by the three judge panel. This suggests that the court will focus on the relevant constitutional issues.

The third question provides a new wrinkle that has gotten less focus in the *PHH* litigation. The court today separately granted rehearing *en banc* in *Lucia v. SEC*, 832 F.3d 277 (D.C. Cir. 2016), a case that addresses the constitutionality of the SEC’s method of appointing ALJs. If the *en banc* panel were to decide that such ALJs were improperly appointed, it could also conclude that the ALJ who originally heard the PHH matter (on loan to the Bureau from the SEC), was not properly appointed. In that case, the PHH litigation could be sent back to the CFPB to restart proceedings.

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