



PHH – The Case that Keeps on Giving*

Bob Barnett

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The oral argument in the PHH case before the *en banc* court of the D.C. Circuit Court of Appeals has concluded.¹ Observers have reached different conclusions about the signals the members gave, but most feel that the chances are good that the court will conclude that the statute appointing the director and allowing for his termination did not violate the Constitution. But we will see for certain when the court issues its decision, probably toward the end of this year.

In the meantime, the case continues to create possibilities that long to be discussed. Here are just a few:

The non-constitutional decisions

The Court seemed to be interested only in the constitutional issues, leaving a discussion of the other issues in the case to a couple of vey late comments by one or two judges. Nothing said suggests that the opinion of the three judge panel on those issues will be modified by the *en banc* court. So if that is the case, the question then becomes – what does the Director do on these issues when he gets a mandate from the *en banc* court, assuming it says something like proceed in accordance with its opinion. The Director has shown legal creativity to arrive at some of the decisions he reached, and there is no reason to think that he has lost that ability during the intervening number of months. So just what revised opinion might be issued by the Director cannot be said to be totally clear. The mandate, of course, could be more direct and eliminate room for creativity.

Will there be an appeal to SCOTUS?

The accepted belief is that the losing party will appeal to the Supreme Court. But if the Bureau loses on the RESPA and statute of limitations issues, but wins on the constitutional point, will it want to appeal? At this point, it considers the opinion in this case to be binding only in the DC

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¹See [*Austin Harrison and Katie Wechsler's article*](#) in this issue of *Our Perspectives* for a review of that hearing.

Circuit, and feels emboldened to proceed elsewhere under the reasoning the Director applied in his opinion. Appealing to the SCOTUS might jeopardize that; living with the D.C. Circuit limitation in that circuit may be more reasonable. If it loses on the constitutional issue, it most likely will want to appeal the case.

PHH may also be presented with an interesting question. If it wins on RESPA and statute of limitations issues (pending, of course, any new ruling the Bureau might make while trying to stay within the mandate of the Court), it will have won on the biggest money issues in the case, and it would be difficult to see the Bureau reaching the money award that the Director reached in any new order issued. If for some reason PHH loses on the non-constitutional issues, of course it will appeal. If PHH loses only on the constitutional point, it may want to consider whether an appeal on that point is worth it.

Will the parties settle the case?

In many respects, this seems to be a case that could be settled, especially if the Bureau wins on the constitutional issue. By settling, the Bureau could avoid the risk of having the RESPA and statute of limitations decisions be national in scope and probably still come away with some “victory” even though it might be at a lower dollar amount. PHH could avoid what risk there might be in SCOTUS supporting the Director on some of the RESPA and statute of limitations issues, and, at the end of the day, it probably doesn’t care all that much about the Director’s constitutional issue other than how it could be used to leverage its negotiation position.

What about the Administrative law judge part of the decision?

At this point, most have assumed that the argument that the ALJ was an inferior officer has been disposed of, and that might well be the case. But there is always a chance that the SCOTUS will want to look at that issue carefully since disposing of the case via use of that argument might appeal – it leaves open the more difficult questions for another day and for various appellate courts to opine.

Nice procedural issues

If CFPB wants to appeal or if any appeal is granted, regardless of who seeks it, CFPB may represent itself before the Supreme Court, provided the CFPB makes a written request to the Attorney General within 10 days of the decision of the D.C. Circuit and the Attorney General concurs with such request or fails to take action within 60 days of the request. AGs generally delegate this authority to the Solicitor General. We cannot predict how the SG might proceed, but this is not the same administration that existed when the Bureau brought the proceeding. It might not be inclined to support CFPB before SCOTUS, especially if one of the issues before SCOTUS is the constitutionality of the agency’s leadership structure, as DOJ filed an amicus brief and argued against CFPB’s position on that issue.

What if the Director resigns for any of a number of reasons or none at all? The statute probably contemplates the Acting Director being the individual currently serving as Deputy Director, but could the President appoint an Acting Director, notwithstanding the statutory language? At the present time, incidentally, the Deputy is only an Acting Deputy for what that is worth.

The newly appointed Director could drop the appeal and the case would remain as determined

by the *en banc* court. The Director also might consider dropping the entire case against PHH. However, if the *en banc* court finds for PHH on all of the RESPA and statute of limitations claims, the new Director might want that carved in stone with a Supreme Court ruling to that effect so might consider an appeal to do just that. That would put the SCOTUS in a strange position of having both parties arguing for the same result with respect to a large part of the case. If they then also argued for the same result on the constitutional question, a question would be raised -- would SCOTUS even hear that case or might it appoint a special counsel to argue the previous position of the CFPB.

Will this finally be determined before the term of the present Director ends?

Director Cordray's term ends in July 2018. If the *en banc* decision does not come down before the fourth quarter of 2017, seeking cert, getting it, briefing the case, arguing it, and then waiting for the Court decision could easily extend beyond July of 2018, and after Cordray's term ends, the President could immediately appoint an Acting Director of CFPB. That person would be faced with a variety of options with respect to this case, and not much time to make them. If the opinion of the Court has not been publicly read or the decision otherwise publicly published, the opinion still has not been made. That would be a fascinating development for this unusual case.

*Bob Barnett is a partner with the law firm of **Barnett Sivon & Natter, P.C.***