Consumer Finance Monitor (Season 6, Episode 44): The U.S. Supreme Court's Decision in Community Financial Services Association of America Ltd. v. Consumer Financial Protection Bureau: Who Will Win and What Does It Mean? Part II

Speakers: Alan Kaplinsky, Michael Williams, Adam Levitin, Scott Nelson, Jeffrey Naimon, Joshua Katz, and John Masslon

Alan Kaplinsky:

Welcome to the award-winning Consumer Finance Monitor Podcast where we explore important new developments in the world of consumer financial services and what they mean for your business, your customers and the industry. This is a weekly show brought to you by the Consumer Financial Services Group at the Ballard Spahr Law Firm, and I'm your host, Alan Kalpinsky, the former practice group leader for 25 years, and now Senior Council of the Consumer Financial Services Group at Ballard Spahr, and I will be moderating today's program. For those of you who want even more information, don't forget about our blog, consumerfinancemonitor.com. It goes by the same name as our podcast show. We've hosted our blog since July 21st, 2011 when the CFPB became operational. So there's a lot of relevant industry content on our blog. We also regularly host webinars on subjects of interest to those in the industry.

So to subscribe to our blog or to get on the list for our webinars, please visit us at ballardspahr.com. And if you like our podcast show, please let us know about it. Leave us a review on Apple Podcast, Google, or whatever platform you use to access your podcast shows. Also, please let us know if you have ideas for other topics that we should consider covering or speakers that we should consider as guests on our show.

Today is part two of our two-part series, which is based on a webinar round table we conducted on October 17th called the US Supreme Court's Decision in CFSA versus CFPB. Who will win and what does it all mean? Our webinar round table brings, today, together six very distinguished attorneys who filed amicus briefs with the Supreme Court. Three of the briefs supported the CFPB. Two, supported the CFSA, and one industry brief, supported neither party, but took a very clear position on what the remedy ought to be.

So let me now introduce our speakers. First of all, want to introduce Joshua Katz. Joshua is a research fellow at the Cato Institutes, Robert A. Levy's Center for Constitutional Studies. At Cato, he's worked on a full range of constitutional issues and is very, extremely well-versed on the appropriations clause.

Next, want to introduce a good old friend of mine, not that he's old, but I've known him for a long time, namely Adam Leviton. Adam is the Carmack Waterhouse Professor of Law and Finance at Georgetown University Law Center, and together with Professor Patricia McCoy of Boston College Law School, my alma mater by the way, Adam, he filed an amicus brief in support of the CFPB on behalf of a large group of financial institution scholars.

Next up, John Maslin. John is Senior Litigation Counsel of the Washington Legal Foundation. His practice focuses on drafting amicus briefs in important cases around the country. Last term, Washington Legal Foundation was recognized as having the most successful and efficient cert-stage amicus practice in the country, and he has filed an amicus brief in support of CFSA on behalf of the Washington Legal Foundation.

Next up, Jeffrey Naman. Jeff, he's a partner in OREX DC office, a financial services lawyer who represents mortgage industry participants of all varieties with regulatory vice examination support and enforcement defense on statutes, regs, interpretations, governing mortgage lending with respect to the CFPB and other state and federal regulators who oversee the consumer finance industry. He's filed an amicus brief in this case on behalf of the Mortgage Bankers Association, the National

Association of Home Builders, National Association of Realtors. And in their brief, they took no position on the merits of the constitutional issue, but with respect to the remedy, if the court gets to the remedy issue, they urge the Supreme Court not to invalidate any of the mortgage banking regs of the CFPB.

Next up is another old friend of mine, known for years, and that's Scott Nelson. He's an attorney with Public Citizen Litigation Group in Washington DC where he has a pro bono public interest practice including consumer law, first amendment issues, class actions, and I could go on and on. He has argued five cases in front of the US Supreme Court during his career, and in this particular case, he has filed an amicus brief on behalf of 10 consumer advocacy groups.

And last and certainly not least, Mike Williams. Mike is the principal Deputy Solicitor General for the state of West Virginia. And there he handles appellate litigation other high impact matters, including the state's briefing in support of CFSA on behalf of more than two dozen states that have Republican Attorneys General. So what I want to do now is go around the horn very quickly. Well, I think we've already heard from you, Jeff, you've said seven to two, CFPB wins. I think, and again, I'm not speaking on behalf of any clients or my law firm, I'm just basing it on the oral argument. I think CFPB wins by a much, well, a slimmer margin, either five-four or six-three. And what do you think, Scott?

Scott Nelson:

I'm with Jeff. Seven-two, eight-one, or nine-zero for the CFPB.

Alan Kaplinsky:

How about you, Mike?

Michael Williams:

Emphasizing that this is not a vote for the states. I guess I would say it's likely going to be a seven-two or worse outcome from our perspective. For me, the interesting question is Justice Thomas, his questions felt to me like someone who really wanted to cast the vote for CFSA, and I also understand that he's never been someone who felt constrained by the inadequacies of a party's argument. If he goes back to chambers and finds a creative solution, he will have no hesitation in employing it. So I could see kind of an unexpected opinion from Justice Thomas, but even then some of the comments that Justice Alito was even arguing, about whether these historical distinctions and sort of unprecedented nature of power, whether that really makes a material constitutional difference, have me questioning whether even he's a vote. So I'll just sort of vaguely say we're going to get two and then call it a day.

Alan Kaplinsky:

Okay. John?

John Masslon:

I think it's going to be eight-one for the CFPB.

Alan Kaplinsky:

Josh?

Joshua Katz:

I'll take eight-one as well.

Alan Kaplinsky:

And Adam?

Adam Levitin:

I'm going to go with nine-zero with a whole bunch of concurrences.

Alan Kaplinsky:

Okay. All right. Now let's focus for a little bit of time. I don't want to spend a lot of time on it, given the unanimous view of the seven of us that the CFPB is going to prevail in this case. But on this remedy issue, which got pretty heavily briefed, Jeff wrote his brief, concentrated on that remedy issue and he basically said, don't throw out the baby with the bath water here. But John, I think it's already been mentioned, and hardly mentioned at the oral argument, and that's significant in and of itself. But why don't you just give us a quick rundown of what got said, how little got said at the oral argument about the remedy?

John Masslon:

Yeah, there was almost nothing said. There was just one question to each party. But if you look at the briefing, I think that there are two issues, if somehow CFSA were to prevail. The first issue is severability. Are any of these provisions regarding the CFPB's funding severable? If so, which ones, and how do you create a constitutional funding mechanism based on the current statute? the government's arguments, I think, border on frivolous. That's how ridiculous they are. They argue that you could give oversight to the House and Senate Appropriations Committee or you can stop the rollover of funds from year to year, but nothing really that actually addresses the core of the problems that CFSA challenged, and I think that's quite noticeable. And I think the problem that the government has is essentially they're asking the court to rewrite a statute.

This isn't a case where you're just excising a removal protection and making an officer removable at will instead of having for cause removal protection. Here you're saying there's this bundle of sticks that create this unconstitutional structure, and say if you remove two of them, it's then constitutional. How do you choose which two? Say there's five or six different options of removing two sticks that make it constitutional. You're essentially just rewriting the statute and you're acting as a policymaker of the court. I think there's almost no chance that the court would find any of the provisions severable.

Then you have to go on to, well, if it's not severable, then what's the remedy for these parties and moving forward? The argument that the CFSA makes is that the whole rule has to be set aside. They're primarily relying upon the Administrative Procedure Act, which says that if a court finds a rule is unconstitutional, that it is to be set aside. And so they're arguing that the whole rule must be set aside.

The government is arguing for a much more limited relief, only prospective, saying that the CFPB should not be permitted to use these, quote, non-appropriated funds moving forward to bring enforcement actions against either CFSA or its members until Congress were to pass a constitutional funding mechanism, and then CFPB could use those funds to bring enforcement actions. I think that's a lot more tenable and something that the court might go along with. There were a lot of other options presented to the court as well, as far as remedies. For example, just staying the court's judgment for a period of time to give Congress a chance to pass a constitutional funding mechanism.

One of the arguments that CFSA makes is that if Congress is going to have to pass a constitutional funding mechanism, they could, at that time, ratify all of the rules that CFPB has passed and say that all the rules are hereby valid. Obviously, Congress probably won't do that. They're probably not going to be able to get a majority that would agree with all of the rules that CFPB passed. Another option, that I think Jeff presented in his brief, was the defacto officer doctrine and saying that all the actions could be seen as legitimate under that doctrine. CFSA argues that what the court put away, the defacto officer doctrine 28 years ago, and there's no reason to bring it back into existence, resurrect it from the dead, and apply it in this case. So CFSA is also arguing against application of the defacto officer doctrine.

Alan Kaplinsky:

Right. I got to say on severability, I never understood how that argument would work. It worked very neatly in the Seila Law case because all the Supreme Court had to do was to excise a few words from Dodd-Frank and didn't have to essentially rewrite anything. It just needed to actually sever a few words, which would give the president the right, for any reason at all, to remove the director. Here, if you sever the funding mechanism, what's left? How is the CFPB, it's not as if Congress put in Dodd-Frank, an alternative method of funding. They didn't say if a court should strike this funding mechanism, then CFPB

would be subject to annual congressional appropriations. And in the absence of anything else in the statute, and the fact that if there's no funding mechanism in a statute, an agency might exist technically, but it can't function. It's not like there is some law, common law, constitutional doctrine that would import into a statute, the appropriations clause of the Constitution. Yes, Josh?

Joshua Katz:

It seems to me, and I hadn't thought of this ahead of the seminar, so maybe it's just off the cuff, but it seems to me that playing around too much with severability here might raise an appropriations clause issue. If the court is itself writing the appropriation, it's not the Congress, it's not allowed to do that. So there might be external constraints in this case, to severability, that wouldn't be present in other cases where the court is trying its hand at applying severability to a statute. And of course that suggests, I agree with the two of you, that I don't see severability going anywhere, I think. If you think of severability in terms of legislative intent, which maybe you shouldn't, but if you do, Congress was trying to consolidate all these regulatory powers in an independent agency that would be beyond the reach of certain limits.

That's what we know is trying to do. So if we ask, well, would it do it this way or would it do it that way through some appropriations that don't achieve that? Well, the answer is no, it wouldn't have done that. It might well have left these powers with the agencies they were with before it created CFPB. So I don't see that as a fruitful endeavor. But on the other issue, on the Fifth Circuit's proposed remedy, I was looking at the Thomas concurrence back in Collins. He says, "Look, a conflict between the statute and the Constitution is not enough to strike down the rule. There has to be unlawful conduct involved in the rule itself." I wonder if that could apply, if that principle would apply here, that the passage of the rule is not, in itself, unlawful, it's the appropriation. Just like having a removal cap in the law didn't prevent you from passing rules.

So I'm curious to hear people's thoughts on that. I would add that just as the court discussed in Collins and Seila Law, there's something to the thought of, well, if you're not going to strike down the rule, what are you going to do for these plaintiffs? And what are these plaintiffs doing in court if you're not going to strike down the rule that's bothering them? So I think this is really, it's tied into standing and redressability. The only thing they can possibly ask for is to strike down the ruling question. And if you decide, as a matter of law, they can't have that, it's not clear what you're doing.

Alan Kaplinsky:

Certainly would've wasted a lot of time, effort, and money. Anybody else want to comment on remedy before we get to what I think is the most interesting part of our discussion? Yes, Mike.

Michael Williams:

Geez, I'll be short with that caveat.

Alan Kaplinsky:

Mike, and then Jeff.

Michael Williams:

So I guess when it comes to separability, I always go back to the Elizabeth Warren quote where she says she wants a strong consumer agency and then her second choice is no agency at all and plenty of blood and teeth on the floor. So it's one of the juiciest quotes of legislative history I think I've ever encountered.

But when it comes to Josh's suggestion that maybe we could get around killing the rule off because maybe the appropriation didn't really involve itself, or I guess the lack of appropriation didn't involve itself in the passage of the rule. I guess, and I can't help but sound snarky in asking this, but I'm legitimately posing the question. I don't see how you, practically speaking, promulgate a rule without spending a little bit of cash. Just in terms of agency staff time and research and calling the federal register to get it published, I don't know how that works, but I assume there's a cost. And as silly and as trivial as those things sound, I think they are meaningful when it comes to Congress's power to control the purse, because, of course, when you pull

back funding from rulemaking efforts, the Congress doesn't like they can't do any of that stuff. So I think it sounds like a technicality, but I think that's the way you get at the rule.

Alan Kaplinsky:

Well, let Josh respond to that and then we'll go to you, Jeff.

Joshua Katz:

That's true. But I'm following Thomas's logic in Collins, where you had statutes that say "The director may", and if you don't have a lawful director, you could ask the same question. It's the director who's empowered, and yet he says "No, it's the action itself that has to be unlawful." Not, in this case, the means of funding it, not, in that case, the means by which the director is in place.

Alan Kaplinsky:

Okay. So Jeff, you wrote a brief on this subject. What did you ask the court to do? You certainly didn't want them to kick the ball over to Congress to figure out a remedy, am I right? You wanted the court to decide then and there that all the other regulations, other than the payday lending regulations, are valid, right?

Jeffrey Naimon:

Well, I guess our broader point and my firm, and I'm sure your firm as well, Alan, we are still getting new litigation matters that derive from the subprime mortgage securitization cases, matters from the early 2000s. So the litigation tsunami that would result as courts all over the country try to grapple with, well, what does this all mean? And with all the different kinds of arguments, you've even just heard a little bits of from in this panel, would be another billions of dollars of money wasted that could be used in more valuable ways. So our brief was really saying we don't want the chaos that would be created by a decision that just kind of threw everything out. And in particular section 1400, I think it's 1400-C of the Dodd-Frank Act, said, well, our ability to repay rule, which I think is about the most foolish lending law ever, okay. It's like we're going to punish you if you lend money to someone who won't pay it back to you.

No one's ever thought we needed a law to prevent lenders from doing that before, not since Hammurabi started doing these laws 2,500 years ago. But anyhow, regardless of whether it's a foolish rule or not, that's the law. And it said it will go into effect as written unless the bureau can write a rule. The bureau did write a rule, and they wrote a rule that took the jagged edges of what Congress enacted in Dodd-Frank and made it workable because the mortgage market did not come to a crashing halt in 2013 when it would have. And every lender I represented at the time was just going to shut down because the risk was so great and people didn't know how they were going to deal with this ability to repay it all. That's what we don't want to have happen. That's a bad result for the United States. And I think if you think about it right now, I would hate for that to happen in the United States given what's going on all over the world. So that's what our brief was about, we suggested a number of-

Alan Kaplinsky:

Jeff, let me just pushback with you a little bit, not because I disagree with you, but I just want to bring out the issue. You got to have a legal hook, right? what's the legal principle that you urge the court to rely on to save the mortgage banking regs?

Jeffrey Naimon:

The legal principle is the court has a lot of room in crafting a remedy. If you think about the Buckley, the FEC case, they said, hey, we're going to turn this over to Congress and give them, and then they gave them some more time. We're going to give you some time to figure it out. They didn't say to the FEC, you're unconstitutionally created so you have to shut down for two years until Congress fixes it. They said, "No, you continue and Congress will get this figured out in the next little bit." So in essence, our brief was about, we don't want chaos and you, the court, can craft something that doesn't go toward chaos that we are trying to avoid, and the economic dislocation that that would create. That's where we were going with it. And I think

the court has plenty of power in how it crafts a remedy, when it makes a decision, to accommodate something like that. And I think Congress would figure out a way to make it work.

Alan Kaplinsky:

Okay. So Adam, I'm going to give you the last comment on this. Well, then I really want to move in to the final section of our round table because we've got a really interesting topic to talk about next.

Adam Levitin:

So first I just have to say, Jeff, I don't think Hammurabi was ever familiar with originate to distribute securitization. If we learned anything in all the representation and warranty cases coming out of the financial crisis, it's that if you're going to be passing the buck on the risk to somebody else, you may not care about whether the borrower can actually repay. But that's a specific regulation.

Jeffrey Naimon:

And we can argue about that later.

Adam Levitin:

I'm sure one day we will.

The bigger problem, I think with the remedy, in theory, there are lots of ways the court could come up with a remedy, but I think it's a scary position to put the court in. This is a point that, Jeff's point, the point made in Jeff's brief and also in mine was, "Hey, there could be real chaos here. You're messing with some dangerous stuff and if you don't get this right, this is going to cause real trouble in financial markets." Do you really, really want to start tugging at the threads here from a delicately balanced, even if imperfect, system? And I think that there's probably a sense of judicial modesty that we may not want to mess with this. Who knows? Usually it's the conservative point that, what about unintended consequences? Well, this is like exhibit A for don't mess with it because there may be unintended consequences that are far worse than any offense to the constitution here.

Alan Kaplinsky:

Right. All right, we're going to get into the final segment of our round table. And that is we're going to assume that the CFPB is indeed going to prevail. And by the way, although we didn't say anything about timing, while the court theoretically doesn't have to issue a decision until the end of this term, and that would be at the end of June of next year, my guess is we're going to see a decision a lot sooner than that. If we are all right that the CFPB is going to prevail, because they then don't have to deal with this thorny issue of what's the remedy going to be, which I think could tie them up for a much longer period of time. But let's assume now CFPB prevails. Question number one, is that the end of the line as far as challenging the CFPB on constitutional grounds, you've had Seila Law, CFSA.

My view, and then I'm going to let others chime in, is yes, it's the end of the line as far as constitutional challenges. However, I don't think it's the end of the line in terms of attacking other actions of the CFPB, specifically final regulations that get issued by the CFPB. Two quick examples come to mind. The final regulations that have been issued under Section 1071 of Dodd-Frank, which deals with data collection related to small business loans. That's already been attacked. There is litigation pending in federal court in Texas challenging that. They challenged it based on this constitutional issue, but they also have other arguments that they've made based on the Administrative Procedure Act, based on other theories that are in their complaint. That case isn't going to go away, it will go back to that court, and those issues are going to need to be litigated and sorted out.

There's litigation pending regarding the revisions to the UDAAP exam manual that occurred several months ago, actually maybe more than a year ago now, where the CFPB, totally out of the blue, decided to define an unfair practice or to use the unfairness prong of UDAAP to ban all kinds of discrimination, not just discrimination that's prohibited by the Equal Credit Opportunity Act. And that is, again, lots of basis for challenging that. Most importantly, the so-called major questions doctrine, which we've alluded to during our round table, although we didn't mention the name of the case, there's a case the

Supreme Court decided a couple years ago called West Virginia, state of West Virginia, Mike, you fair state. I don't know if you're involved in the case, versus the EPA, Environmental Protection Agency, where the court reiterated something called the major questions doctrine. That is that you can't take a very, very general statute enacted by Congress and read into it too much.

And you can't really give it just a literal, dictionary definition. You got to scratch your head and say did Congress really intend in enacting the UDAAP statute, which was part of the Federal Trade Commission Act before it became part of Dodd-Frank. Did they really intend that unfairness would include discrimination. And then, you've got coming down the pike, an oral argument that will be held in January in two cases, the Raimondo case and the Relentless case where the court is taking up the question of whether to overrule the so-called Chevron doctrine. And under the Chevron doctrine, which has been in effect since 1984, though Supreme Courts barely noted the existence of the doctrine for several years. It goes beyond even paying lip service to it. They never even cited in most of the cases dealing with regulations and whether or not they're valid or not.

But in that case, the court could overrule Chevron and under Chevron, that will be a sea change, I think. Because under Chevron, if you've got a vague statute, it isn't completely clear, and regulations were promulgated by an agency that interprets the statute and it's deemed to be reasonable by the Supreme Court, then the Supreme Court has to defer to that regulation. They can't, on their own, decide whether the regulation is valid by writing on a clean slate. And that's going to have a big impact on a lot of CFPB regulations, not only future regulations, but there's concern, at least I have concern, whether or not that might be applied retroactively to nullify other Supreme Court cases that have come down over the years that relied on the Chevron doctrine. The Chevron doctrine gets knocked out, does that mean that these older cases are subject to collateral attack, perhaps in a class action by plaintiff's attorney? Don't know the answer.

But all that, again, is a further problem for the CFPB, but not only the CFPB, all federal government agencies. And I would be remiss if I didn't mention the credit card late fee regulation that's coming to a theater near you. Certainly by the end of this year, I would probably expect it sometime in November, maybe early December. And there is a proposed reg CFPB has issued under which it would reduce the late fee safe harbor on credit cards from $30 and $41, based upon how delinquent a card is, to a flat $8. And there is no doubt that before the ink is dry and President Biden signs that legislature, soon as he signs it, a lawsuit will get filed and it's going to attack that regulation on a whole range of theories. And I think the complainant may already be drafted to bring that lawsuit because it's really important to the credit card industry.

So now, I'm going to go around the horn. Oh, and the other final, final thing, and that is in my own view, if you've been litigating with the CFPB and you were holding out in the hope that the Supreme Court would affirm the Fifth Circuit and your case would go away, I wouldn't hold your breath much longer. This may be a propitious time to try to get rid of some cases, particularly after I read the American Packer article the other day. It said that Rohit Chopra announced that he's adding a lot of staff to the CFPB and there will be a 50% increase in the number of enforcement personnel. So that's a bit scary, I think, to the industry. But let me go around the horn. Let me go to Adam, let me go to you first and then we'll let others chime in.

Adam Levitin:

Alan and I may have different views about the substance of the particular regulations, but there's not much I disagree with in his analysis. I think this is the end of the line for constitutional challenges for the CFPB, and ironically, had Seila Law really, I think, helped protect the bureau on the appropriation side because there used to be what was sometimes called a mosaic theory of constitutional infirmity for the bureau, that there were just too many different things that didn't fit the traditional paradigm, whether it was removal or appropriations. And even if no single feature was inherently unconstitutional, or render the agency unconstitutional by itself, that there were enough synergies that it would get the bureau passed, that it made the bureau unconstitutional. And by the legal strategy by which the bureau's constitutionality was attacked, turned into a piecemeal assault. And I think that really helped the bureau because certainly if you go back to the PHH case, Justice Kavanaugh was quite open to that mosaic theory in PHH, but that was not the theory that really got advanced in Seila Law.

And I think the bureau got very lucky in that regard because the mosaic theory, even it was one of these, I know something's wrong even if I can't say exactly what, but I know this doesn't sit right. And I thought it was quite compelling case.

But I think it's the end of the line for the constitutional cases. The CFPB at this point is going to be like any other regular, frankly, boring government agency that's going to receive APA challenges and maybe sometimes first amendment challenges to its rulemakings, and each one will stand or fall on its own bottom. But the agency's around, and if anything, there's a

hydraulic effect that if it comes too hard to be successful for agencies with rulemaking, everything just shifts to enforcement. And then we have complaints about regulation by enforcement, but that's what is being forced on regulatory agencies. If they can't actually do regulation through the regulation process, it becomes a world of second best. It's not the way we should run a railroad, but that's where we are.

Alan Kaplinsky:

So Jeff, let me go to you, and then we'll quickly go around the horn.

Jeffrey Naimon:

Yeah, well, I agree this is the end of the constitutional challenges and it's going to be back to APA. And I guess when I was saying how some of the justices were looking for textual hooks to support the theory and the argument, I think we're going to see courts around the country looking for better textual hooks for the CFPB's theories that they put forward in rules and enforcement actions. And there's going to be that kind of scrutiny given to the Bureau's positions.

But like Adam said, it's going to be more like a regular agency. I think one little difference that I have with Adam on that, is I'm not sure it's going to be like a regular agency in the sense of the tradition at the Bureau thus far has been a greater willingness, than we ever saw from financial regulators, to take a swing and potentially lose in court. Traditionally, the Fed, the OCC, the FDIC have been very worried about taking positions that they could, in an enforcement action or elsewhere, that they might lose and have kind of pulled in their forms and have been pretty conservative about how they did that. I think the leadership at the bureau has been much more willing to take an aggressive position that is consistent with their policy views and see how it goes, than we have seen it from other agencies. That's my one real difference with Adam on that.

Adam Levitin:

Well, I would just say I think the MTC right now isn't the lead on being aggressive on novel theories, litigation.

Alan Kaplinsky:

They're going to have an auto dealer regulation coming out sometime in the near future, and you can be sure that's going to get attacked in court. How about anybody else? Anybody else want to comment?

John Masslon:

I disagree that this is the end of the line for the constitutional challenges. I think that what we see in Jarkesy has some implications here, and that if the aspects of the Fifth Circuit's decision there are affirmed, then the same constitutional problems are present with the CFPV.

Alan Kaplinsky:

Well, that's true, I agree. But I don't think the CFPB has really been using, maybe I'm wrong here, but I don't see them initiating a lot of administrative proceedings because I think they recognize that in light of the Jarkesy case, the whole administrative law structure for resolving cases might not work for them either, not just CSCC. So that certainly-

Adam Levitin:

PHH was-

Alan Kaplinsky:

I don't think... Huh?

Adam Levitin:

PHH was an administrative law case.

Alan Kaplinsky:

Oh, yeah. But that got filed a long time ago, Adam, I think. I don't know for sure, but it may have been even before Jarkesy, but, I mean that was several years ago. Anybody else with any final thoughts before we wrap it up? Mike?

Michael Williams:

Alan, I agree that this is the last of the really distinctive CFPB constitutional challenges, but I also just think people should know that there's still a looming issue out there that was teed up in a case a few years back called Gundy v. United States, about changing the non-delegation doctrine. And I think you'll see some challenges to some things that the CFPB does on that ground. I think, ultimately, that's unlikely to be where the majority is going to go. I'll also say, once you get to treating the CFPB like a normal agency, as this case illustrates, a lot of things that the agency does are going to be very easy to uphold. Remember the Fifth Circuit thought this rule was just absolutely fine in every respect other than this appropriations clause issue. And so there are not going to be magic bullets left against this CFPB.

Alan Kaplinsky:

I want to thank all of our speakers today for contributing to our show, and I, in particular, want to thank all of our listeners who have downloaded our show today.

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