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As widely reported, on October 19, 2022, the US Court of Appeals for the Fifth Circuit struck down a Consumer Financial Protection Bureau rulemaking on the grounds that the mechanism for funding the CFPB's operations is an unconstitutional violation of the appropriations clause of the US Constitution. On November 14, the CFPB decided to skip review by the full panel of the Fifth Circuit and take this critical question right to the US Supreme Court, asking it to set the case for argument **this term**, given the significant legal and practical consequences of the outcome for the entire financial services industry.

Fifth Circuit struck down rulemaking on constitutional, rather than procedural, grounds

In *Community Financial Services Association of America v. Consumer Financial Protection Bureau*, a trade association asked the Fifth Circuit to strike down the bureau's 2017 payday lending rule because, it argued, the CFPB acted arbitrarily and capriciously, and therefore exceeded its statutory authority when it promulgated the rule, and the CFPB's funding mechanism – drawing funds from the Federal Reserve's operating expenses rather than directly through the appropriations process – was unconstitutional. As to the first question, the Fifth Circuit found that the CFPB had appropriately exercised its authority to declare certain practices "unfair," finding that the bureau properly studied the issue in question, considered comments made during the rulemaking process, and had a reasonable basis to conclude that a particular act was "unfair." However, the Fifth Circuit's determination that the CFPB's rulemaking process was appropriate was rendered moot by its determination that the CFPB's funding mechanism was unconstitutional.

CFPB argues to Supreme Court that funding mechanism is constitutional – and warns of collateral damage in ruling to the contrary

In its petition to the Supreme Court, the CFPB claims the Fifth Circuit's ruling is based on an unprecedented and erroneous understanding of the Constitution's appropriations clause and warns that a ruling to the contrary will call into question almost every CFPB action taken since it was created. The CFPB's brief then marches through the history of the congressional appropriations process, and notes that a host of federal entities are funded through permanent appropriations, rather than an annual congressional authorization process. The CFPB also notes that other financial services regulators derive funding from sources outside of congressional appropriations, such as the Office of the Comptroller of the Currency and the Federal Reserve Board. Finally, the bureau notes that, even if the funding mechanism is constitutional, the Fifth Circuit failed to conduct an appropriate severability analysis, which would have more appropriately preserved the CFPB's ability to continue its functions despite the constitutional issues with the funding mechanism.

What's next?

Only time will tell if the Supreme Court decides to pick up the case this term and how it will resolve this critical issue. In the absence of legal clarity, the CFPB has nevertheless shown no signs of withdrawing from regulatory, supervisory or enforcement activity in the aftermath of the Fifth Circuit's decision. Indeed, the bureau has since the Fifth Circuit's ruling promulgated new rules, continued conducting examinations and even settled a pending lawsuit.

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