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## Three Things You Missed Since CFPB Received En Banc Hearing in PHH Case

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All eyes are on the future of the CFPB as it fights for its existence in the D.C. Circuit Court of Appeals through the matter, *PHH Corp. et al. v. Consumer Financial Protection Bureau*. On February 16, the D.C. Circuit agreed to an en banc review of its October decision that found the CFPB's single-director structure violated the Constitution's separation of powers doctrine. The October opinion also importantly:

- Severed the unconstitutional provision to make the CFPB Director removable without cause by the President;
- Held that the CFPB's attempt to apply a new interpretation of RESPA retroactively, violated due process;
- Held that the statutes of limitations apply to CFPB administrative enforcement actions; and,
- Remanded the case to the CFPB for further proceedings.

Since last month, there have been 3 major moves in the litigation:

### 1. PHH submitted its opening En Banc Brief

On Friday March 10, PHH submitted its opening en banc brief arguing that the constitutional issues are too pervasive to justify the CFPB's existence and that the appropriate remedy should be to "strike down the agency in its entirety." Specifically, PHH argues that the for-cause removal provision of the director is not severable from the rest of the provisions because it would render an agency that is too far afield from what Congress envisioned when passing Dodd-Frank. It further contends that the court cannot remand the case back to the CFPB because to do so would be to remand it "to an unconstitutional agency." Instead, it asks for vacation without remand.

With regard to the RESPA issues, PHH argues that there is no "legitimate basis to revisit the panel's statutory rulings" and urges the court to consider the impact of creating a circuit split with other courts that have already decided the proper scope of RESPA.

Seven amicus briefs were filed in support of PHH by: The Chamber of Commerce of the United States of America; the American Bankers Association and related trade groups; ACA International; The Cato Institute; RD Legal Partners and related entities; 15 Republican state attorneys general; and, State National Bank of Big Spring and related entities.

## **2. Court Rejected Renewed Motions to Intervene by Interested Parties**

On Tuesday March 7, the court rejected motions from 17 Democratic state attorneys general, 2 democratic lawmakers as well as a coalition of consumer advocates to reconsider the court's earlier denial of the group's motions to intervene in the case.

The democratic lawmakers and attorneys general argued that the constitutionality of the CFPB is central to the state attorneys general ability to enforce Dodd-Frank and act as a law enforcement partner.

At the same time, the court blocked intervention by groups affiliated with the State National Bank of Big Spring, Texas, a small bank that had previously and unsuccessfully challenged the CFPB's constitutionality, to intervene in the litigation.

Note that State National Bank filed an amicus in support of PHH, and one might expect the same from the state attorneys general and consumer advocacy groups when the CFPB files its response.

## **3. New White House – through Solicitor General – Moves to Extend Deadline to file Amicus, Likely in Support of PHH.**

On Tuesday March 7, the United States' filed an unopposed motion requesting an extension to file an amicus brief until Friday March 17. The timing and language of the motion suggests that the amicus will be in support of PHH.

The court previously invited the Solicitor General to opine on the case late last year when the decision regarding an en banc hearing was pending. The Obama-led administration supported CFPB's position.

Just a couple of months later, the new Trump administration suggested a different perspective for the United States in its motion stating, “the views of the United States on matters involving the President’s removal power are not always entirely congruent with the views of independent agencies.”

We should expect to see a brief filed by the United States in the coming days.