FinReg
Davis Polk Insights on Financial Regulation

Eighth Circuit Decides a Net Worth Sweep Claim, but is the Real Action Elsewhere?

By Randall D. Guynn, Margaret E. Tahyar & Ryan Johansen on August 28, 2018

POSTED IN ADMINISTRATIVE LAW, CFPB, FHFA

Another circuit court has opined on the Federal Housing Finance Agency (**FHFA**) and the legality of its net worth sweep. Late last week, the United States Court of Appeals for the Eighth Circuit held in ***Saxton v. FHFA*** that the FHFA did not exceed its statutory authority under the Housing and Economic Recovery Act (**HERA**) by agreeing to the net worth sweep. As the Eighth Circuit noted in the introduction to its opinion, four other circuit courts have considered and ultimately rejected "materially identical" arguments from other Fannie Mae and Freddie Mac shareholders.

The Eighth Circuit's decision is notable, but the key context for its opinion is what it was not asked to, and did not, decide: unlike the plaintiffs in the recent ***Collins*** case, which we have discussed previously on **this blog**, the plaintiffs in *Saxton* did not present any constitutional claims about the structure of the FHFA. Therefore, unlike the court in *Collins*, the Eighth Circuit did not have the opportunity to consider whether the FHFA as currently constructed is "unconstitutionally insulated from executive control." Thus, though Judge Stras in his *Saxton* concurrence noted that the delegation of authority to the FHFA is "harrowing" and that Congress "may have created a monster" with "breathtakingly broad powers" that are "insulat[ed]" from judicial review, Judge Stras felt that the disposition of the plaintiffs' claim was dictated by the "clear statutory text."

In *Collins*, Judge Willett, like Judge Stras a recent appointee to the federal bench and included on President Trump's **list** of potential Supreme Court candidates, offered a compelling argument in dissent that the net worth sweep claim should have been decided in favor of the plaintiffs. As discussed in greater depth in our **previous post**, Judge Willett grounded his dissent in the context of HERA as a whole, the closely related powers of the Federal Deposit Insurance Corporation as conservator for insured depository institutions and the common law of conservatorships. As we noted then, Judge Willett's dissent is likely to feature in any eventual cert petition by the *Collins* plaintiffs.

A Supreme Court grant of cert is made much more likely, of course, in the event of a circuit split. Though the Fifth Circuit in *Collins* strove to distinguish its decision with respect to the structure of the FHFA from that of the D.C. Circuit with respect to the structure of the CFPB in ***PHH***, in our view the *Collins* decision is best viewed alongside those cases that have considered the constitutional structure of the CFPB, including *PHH* and Judge Preska's recent decision in the SDNY in ***RD Legal Funding***.

Consistent with this view, All American Check Cashing, Inc., currently challenging the constitutionality of the structure of the CFPB before the Fifth Circuit, recently filed an unopposed **petition** for initial hearing *en banc*. Citing *Collins* and other cases, All American seeks to bypass the need for an initial decision by a three judge panel in light of the "rapid development of conflicting judicial opinions on the same issue in concurrent nationwide litigation." Further, in the event that the Fifth Circuit grants rehearing *en banc* in *Collins*, All American asks that the Fifth Circuit coordinate oral argument for its case with oral argument in *Collins*.

Meanwhile in New York, Judge Preska last week **granted** the CFPB's request for entry of final judgment against it in in the *RD Legal Funding* case. Judge Preska's order will permit the CFPB to appeal her June ruling, discussed previously **here**, that the CFPB as currently structured is unconstitutional and that Title X of the Dodd-Frank Act must be struck down in its entirety. Thus, the Second Circuit, like the Fifth Circuit, will soon have the opportunity to consider the structure of the CFPB, and by implication, the structure of the FHFA.