

Consumer Finance Monitor (Season 8, Episode 17): A Deep Dive Into Judge Jackson's Preliminary Injunction Order Against CFPB Acting Director Vought

Speakers: Alan Kaplinsky and Joseph Schuster

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 consumers, and the industry. This is a weekly podcast show brought to you by the Consumer Financial Services Group at the Ballard Spahr Law Firm. I'm Alan Kaplinsky, the former practice group leader for some 25 years, and now senior counsel of the Consumer Financial Services Group at Ballard Spahr. For those of you who want even more information, either about the topic that we're going to talk about today, or for that matter, anything else going on in the world of consumer finance, don't forget about our blog, which also goes by the name of consumerfinancemonitor.com. We've hosted our blog since July of 2011, when the CFPB became operational, so there's a lot of relevant industry content there. We also regularly host webinars on subjects of interest to those in the industry, to subscribe to our blog or to get on our list to get webinar invites, please visit us at ballardspahr.com. And if you like our podcast, please let us know about it.

You can leave us a review on whatever platform you use to access your podcasts, be it Apple, YouTube, Spotify, or any other one. Also, please let us know if you have any ideas for other topics that we should consider covering on our show, or speakers that we should consider inviting as guests on our show. So, I'm going to be joined by Joseph Schuster, a partner at Ballard Spahr in the Consumer Financial Services Group, and we're going to be talking about a very important topic. We usually release our webinars only on Thursday, when we have a special topic we will release it on another day of the week, and so this week you're going to get a twofer. And what we're going to be talking about is what I would call a monumentally important opinion, that was issued very late in the day on Friday, by Judge Amy Berman Jackson.

It was 112 page opinion, and a three-page order in a case called National Treasury Employees Union versus Russell Vought, in his official capacity as Acting director of the CFPB, District Court for the District of Columbia. In short, Judge Jackson granted a motion for preliminary injunction to the plaintiffs. And the plaintiffs were two labor unions representing CFPB employees, plus some other parties, but the injunction, in very broad terms, enjoined the defendants from continuing to dismantle the CFPB without congressional authorization to do so. That's stating it very generally, it gets a lot more specific about what she specifically enjoined. So, Joseph, a warm welcome to be my co-host today.

Joseph Schuster:

Thank you, Alan, I'm excited to be here. This is a very interesting case to discuss and its implications on the industry.

Alan Kaplinsky:

So, the case began, I guess it was in February, and there was a stipulated injunction or order that was agreed to by all the parties, basically saying, don't do anything, you can't do anything until Judge Jackson decides a motion for a TRO, which later got converted by stipulation into a motion for preliminary injunction. There was a hearing in the case, and then Judge Jackson decided she wanted to hear live testimony, and she brought in, or the plaintiffs brought in, a lot of employees of the CFPB, who were in meetings with certain people from the CFPB who had been put there by the administration or by DOJE. They were, I guess you could say, new employees of the CFPB. Do you want to pick it up from there, Joseph? Why don't you talk about Judge Jackson's, how she started the opinion? I thought that was incredible. At the very top of page one.

Joseph Schuster:

The whole opinion is incredible, but at the top on page one, it starts off, "CFPB RIP," Elon Musk, February 7th, 2025. "The CFPB has been a woke and weaponized agency against disfavored industries and individuals for a long time, this must end." Russell Vought, February 8th, 2025. "That was a very important thing to get rid of," President Donald Trump, February 10th, 2025. It starts off with those three quotes from different individuals. I think, Alan, some of the things that we will discuss, that it's clear that this court had a view that how the CFPB was operating, and really the, I would say the Chopra mission of the CFPB is something that, it becomes clear through this opinion that this court would like to maintain.

In the beginning of this, I note that the court discusses the purpose of the CFPB. And if you look at the purpose, it's that all consumers have access to markets for credit products, and that they are fair, transparent, and competitive. I'd argue that some of the things that were happening during the previous CFPB were not giving people access to credit markets, and that they were not competitive, setting prices on things that could affect whether or not people can have products, or engaging in rulemaking that can reduce short-term small-dollar lending, that doesn't go to the purpose of the CFPB, but that's not the purpose of this. I share that just because that is what all of this goes to, that the court believes that this extraordinary preliminary injunction is necessary to preserve the CFPB and preserve the CFPB conducting its statutory requirements.

So, after those quotes, giving a little bit of introduction on the CFPB, what follows is a very detailed day-by-day assessment of what was happening. Emails that were sent identifying that employees should stop working, except for conducting activities that were required by law. And a couple of the emails that it goes through specifically discuss continuing activities that are required by law. One particular email, by Acting Director Vought on February 10th, does not have that required by law language, that is a key piece that is used throughout this entire opinion, and going through whether that was an indication that Acting Director Vought and others were trying to shut down the CFPB and prevent the CFPB from doing its statutory requirements.

Now, when we get to, and I'll turn it back over to you here in a moment, Alan, to maybe go through the preliminary injunction, which I think goes above and beyond what would arguably be required for the CFPB to continue its statutory mandate, in the sense that there are specific things that the CFPB is required to do. However, those have been the same requirements since the CFPB's inception. I looked at, just before we got on here, how many employees the CFPB had, there was just a report that came out a couple of months ago, and in 2011, the CFPB had 663 employees, by 2024, that number was 1,758. To give you a sense to where it was during a time period during the Trump administration the first time, there were 1,430 employees. So, can the statutory requirements of the CFPB be conducted with less employees?

Seems like it can. The funding has dramatically increased for the CFPB over time as well. However, this court seems to make an inference that if there is a reduction in the number of employees at the CFPB, or the employees that were hired during the Trump administration, that the CFPB would not be carrying out its statutory authority. But Alan, before I go on, I'd like to turn it back over to you if you have any other specifics on the opinion there, or if we want to get into some of the things on the preliminary injunction as well.

Alan Kaplinsky:

Yeah. No, well, first of all, when you read the quotes at the very beginning of the opinion, you knew the outcome already. You knew where Judge Jackson was going, and she did a very thorough job in putting together a chronology of events, day by day, email by email, meeting by meeting, all the things that were going on. And what I would say the gravamen of this lawsuit was basically to make sure that the CFPB was not being dismantled or shut down by President Trump, and the acting Directors Bessent and then Vought, who were appointed by President Trump to lead the agency until they had a director confirmed by the Senate. So, she wrote a very thorough opinion, and I will say Deepak Gupta, who represented the plaintiffs, and somebody I know very well because he used to co-chair the PLI Consumer Financial Services Annual Institute that I used to co-chair, and Deepak is a very, very good lawyer, very bright, and he knows what he's doing. That's not to say that the defendants didn't have good lawyers, I just don't know who they are.

But in any event, you then get to the preliminary injunction motion, and let's run through it. Because in a startling way, virtually nothing in here that's in the injunction has much of a connection to what the case was all about. The case was not, the plaintiff was not saying that the CFPB has to exist as it existed under Director Chopra, that of course, would have been stupid, that never would have been granted by the judge, but yet the relief very much seems like that's sort of what Judge Berman, I

think you put it right, that's what Judge Berman was aiming for. So, let's run through the injunction, and if you want to comment on any of these things as I run through it, by all means feel free.

So, the first thing in the injunction was a requirement that the defendants not delete, destroy, remove, or impair any data or other CFPB records covered by the Federal Records Act, except in accordance with a certain procedure prescribed by statute. And then, it goes on to say, "This means defendants shall maintain and not delete, destroy, remove, or impair agency data from any database or information system controlled by or stored on behalf of the CFPB." Well, why did the judge need that, I guess I'm wondering, and was there a fear that the new management at the CFPB were going to destroy the records? I'm not sure why that's in there. Do you have any thoughts?

Joseph Schuster:

I don't, Alan, but I'll say that of all the things in the preliminary injunction that one makes the most sense to me, that of course they'd need to retain records. There was at one point, in the opinion, a discussion that one of the vendors that they canceled the contract on was used to store backups of some blog posts and other things. That there were hard copies of Director Chopra's entries, but perhaps others didn't have backups without a vendor. So, it's possible that it relates to that, that's the only thing that I could come up with, but I think it gets more interesting from there.

Alan Kaplinsky:

Yeah, you're right. Number two, "The defense are required to reinstate all probationary and term employees that were terminated between February 10th, 2025," that's when the first Acting Director Bessent took on that position, "and the date of this order, including but not limited to the private Student Loan Ombudsman Julia Barnard," who is actually named in that order. I think, and maybe I have the number wrong, but probationary, I think maybe was there 85 or so probationary employees and term employees? It wasn't that large a number, maybe it was close to 200 or so.

Joseph Schuster:

It wasn't a large number, but it is still interesting that it's all of those employees is the scope of this preliminary injunction. Like I said when we started this, the number of employees at the CFPB has fluctuated wildly over the years, and it continues to go up. I will note that from 2017 when Trump was inaugurated the first time through 2019, it did decrease. There it went from 1,668 to 1430. So, looking at the number of employees and who the employees are, when new administration comes into being, like the first time that Trump was elected, those things happen. So, requiring all of the employees to stay does seem like an extraordinary measure when you put it into the context of, is the CFPB performing statutory requirements?

Alan Kaplinsky:

Now, I would guess, just a guess, because I don't know what's going to turn out, that a lot of those employees who were terminated, both probationary... And by the way, you get put on probation if you're a new employee or if you move into a new position, you have new duties at the CFPB, you're considered probationary, even if you may have been in another position for several years. A term employee is exactly what that says, you're hired for a period of 2, 3, 4 years maybe. I would guess a lot of them already have jobs, or alternatively, they don't want to go back to the CFPB as it exists today, and as it's going to be operated for the next several years. People who have been there under Director Chopra, and it is certainly going to be a seat change.

So, anyway, you got that. And then this is, I think, the one that really struck me as being really extraordinary. "Defendants shall not terminate any CFPB employee except for cause related to the individual employee's performance or conduct, and defendants shall not issue any notice of reduction in force to any CFPB employee." So, apparently what precipitated the lawsuit is that I think Deepak Gupta felt that the new leadership was on the cusp of terminating about 1300 other employees, meaning not including those on probation or term employees, but just other employees. And in fact, there is some suggestion in the opinion and the evidence proffered by the plaintiffs that that very same day that the lawsuit got filed and a stipulation was entered into with the Department of Justice to freeze things, if they had waited another day, the 1300 employees would have already been terminated. But we don't know, it never actually happened.

But to say that they are, at least for now, remember, it's a preliminary injunction, not a final injunction, they can't reduce the number of employees, even though it's clearly the case that they want to right size the CFPB, that there are too many employees, there probably were too many even for Director Chopra, but the new vision of the CFPB that's maintained by Acting Director Vought, and I think President Trump is going to be a lot different. It's not going to be as ambitious, it's not going to be as aggressive, it's going to be more limited in the things that it does. So, I'd love to get your reaction to that provision, which I thought, that really surprised me.

Joseph Schuster:

I agree. This is an area where I agree with what you said earlier, Alan, that a lot of these employees have probably looked for or found other jobs at this point, but to some extent, there could be a core group of employees who want to continue some of the aggressive actions that the CFPB was making during the Chopra administration, and now there's almost a backing that the CFPB has to maintain those employees who may be trying to do things that arguably are beyond the scope of what the CFPB can or necessarily needs to do. As you said, the administration is looking at whether this level of staffing is necessary, there may have been some of the staffing up because there were some actions that were being done that were very different than what the CFPB had done previously.

They were very much in contrast to what the CFPB had done in terms of reviewing laws, or how they interpreted laws, or what the Fed had done previously, and now this court is saying that the employees who had been hired, a lot of them probably during the Chopra era, the new administration has to keep those employees on, even though they may want to have the CFPB much more follow what the statutes say, in that sense. We've discussed on this podcast and our blog and in many other things, where, there are many times where the CFPB was, I'd say over the past four years, becoming a bit more politicized than it had been in the past, and focusing on specific topics.

Whether that was focusing on payments and trying to shut down different areas that they didn't particularly want to have happen, like with respect to fintechs and things of that nature, as opposed to a focus on the actual statutes that were promulgated by Congress. So, having a pullback of those employees when that's not something that's a statutory mandate of the CFPB makes sense with a change of administration, but again, here you have that they cannot do that, they can only eliminate people for cause. That's pretty Draconian.

Alan Kaplinsky:

Yeah, I should say so. And you wonder for how long does that have to happen? Because there ain't going to be work for all these people. In light of the new mission of the CFPB... Which I think maybe we should just pause for a second to talk about that, Joseph. I would expect we're not going to see many new enforcement cases filed in the next three and a half years, and those that we see are going to involve what I'll call out-and-out fraud, fly by night companies, scams of all sorts involving debt settlement companies, companies that even the industry would like to get rid of. You aren't going to see any pushing the envelope cases, where they're trying to contort some business, that they have anything to do with the extension of credit, into something that's covered by the CFPB jurisdiction.

So, once they started with 38 enforcement lawsuits, I don't know what they whittled that down to already, they've already dismissed with prejudice a whole bunch of them, a bunch of them had been stayed temporarily, I think eventually most of them will go away. The only ones that I think are going to stay are the ones where they're a co-plaintiff with a state AG, or a state department of banking, or something that is politically up their alley. Like if you're alleged to have violated the Military Lending Act, that case isn't going to go away, right? So, I don't see a lot of activity in the enforcement area. In the regulatory area, well, yeah, do you have a comment on that? And then we'll talk about the other areas.

Joseph Schuster:

Sure. I think you're exactly right on the enforcement area, I think that there... And I think that there was a shift over the arc of the CFPB's existence. Which, I should point out, Alan, too, that the court seemed to suggest that prior to the enactment of the CFPB, there was no regulator of banks and financial institutions, they were able to just run amok, and that is simply not true. When the CFPB was enacted, it eliminated a different regulator, the Office of Thrift Supervision, but the OCC, the FDIC, the Federal Reserve, all of these other banking regulators are, they do still exist, they had regulatory authority, so it's not as if there

are no other financial regulators that are out there, or that nothing existed before the existence of the CFPB. But in terms of enforcement, I think you're right, and what that really looks like is looking for specific violations of laws enacted by Congress, as opposed to looking for big headlines that suggest that the entire financial industry is somehow problematic.

Again, I go back to the purpose of the CFPB, and it does include access to markets for credit, and having products that are fair, transparent, and competitive. There was I think over the last four years, less of a focus on consumers being able to have access to fair, transparent, and competitive credit, and more a focus on eliminating credit that the CFPB or the leadership of the CFPB found objectionable in one way or another.

Alan Kaplinsky:

Yeah. Okay. Second area, regulatory. I would, and here I'm speculating again, but I think anything that was proposed by Chopra will go away unless it's something that the Dodd-Frank Act requires that there be a regulation. So, I do think, for example, they're going to have to continue to deal with Section 1071 of Dodd-Frank, which is the section dealing with not open banking, that's the one dealing with small business data collection, they're going to have to continue to deal with the open banking regulation, the regulation under 1033 of Dodd-Frank, because that's required by Dodd-Frank. But you aren't going to see regulations promulgated under UDAP, I don't think that's... I think this is the last we've seen of that for at least the remainder of President Trump's term. So, the only area where I could foresee a real need for employees will be in the area of supervision.

They are, I believe, I don't think they have yet begun to examine anybody, at least I haven't heard that they're doing it, but they have acknowledged that they've got to follow the law, and supervision is statutorily required for the largest banks, those that have more than \$110 billion in assets, and for certain designated non-banks. So, I think they're going to need some people there, how many people? I'm not sure out of the total headcount at the CFPB, how many are in supervision? I would guess there's quite a few. But I don't think probably most of the people are examiners, they don't need too many senior people in that area.

Do you have a reaction to that, where we've sort of laid out the need to rightsize the CFPB, but item number three in the preliminary injunction basically says, sorry, you can't rightsize it, and even if people don't have any work to do, they've got to be there. And I don't know what they're going to do, they can work from home, or they, I don't know, they've got to provide an office, I guess to them. The main office has already been shut down, so I don't know how that's all going to work.

Joseph Schuster:

And the court said that they have to provide laptops with access to Citrix or another program, really getting into these specifics of how the court's deciding that this agency must operate. Just a couple of reactions to some of the things that you said there, Alan, on the regulatory side, I think you're exactly right, that there are pieces where the CFPB is required to promulgate regulation, like you said with 1071. And this is a unique difference with respect to this lawsuit versus others. There was actually a lawsuit against the CFPB, I think it was back in 2019 that the CFPB was not promulgating rules with respect to 1071. And there the CFPB eventually settled and put out a timeframe for when they were going to have those rules. A specific statutory requirement was identified that the CFPB was not satisfying. That's not happening with this case.

There was some discussion of complaints portal and things of that nature, but otherwise, it's just, it's a very broad brush here. At one point, looking at a section of the opinion, the court says, "The court cannot stay its hand based on defendant's assurances that statutorily mandated work is being performed because defendants now claim that they do not know what that means." This broad brush, that there's a belief that the new administration will not satisfy statutorily mandated requirements, but they're not being identified, and the belief that the way that the previous CFPB was operating does satisfy statutorily mandated requirements, those are some pretty big assumptions that I think are built into that. And then, with respect to supervision, real quick on that one, I agree, that's one of the statutory requirements of the CFPB, how they do that, and with how many people, there's a lot of discretion.

What supervisors have looked at changes pretty dramatically and how they conduct exams. There's an exam manual that the CFPB has put together, I've seen many times though that based on... And over the last four years in particular, the focus of some of those exams is not with respect to whether institutions are following specifically mandated requirements from Congress, those truth and lending truth and savings there are specific regulations, but more looking at specific areas that

political appointees within the agency had an interest in them looking at and trying to push, again, like you said, through that UDAP authority to make changes, as opposed to really looking at what I'd say is much more in line with that statutory requirement, those specifically enumerated statutes from Congress.

Alan Kaplinsky:

Truth and Lending Act, Fair Credit Reporting Act, et cetera.

Joseph Schuster:

Yeah. Exactly. The Electronic Funds Transfer Act. If there's a concern with respect to how payments are being processed, Congress has promulgated a law with respect to how those work. There is a regulation underneath that law, that regulation can be amended through notice-and-comment period... Yeah, we saw that step aside, having notice-and-comment period during the previous CFPB. But I think you're right on UDAP though, that it's going to be used where there are egregious instances, which we saw during the previous Trump administration as well, the FTC does that, the Federal Reserve uses UDAP, doesn't have abusive from the FTC Act as well. So, that is something that does happen there.

I think as we see that, we've discussed this before, and Ballard set up a task force, states are becoming very active with respect to UDAP as well. Like New York has introduced a law to add unfairness and abusive to, they already have deception right now... That that'll give them some legs there, but I still think that in those instances, states are looking for areas that are a problem as opposed to just looking for headlines.

Alan Kaplinsky:

Right, right. Am I right, let me ask you this question, I don't know if you know the answer to it off the top of your head, but I think under Dodd-Frank, the mandate is to conduct supervision, does it mention specifically examinations in Dodd-Frank? Because I'm wondering whether they could supervise with actually conducting examinations? Or doing examinations off site, not sending a whole bunch of people out to a bank, or to a non-bank, for a week or two weeks or three weeks, which can be very expensive, of course. So, even there, I think as subject to interpretation, I don't think it requires they conduct field exams. So.

Joseph Schuster:

I think you're right. Yeah, they specifically grant, like you say, supervisory powers, which authorizes examination and the ability to require periodic reports from financial institutions, but there's a lot of different ways that they could supervise institutions.

Alan Kaplinsky:

Yeah. All right, let's run through some of these others, I'll try to do it more quickly. So, February 10th, a so-called stop work order was issued, that was the infinite stop work order. Where, I don't remember who it came from, whether it came from Bessent or whether it came from Vought, I think it may have been Bessent actually. Where he was only acting director for about a week, where he said, "Nobody can do any work. Go home, go home, and whatever you were working on, stop working on." And then, there were a number of other things that happened around that time, they closed the building, they wouldn't allow people access to the building to pick up their personal effects, they may not have even had a computer at home that they could use.

So, item four of the injunction says, "Defendants can't enforce the February 10th, 2025 stop work order, or require employees to take administrative leave in furtherance of that order. And they shall not reinstitute or seek to achieve the outcome of a work stoppage, whether to stop work order and order directing employees to take administrative leave, or any other means." So, I'm chuckling a little bit because we earlier said there are going to be a lot of employees that don't have any work to do at all, they don't have to be told to stop working, they're not going to have any work, I think. And that's okay, it doesn't say you've got to keep everybody working, it just says they got to be employed. Any reaction to that?

Joseph Schuster:

It's just so strange, Alan. I agree with how you're reading it, that it doesn't say that they have to be... That they just have to be employed. And that stop work order was from Vought. But does that mean that they couldn't say stop doing this particular task, that is not a statutory requirement that an employee has been doing in the past? I hope not, I don't think that it would prohibit that, but it's just, it's a very broad statement in the preliminary injunction.

Alan Kaplinsky:

Yeah. I think it would cover what you just described, that they couldn't tell somebody to stop working on something. And in fact, the judge to some extent, very strong word I'm going to use, has usurped the management function of the acting director in several respects, and then you already alluded to the fifth thing, so we weren't going to spend any time on that, it's just that they've got to be able to perform their statutorily mandated functions, and they have to be provided with fully equipped office space or permission to work remotely, and laptop computers that are enabled to connect securely to the agency's server through Citrix. I don't think there's anything more we need to say about that.

Number six deals with the consumer complaint portal, and basically repeats what's already required in Dodd-Frank, there's got to be a single toll-free telephone number or website, a database for a centralized collection of consumer complaints. And I guess that's the one I probably have the least problem with. And I think they've already agreed to this, I don't think that they have objected to item six, dealing with the complaint portal. Do you agree?

Joseph Schuster:

I agree. And in fact, throughout the opinion, there are pieces where people who had stopped working on the complaint portal, it was made clear to them by leadership within the CFPB that they need to continue that. Now, the court didn't seem to give much credence to those things, but those had already been addressed previously.

Alan Kaplinsky:

Right, right. All right. Now, here's an interesting one, number seven, we had heard a rumor, I guess it got documented at some point, that one of the first things that the new acting director did was to instruct that there be a review of all third-party contracts, contracts between the CFPB and a whole variety of third-parties. And there are many of them, some of them involve active litigation, where they had expert witnesses they had contracted with, some involved I think the complaint portal, maybe providing the software for the complaint portal, and other functions performed by the CFPB, and Judge Jackson says, "They shall rescind all notices of contract termination issued on or after February 11th, and may not reinstate the wholesale cancellation of contracts. It doesn't prohibit the defendants of ordering that worker services under specific contracts be halted, based on an individual assessment that the contract involved is unnecessary for the agency to fulfill its statutory functions, to ensure that this court can award full relief at the end of the case however, defendants may not finalize the termination of any contract." Any reaction to that, Joseph?

Joseph Schuster:

I think we've covered that one already. It's just, again, just the overreach of this is just unbelievable of, to your point, of trying to really, through judicial review, dictate how the CFPB operates.

Alan Kaplinsky:

And then, eight is defendants have to file a report with the court by April 4th, that is today, the day we're releasing our podcast, confirming that all individual entities that fall within a certain rule of civil procedure have received actual notice of the order, and that the defendants are in compliance with the order. Boy, I wouldn't want to sign that certification, for sure. And then they repealed the temporary orders. Right, the following day, last Saturday, the 29th, defendants filed a notice of appeal to the DC Circuit Court of Appeals, and then, right after that, actually on Monday, March 31, they filed a motion in the Court of Appeals seeking a stay of Judge Jackson's order, pending their appeal to the circuit court. And they've written a 35-page brief, I

think, roughly, picking apart Judge Jackson's opinion, and basically say it amounts to micromanagement of the CFPB and is unnecessary and contrary to law.

Joseph Schuster:

And Alan, there's one other thing that the court did as well, and that is that Judge Jackson has asked the plaintiffs to brief on why they did not request that the CFPB request a specific amount of money from the Fed for funding of the CFPB as well. And so, there was discussion that Acting Director Vought had looked at the funding that the CFPB has, and then decided that no additional funds were required from the Federal Reserve, and the court is looking at whether, it seems from this to almost require the Acting Director Vought attempt to request those funds.

Which again, it goes to the fascinating nature of really the court is trying to say that the CFPB needs to continue to operate in the exact same manner, request the same funds, keep the same employees, not tell them that they have to stop doing a job that they were doing, even if there's discretion with it. But on the funding point though, Alan, I know we've discussed a little bit some of the other arguments that could have been made that weren't necessarily made with this, and so I wasn't sure if you wanted to get into that a little bit as well.

Alan Kaplinsky:

Yeah. Okay. My favorite topic. I've done a couple of podcasts with Hal Scott, the professor Emeritus at Harvard Law School, he wrote an op-ed in the Wall Street Journal right after the Supreme Court came down with its opinion in CFSA versus CFPB. And in that op-ed, that Supreme Court victory for the CFPB was referred to as a Pyrrhic victory, because Hal Scott felt, a lot of other people also believe, including myself, that any funds received by the CFPB after September 2022, any funds received from the Fed were unlawfully received because of the language in Dodd-Frank that says that funds have to come out of, "Combined earnings of the Federal Reserve banks." And beginning in September 2022, there were no combined earnings, indeed, there were losses that began to accumulate, and the losses have gone up every single month since then. It is a huge number, but yet, CFPB has ignored that, for that matter the Fed has ignored it.

I can't figure out a good reason why the Republicans or Department of Justice in these cases hasn't defended the cases on the basis of the illegality of the funding that the CFPB has seems to have. Now, I can see there's no court ruling yet on point, but to me they would have a good shot at getting a court to agree that there were no combined earnings of the Federal Reserve Bank after September 2022. The CFPB says the word earnings doesn't really mean earnings as you and I think about it, I think of earnings as profits. The CFPB says no, earnings, the old CFPB, means revenue. Okay? Well, that hasn't been resolved, but why hasn't that issue been teed up? I don't know. I don't know why the Trump administration seems to be fearful of raising that issue because I think they would have a pretty good shot at getting the Supreme Court to agree with Hal Scott. And do you have a reaction there?

Joseph Schuster:

I think that if something does come of the judge's request with respect to requesting funding, that it's an argument that I would hope that they raise in defense to being required to solicit a certain amount of funds from the Federal Reserve.

Alan Kaplinsky:

Yeah. One of the things we ought to just go through very quickly is what the order does not say, Joseph. And let's just tick off the things. It does not require that CFPB employees, that the CFPB continue to function in the way it functioned under Director Rohit Chopra, it doesn't say that. It doesn't preclude the CFPB from ceasing to perform functions that are not statutorily required, even though they were performed by the CFPB prior to the time Chopra was terminated. It doesn't require that the CFPB promulgate any particular regulations, it doesn't say anything about that. It doesn't say anything about enforcement, doesn't say they have to maintain any of the... prosecute the lawsuits that were outstanding, or that they have to bring new lawsuits, that's not required. So, it seems to me when you boil it all down, yeah, this is a very significant order for what it does, but at the end of the day, I don't think it's going to mean very much in terms of what will ultimately happen at the CFPB.

I still maintain we're not going to see very much in the way of regulations, we're not going to see much in the way of new lawsuits, we're going to see a lot of the lion's share of the other lawsuits go away, it's going to be a light touch supervision, not like it was under Director Chopra. And this, obviously, if you were one of the probationary employees, and you didn't have a job, and you lost your health insurance, this order is pretty damn important. Right? Now, I don't mean to minimize that. But I think from the overall impact on the consumer, and the impact on the industry, I don't see it being that big a deal. Do you see anything?

They're going to have to deal with having too many employees, and maybe they could have prevented that by having a little softer touch you, maybe not a chainsaw, a visual or some of the quotes. But it is what it is, and I think to a great extent, what Judge Jackson did was punitive rather than trying to deal with whatever the problem may be. She was really, I think, very angry with what she had seen, and some of the testimony, and she said, well, I'm got going to show them, I'm just going to undo all the things that they did.

Joseph Schuster:

I think that's right, Alan, because, and this goes to a little bit of what was discussed in the appeal, there would be an easier way to... Even if you agree that that was what was happening, that the CFPB was not going to be able to satisfy statutory, the mandated work, there's an easier way to do that with the preliminary injunction, than saying that you cannot issue stop work orders. But I agree that this is more of a speed bump as opposed to something that's going to prevent the changes to the CFPB that are being contemplated.

And I would note too, just as we're wrapping up here, there was another case before the district court for the District of Maryland, similar, mayor and City Council of Baltimore, the Consumer Financial Protection Bureau is essentially also seeking a preliminary injunction against the CFPB, saying that with the defunding, that the CFPB was going to be at a point where it could not perform functions mandated by statute. And there, that was not found to be the case, that there was something that was not... That there was a statute or a requirement that the CFPB was not satisfying. So, the punitive piece.

Alan Kaplinsky:

That case I think has actually been misunderstood by a lot of people, and a lot of people are saying, well, the plaintiffs so far have lost that case. Well, that case was a very narrowly tailored complaint. The only thing, it talked about all the other things that were going on, but the complaint itself, when you looked at it, the only thing it really had attacked was the preliminary discussions that Acting Director Vought and others at the CFPB had had with the Federal Reserve Board, and with the treasury, to see if they could return any of the funds that they had on hand. As we already mentioned, Vought indicated he didn't need any funding for the remainder of this fiscal year. But on top of that, apparently they were investigating the idea of returning to the Fed or the Treasury, some of, or maybe all of the funds that they had on hand, which would essentially have defunded them completely, and they wouldn't be able to function, they wouldn't be able to pay anybody.

That's what the case involved, and I think the judge rightly concluded that it did not state a cause of action under the Administrative Procedures Act because it wasn't ripe. It never happened, it was just preliminary discussions. They couldn't figure out a way to do it, by the way, which that sort of puzzled me. I'm surprised that they just didn't do it. When I see all the other executive orders that get issued, I sort of wonder why is it in this case they worry so much about how do I return the money? Well, write a check to the Fed and send it back to them [inaudible 00:50:29] return the money. But in any event, very narrow case, I don't think a case... By the way, would have been a perfect case for the government to raise the unlawfulness of the funding after September 2022, it didn't get raised. Anyway, we come to the, pretty much to the end of our program, Joseph, do you have any final words for our audience today? Where is all of this edit? When the dust settles and all this litigation is over, where are we?

Joseph Schuster:

I think we're back to a CFPB that has returned to its core statutory requirements of reviewing the laws as Congress has enacted them, and as they have been interpreted according to the APA through notice-and-comment, what was being done as opposed to... Really, where I think we'll end up is having less of a political CFPB. But the CFPB I think will still exist, and I think that it will still serve as something that enforces consumer protection laws, especially with respect to large banks and

egregious actors. I think though we will also see the rise, and we are seeing the rise of state AGs and state agencies really thinking that there's a much larger void here than I think there really is, but they are still staffing up, we are seeing those things happen, and that's not going to go away.

Alan Kaplinsky:

We at Ballard have created a special task force dealing with what's happening at the state level, and I know you're involved in that.

Joseph Schuster:

I am part of that task force, because the state AGs are becoming very active, plaintiffs counsel are also looking at states as well, and this is something that we've been talking about, I'd say for the past year, that there have been some precipitating factors that are really emboldening states, even apart from what they're perceiving to be happening at the federal level. There was a case a few weeks ago in Wisconsin, we have a blog post about this, looking at the Wisconsin Consumer Act after Cantero. And some national banks have taken the position in that that law is preempted. The Wisconsin Court did a Cantero analysis and determined that, no, it's not preempted. So, a lot of our clients are kind of re-looking at what state laws should they be considering, and I think others might be discovering some of these state laws through state actions and other things. So, we've been feeling a lot of questions with respect to state actors. Like I said, I don't think the CFPB is going away, but I think there's a massive rise on the state front at the same time.

Alan Kaplinsky:

Yeah, and let's remember that State Attorneys General have got a statutory right under Dodd-Frank to enforce certain parts of the Consumer Financial Protection Act, the UDAP provisions, against anybody, and they have to notify the CFPB they're doing it, but that doesn't require any consent. You can be sure, based on what we've seen so far, and we've already had as guests on our show, Matt Platkin, the New Jersey Attorney General, Avy Malek, the General Counsel of the California Department of Financial Protection and Innovation, the states are going to fill that void. And from the standpoint of industry, I know what I'm telling clients is this is not a time to say, all right, for the next four years, I guess we can forget pretty much about the compliance function, we'll focus on other things. Serious, serious mistake because the states will come after you, and it'll be several states, and it will actually could end up in being a better or worse problem than just having the CFPB come after you.

Joseph Schuster:

I'd say we're already starting to see that. So, it's not just a future thing, it's happening.

Alan Kaplinsky:

Well, thank you very much, Joseph, really appreciate your taking the time with me today to talk about these important developments involving the CFPB. And to make sure that you don't miss any of our future episodes, please subscribe to your show on your favorite podcast platform, be it Apple, YouTube, Spotify, or wherever you listen. And don't forget to check out our blog, consumerfinancemonitor.com for daily insights on the consumer finance industry. And if you have any questions or suggestions for our show, please email them to us at podcast@ballardspahr.com. Thank you very much for listening and have a good day.