
The Consumer Finance Podcast – Initial Reactions to the Fifth Circuit CFSA Decision**Host: Chris Willis****Guest: Misha Tseytlin****Posted: October 21, 2022****Chris Willis:**

Welcome to *The Consumer Finance Podcast*. I'm Chris Willis, the co-leader of Troutman Pepper's Consumer Financial Services Regulatory Group. I'm really glad to welcome you to this special edition of our podcast to talk about our initial impressions of the Fifth Circuit's decision in the CFSA versus CFPB case.

Of course, before we jump into that, let me remind you to visit and subscribe to our blog at consumerfinancialserviceslawmonitor.com, where you'll see all of our thought leadership on this and many other issues that are going on in the industry. And while you're at it, don't forget to check out our other podcasts, [FCRA Focus](#), which is about credit reporting, [The Crypto Exchange](#), about all things crypto, and our privacy and data security podcast, [Unauthorized Access](#). All of which are available on all the popular podcast platforms.

And speaking of those platforms, if you like our podcast let us know. Leave us a review on the podcast platform of your choice. Well, as I said, we're here today to talk about the big news that came out earlier this week, which is the Fifth Circuit's decision in the Consumer Financial Services Association versus CFPB case, which declared the CFPB'S funding structure unconstitutional and voided the CFPB'S 2017 Payday Lending Rule.

Now to join me for this conversation, I have one of our expert appellate lawyers, Misha Tseytlin. Misha is a former Supreme Court clerk. He clerked on two different federal courts of appeals as well. He's very involved in a number of cases before the Supreme Court and elsewhere, challenging agency authority and separation of powers issues, including a case that we're litigating against the Small Business Administration right now, dealing with the SBA's refusal to grant PPP forgiveness for small businesses who are involved in the lending industry. So Misha is a real expert on these issues and how the Supreme Court may look at them, and so we're lucky to have him in our firm and also to talk to us on the podcast today. So Misha, thanks for being on the podcast.

Misha Tseytlin:

Thanks for having me, Chris.

Chris Willis:

We're here to talk about what happened in the Fifth Circuit with the CFSA case and sort of what might happen next, what are the implications of it? So let's begin by just letting me ask you briefly, what did the Fifth Circuit say in the opinion that came out on the night of October 19th?

Misha Tseytlin:

Thank you, Chris. So this case involved a challenge by a group of plaintiffs to the CFPB's 2017 Payday Lending Rule. These plaintiffs had several theories of why this rule was unlawful, and the one that they prevailed on before the Fifth Circuit Panel was their argument that the rule was unlawful because the CFPB's funding structure was unconstitutional.

Now the panel, in reaching this decision, went beyond just holding that the funding structure was unconstitutional, but it actually held that because the CFPB did not have constitutional funds that it could use to issue the 2017 Payday Lending Rule, the rule itself was illegal on that basis.

Chris Willis:

And of course, the issue with the CFPB's funding is that it doesn't receive its funding as a result of congressional appropriations, rather its funding structure was set up in Dodd-Frank, such that the bureau could request sort of any amount it wants up to a particular ceiling specified in the statute from the Federal Reserve. And so the CFPB gets its money without and outside the congressional appropriations process, as does the Federal Reserve.

And so the argument in the Fifth Circuit, that the Fifth Circuit found to be persuasive, was that this double insulation from the congressional funding process rendered it essentially a violation of the Appropriations Clause in the Constitution and quoted extensively from the Federalist Papers in support of that conclusion. Right?

Misha Tseytlin:

That's right. That's right. The U.S. Supreme Court across the board, but especially in separation of powers cases, has really gone in on the Justice Scalia, Justice Thomas originalist approach, so that requires a deep dive into the history. And in the separation of powers context, to see what the organization, the separation of the branches was at the time of the founding.

The Fifth Circuit panel did a deep dive. They also cross-referenced a prior concurring opinion at the en banc stage, written by a different judge on the Fifth Circuit, that did an even more extensive originalist analysis. And also, consistent with recent Supreme Court precedent, did an analysis of whether the claim separation of powers violation here was unusual or different from what had been done historically, as another guide to whether there is a constitutional problem, and it found that the CFPB structure is constitutionally and practically unique, where there's a double insulation from appropriations accountability that you referenced, Chris.

Chris Willis:

So Misha, let's assume for a second that this opinion became the law of the land, that instead of being a panel of the Fifth Circuit, this was the Supreme Court's opinion. So what would the practical implications of that be for the CFPB's past, and present, and future actions?

Misha Tseytlin:

Until and unless the CFPB were to get a constitutional funding stream, that is appropriations from Congress, it would essentially be mothballed. Anything it did in the past, any rules that were issued in the past would no longer be valid. Any investigations that it was conducting would need to be halted. Any court actions involving it would need to be halted because all of that would be unconstitutional, unless and until, its actions were supported and financed by an appropriate constitutional appropriation by Congress.

Chris Willis:

And one of the things that we can look at in recent history with the CFPB is, of course, the Supreme Court's decision in Seila Law. Where the court held that the insulation of the director from removal by the president, except for-cause, was depriving the president of authority over

controlling the executive branch. But the CFPB seemed to solve for that in the wake of the Supreme Court opinion, by having the then director of the bureau ratify past actions of the bureau taken when the for cause provision was still in effect. Do you see a similar possibility of ratification under these circumstances? Because it seems like it might be harder from my standpoint.

Misha Tseytlin:

Right. So there was actually kind of two steps in what the Supreme Court did and then what the CFPB did in *Seila Law* that allowed it to basically ratify. One is, the U.S. Supreme Court itself remedied the unconstitutional structure of the CFPB, with regard to remove of power, by essentially saying the president can remove the director of the CFPB, then the CFPB director, by the Supreme Court action, became constitutional, and the CFPB'S director could then ratify these prior actions.

But the fundamental difference with regard to this constitutional problem that we're dealing with, with regard to the funding, is that the Supreme Court itself, it seems unclear how itself could remedy the unconstitutionality when unconstitutionality is a lack of a statute appropriating money passed by Congress. So the first step would need to be, I think, for Congress to pass a statute appropriating the funds for the CFPB to act.

If Congress passed that statute, then theoretically the director, now properly funded, could take certain actions to perhaps ratify or do other steps to put the rules and the investigations back into place. Now with regard to rules, the question would be then, do they just need to go through a new round of notice-and-comment rulemaking now being constitutionally funded? Or can the administrator or the agency otherwise ratify what it had done without going through notice-and-comment rulemaking?

But before any of that would come to the floor, Congress would need to in fact appropriate the money. And you could certainly see given that everyone would understand this problem coming, and given that any funding to the CFPB, what I would think need to be part of a political compromise, that some of these issues could be dealt with through the political compromise that would lead to the restoring of funding to the CFPB in some form or another.

Chris Willis:

So we've been talking for a minute on the assumption that the Fifth Circuit's opinion were sort of copied and pasted by the Supreme Court, but of course, there are a lot of steps between now and an eventual decision by the Supreme Court. What do we expect to happen next in the CFSA case from the CFPB standpoint? So, what are the steps that lie ahead?

Misha Tseytlin:

The Federal Government essentially has two paths to challenge this decision. Well, I guess three. One is, they could go to the Fifth Circuit en banc, which is the full Fifth Circuit, to challenge this decision. As I mentioned earlier, there was a previous concurring opinion by Judge Jones, for five judges on the en banc court. If you add up those five judges with these three judges, you don't have a majority of the Fifth Circuit, so the CFPB could see if it could add up enough votes to get this overturned. That seems somewhat unlikely.

It seems like, if you look at the headcount in the Fifth Circuit, there are likely not the votes to overturn this, but they could give it a shot. The other path they could do is to go to the U.S. Supreme Court and to petition for Cert. Service of either of those paths you could certainly see

the CFPB seeking a stay of this decision to keep the small Payday Lending Rule in place pending its further review.

And I guess the third path it could do is, it could decide whether this particular challenge is its best vehicle to deal with existential threat, whether it's developed all its arguments in this particular case and it could allow this decision to stand and bring up this case ultimately to the U.S. Supreme Court in a different vehicle. Perhaps one where they have fully vetted and shaped all their arguments, knowing that this really is for the agency's existence pending further congressional appropriations. So those are the three options I think the Federal Government has here.

Chris Willis:

So, let's assume for a second that the bureau does challenge the CFSA decision, either through en banc rehearing, petition in the Fifth Circuit, and/or through a petition for Cert to the Supreme Court. And let's assume for a second that the Supreme Court will take the case. It seems like a case that would be appealing to the court, and it's obviously an important case. That seems to me to introduce a period of probably a couple of years during which this issue doesn't get finally settled. Am I roughly right on that?

Misha Tseytlin:

It really depends. As our listeners know, this is hugely disruptive to a lot of industry and the federal bureaucracy. If the Federal Government wanted to it could move this very quickly. And while I do think the most likely outcome is a decision on the constitutionality of the CFPB'S funding structure by the U.S. Supreme Court in 2024. You could certainly see a world, a very realistic world where this issue comes to a head at an oral argument at the U.S. Supreme Court early to spring next year and a decision by June. That is certainly a very real possibility.

Chris Willis:

So while we wait, however long it's going to be, for this issue to sort of finally settle with the Supreme Court decision, what are the sort of short-term implications for the CFPB? What kinds of litigation involving the bureau may unfold while this issue is somewhat up in the air, as a result of the Fifth Circuit's decision, and the bureau's likely effort to get it set aside?

Misha Tseytlin:

I think there's going to be now two categories of cases. Those in the Fifth Circuit and those that are not in the Fifth Circuit. If a party, it can have venue in the Fifth Circuit, it can essentially get any CFPB rule or investigation quashed sooner rather than later. There are obviously different procedural paths that can be done. But if you're on the Fifth Circuit, you're going to be in very good shape if you're a company.

If you're outside the Fifth Circuit and you can't get into the Fifth Circuit, then the issue is going to be whether you can convince your court, wherever that is in the country, to adopt the Fifth Circuit's approach on the one hand, or I guess the biggest decision on the other side is the D.C. Circuit's approach, on the other hand.

And so you're just going to have this different world where if you're on the Fifth Circuit, you're sure to win, and if you're outside of the Fifth Circuit then you really, you're up in the air until your circuit makes a decision, which I think will strongly be in favor of the U.S. Supreme Court, assuming the en banc court and the Fifth Circuit doesn't reverse this. The U.S. Supreme Court

really settling this in short order because of course that's really not a very sustainable situation, especially since a lot of companies operate across the nation, including in the Fifth Circuit.

Chris Willis:

Yeah, and it seems to me, that during the period of uncertainty that we're anticipating, while this decision sort of works its way up to the Supreme Court, you may very well get a situation where you get a multiplicity of rulings from district courts and maybe even other appellate courts, if they move quickly enough across the country, that will go one way or the other on this issue. As you mentioned, either the Fifth Circuit way or the D.C. Circuit way. And so we may have quite a complex of different decisions while the case sort of winds its way to a Supreme Court decision. Do you think that's a reasonable possibility?

Misha Tseytlin:

Yes, that is certainly a reasonable possibility. Now, it depends on how quickly the U.S. Supreme Court acts. I can definitely see a world where the CFPB acts as the U.S. solicitor, petitions the U.S. Supreme Court really quickly, and the U.S. Supreme Court quickly signals that it's going to decide this issue before the end of this term, which would be June 2023.

In that case, you could just see everything being put on ice more or less until the Supreme Court speaks in June 2023. So that's certainly the most earliest multiplicity decisions as possible, perhaps probable. But I do think there's a very real possibility that the U.S. Supreme Court tells the world through a grant of Cert on an expatiated schedule that it will resolve this issue, in which case that multiplicity of decisions may not develop because everyone's just going to be holding its breath until the U.S. Supreme Court acts.

Chris Willis:

Yeah, makes sense. So this podcast is sort of intended to be our first take on the CFSA decision, so I want to let our listeners know that we're going to be writing and speaking about this in a lot more detail in the coming weeks, and of course, as events happen, we'll be reporting on them as well.

So consider this podcast sort of the first installment in what we're going to say. And we expect we'll be doing some webinars and other podcasts to dive into other particular details of this issue, the implications of the decision, et cetera, and of course, as events happen, we'll be reporting on them as well.

So Misha, thank you for being on the podcast today. I'm sure we're going to be hearing from you a lot more as this issue unfolds. And of course, thank you to our listeners for tuning in for this special edition of the Consumer Finance Podcast. And don't forget to visit our blog, consumerfinancialserviceslawmonitor.com and hit that subscribe button so that you can get all our updates, including updates about this case. And while you're at it, head over to troutman.com and add yourself to our Consumer Financial Services email list so that you can get copies of our alerts and our webinar invitations, including the webinar we're going to do on this topic. And of course, stay tuned for the regular episodes of this podcast that come out every Thursday afternoon. Thank you all for listening.

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