

[Banking and Finance Law Daily Wrap Up, TOP STORY—D.C. Cir.: Company challenging CFPB investigation can't preserve anonymity on appeal, \(Mar. 6, 2017\)](#)

Banking and Finance Law Daily Wrap Up

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By [Richard A. Roth, J.D.](#)

A company attempting to block a Consumer Financial Protection Bureau investigation into income-stream marketing cannot prevent the bureau from identifying it while the case is on appeal, according to the U.S. Court of Appeals for the District of Columbia Circuit. The majority of the three-judge panel decided that the company had shown neither that it was likely to succeed on the merits of its challenge to the bureau's constitutionality nor that it would suffer irreparable harm from being identified ([John Doe Co. v. CFPB](#), March 3, 2017, *per curiam*).

The bureau issued a civil investigative demand in 2016 asking the company to provide information about the business of buying and selling income streams—benefits from pensions, injury settlements, and other periodic payments. The court noted several facts about CIDs:

- They are "purely investigatory"; they do not start, or necessarily herald, an enforcement proceeding.
- They are not self-enforcing, and a company's refusal to comply alone will not trigger any sanctions.
- The CFPB must obtain a court order to enforce compliance with a CID, and the company can assert any defenses it has during that proceeding.

In this case, however, the company did not wait for the CFPB to attempt to enforce the CID. Instead, it sued the bureau, claiming that the bureau's structure was unconstitutional and asking for an injunction against any bureau action. The desired injunction would not only have blocked any effort to enforce the CID, it would have prevented the bureau from publicly identifying the company.

District court decision. The U.S. district court judge denied the company's request for a preliminary injunction. According to the judge, the company had based its claim that it was likely to succeed on the merits solely on a D.C. Circuit decision that establishing the CFPB as an independent agency with a single director violated the Constitution's separation of powers requirements (see [PHH Corp. v. CFPB](#), [Banking and Finance Law Daily](#), Oct. 11, 2016).

However, that decision was vacated when the D.C. Circuit granted the bureau's request for an *en banc* rehearing, the judge pointed out. This left the company with no support for its request for a temporary restraining order or preliminary injunction (see [John Doe Co. v. CFPB](#), [Banking and Finance Law Daily](#), Feb. 21, 2017).

However, the judge left the window slightly open for the company. He prevented the bureau from identifying the company for two weeks in order to give the company an opportunity to ask the appellate court for an injunction during an appeal.

Basis for injunction. In order to secure an injunction during the appeal, the company had to show that there was persuasive legal authority for its claim that the CFPB's structure is unconstitutional and that the district court judge abused his discretion when he decided that authority did not merit an injunction, the appellate court said.

All the company did was argue that the *PHH Corp.* decision meant it was likely to win its case, and that, in the opinion of the panel majority, was not enough.

Likelihood of success. The two judges in the majority listed four reasons why the company's argument fell short:

First, the *PHH Corp.* decision had been vacated. Moreover, the portion of the decision that addressed the separation of powers issue had not been unanimous. It was not an abuse of discretion for the district court judge to decide the decision did not mean the company was likely to win its own challenge.

Second, the company had failed to establish that it had standing to sue to block the CID. Establishing standing to block a CID based on a separation of powers violation would require the company to show that only the executive branch of the government had the ability to demand information from regulated companies. That was not the case, the majority said, and the company had not even tried to claim that it was.

Third, the usual remedy for a separation of powers violation is severing the offending section of the law, the majority said. That is precisely the remedy adopted in *PHH Corp.*—the bureau director was to be subject to removal by the president at will. This did not prevent the bureau from exercising its powers, including issuing CIDs.

The *PHH Corp.* decision did not even vacate what the bureau had already done, the two judges added. It just remanded the case so that the CFPB could reconsider some of its decisions.

Finally, the separation of powers violation claim should not even have been raised by suing the bureau, the majority said. The argument should have been raised as a defense to the bureau's suit to enforce the CID.

Irreparable injury. The two judges in the majority were unimpressed with the company's claim that it would lose customers and employees and its reputation would be harmed if it were identified as the subject of a CID. The company already had been named in regulatory investigations by six states, a critical Government Accountability Office report, and considerable resulting bad publicity, they noted. None of that appeared to have caused the company any harm.

They also rejected the argument that a violation of separation of powers principles was alone enough to be an irreparable injury.

Dissent. Judge Kavanaugh, a panel member who also was one of the judges in the *PHH Corp.* decision who believes the CFPB's structure is unconstitutional, would have given the company its injunction. He argued that the company is likely to win its challenge to the bureau's structure for the same reasons he voted in *PHH Corp.* to decide the single-director structure is impermissible.

Irreparable harm was shown simply by the company's ongoing regulation by an unconstitutionally structured agency, he argued.

The case is [No. 17-5026](#).

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