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BREAKING: High Court Will Hear Challenge To CFPB Funding

By **Jon Hill**

Law360 (February 27, 2023, 10:08 AM EST) -- The U.S. Supreme Court said Monday that it would review a federal appellate decision holding that the Consumer Financial Protection Bureau was unconstitutionally funded, taking up a case that could determine the fate of the consumer watchdog and its budgetary independence.

In an order list, the Supreme Court said it had agreed to hear the agency's appeal of the Fifth Circuit's decision, which a panel **handed down last fall** in a major win for two trade groups that had sued to block a CFPB rule on payday lending.

The decision invalidated the rule based on the CFPB's independent funding structure, holding that it unconstitutionally insulates the agency from congressional oversight. Because the CFPB has always had this funding structure, the decision is also widely seen as casting doubt on the validity of everything else the agency has ever done.

Citing such stakes, the Biden administration has been pushing for the justices to **weigh in as soon as possible** to overturn what the agency has called the Fifth Circuit's "unprecedented and erroneous" reasoning.

The trade groups on the other side — the Community Financial Services Association of America and the Consumer Service Alliance of Texas — instead urged the justices to either take a **pass on the case** or else hear a more expansive appeal that would examine other grounds for scrapping the CFPB payday rule.

Monday's order list indicated that the justices have opted to grant only the Biden administration's petition, but without an expedited timetable. That would tee up the case for next term.

As is customary, the order list did not specify which justices voted to take the case, nor did it explain their reasons for doing so.

The Fifth Circuit's decision endorsed what had previously been a largely unsuccessful line of attack on the CFPB — namely, that its statutory authority to fund itself outside the congressional appropriations process infringes on the Constitution's separation of powers.

The Dodd-Frank Act, which created the CFPB in 2010, spared the agency's budget from reliance on annual spending bills by allowing it to draw funding directly from the Federal Reserve System up to a certain cap, which is set at around \$750 million for the current fiscal year.

The CFPB has argued that this arrangement is effectively a "standing, capped lump-sum appropriation" and isn't that different from the way Congress has funded other agencies.

But in a unanimous October opinion, a three-judge panel of the Fifth Circuit described the CFPB's open-ended funding mechanism as "unique" among regulators and held that it is at odds with the Constitution's appropriations clause, which assigns the "power of the purse" exclusively to Congress.

The panel went on to conclude that the CFPB used its "unappropriated" funding to promulgate the payday loan rule at the center of the trade groups' lawsuit, so the rule needed to be set aside as "the product of the bureau's unconstitutional funding scheme."

In the aftermath, the ruling has come under heavy criticism from consumer advocates, who have argued that its reasoning is internally inconsistent and glosses over important factual nuances about how the CFPB's funding mechanism works.

The CFPB has also defended its funding as consistent with the appropriations clause. That provision only requires that Congress authorize all government spending by statute, and that's what lawmakers did for the CFPB's funding when they passed Dodd-Frank, the agency has said.

In petitioning the Supreme Court for an appeal, the Biden administration additionally warned that the Fifth Circuit's logic could derail the CFPB's enforcement work and endanger more than a decade of rulemaking, guidance and other regulatory activities by the agency.

"That threat raises grave concerns not just for the CFPB and consumers, but for the entire financial industry," the administration said.

Since the Fifth Circuit ruled, new CFPB enforcement actions haven't disappeared altogether, but several of the agency's court cases have been put on hold. In other cases, meanwhile, the agency has had to deal with a flurry of attempts by litigants to invoke the ruling as grounds for judgments in their favor.

Concerns about regulatory uncertainty have also been raised by several dozen Democratic and Republican **state attorneys general**, who achieved a rare moment of bipartisan consensus late last year in lobbying the Supreme Court to take up the Biden administration's appeal.

That consensus did not extend to the critical question of whether the CFPB's funding structure was constitutional, but the state officials from both parties stressed the potential for "chaos" if a definitive answer was not forthcoming.

Given the high perceived stakes, many legal observers have expected that the Supreme Court would agree to weigh in. But having emerged victorious at the Fifth Circuit, the trade groups that challenged the CFPB urged the high court to sit this one out.

The trade groups contend that even if the justices wanted to intervene, they might not actually get to rule on the CFPB's funding structure. That's because the Fifth Circuit's decision raises other key questions that the justices would need to "consider and reject" first, the groups said.

Those questions relate to additional legal arguments that the groups have made against the payday loan rule at the heart of their lawsuit, which dates back to 2018. The Fifth Circuit shot down these arguments in its October opinion, saying only that the groups' funding challenge "found its target."

But if there is to be any appeal of that decision, the trade groups said, the justices should at least broaden its scope to include a second look at the rule's other purported flaws.

"Given constitutional-avoidance principles and the strength of the alternative grounds on their own terms, the court should have before it the proper range of options to resolve the actual controversy between the parties over the rule's validity," the groups told the high court last month.

Their petition was denied in Monday's order list.

The announcement sets up what could be the second time that the Supreme Court rules on the constitutionality of the CFPB's design, an issue that has been the focus of persistent debate and litigation over the years.

Under the Dodd-Frank Act, the sweeping financial reform law passed by a Democrat-controlled Congress, the CFPB was created to be a strong, independent regulator that could crack down on predatory lending practices and root out other forms of consumer harm in the financial marketplace.

The architects of the CFPB sought to safeguard its independence in multiple ways, including by giving for-cause tenure protection to the director of the agency — its presidentially appointed top official — and excusing the agency from having to rely on annual spending bills for its budget.

But Republicans and industry critics have argued that the CFPB's design left it untethered from the kind of checks and balances needed to ensure appropriate accountability for such a powerful regulator — in other words, the agency was made too independent.

The Supreme Court has already modified this design once with its **2020 decision** in *Seila Law v. CFPB* . In that case, the justices ruled 5-4 that the CFPB director's statutory tenure protection was an unconstitutional limit on presidential power and struck it down.

The decision did not undo any past CFPB actions, but it did pave the way for the Biden administration to install the agency's current director, Rohit Chopra, the next year.

The CFPB is represented at the Supreme Court by its own Seth Frotman, Steven Y. Bressler, Kristin Bateman, Christopher Deal, Kevin E. Friedl and Justin M. Sandberg, and by Solicitor General Elizabeth B. Prelogar and Brian H. Fletcher and Ephraim A. McDowell of the Department of Justice's Office of the Solicitor General.

The trade groups are represented by Noel J. Francisco, Christian G. Vergonis, Hashim M. Mooppan, Yaakov M. Roth and Brinton Lucas of Jones Day.

The case is Consumer Financial Protection Bureau et al. vs. Consumer Financial Services Association of America Ltd. et al., case number 22-448, at the Supreme Court of the United States.

--Editing by Karin Roberts.

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