

## [Banking and Finance Law Daily Wrap Up, GOVERNMENT SPONSORED ENTERPRISES—Oral argument scheduled in case over FHFA constitutionality, actions with the Enterprises, \(Sept. 17, 2020\)](#)

Banking and Finance Law Daily Wrap Up

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By Nicole D. Prysby, J.D.

Cases involving challenges to the FHFA's constitutionality and its actions that transferred Fannie Mae and Freddie Mac assets to the Treasury Department are scheduled for oral argument in the U.S. Supreme Court in December.

Two cases—*Mnuchin v. Collins* (No. 19-563) and *Collins v. Mnuchin* (No. 19-422)—involving the Federal Housing Finance Agency (FHFA) have been [set](#) for argument in the U.S. Supreme Court on Wed., Dec. 9, 2020. The cases involve challenges to the constitutionality of the FHFA and the FHFA's agreement with the Treasury Department that transferred the net worth of Fannie Mae and Freddie Mac to the Treasury as compensation for capital contributions to the government-sponsored enterprises. The plaintiffs are Fannie Mae and Freddie Mac shareholders who sued, arguing that the actions of the Treasury Department and FHFA must be set aside because they exceeded the statutory authority of both the FHFA and Treasury Department and because the FHFA is unconstitutionally structured.

The Housing and Economic Recovery Act (HERA), created the FHFA to replace the Enterprises' prior regulator and authorized the FHFA to appoint itself conservator or receiver in certain statutorily specified circumstances. In 2008, Fannie and Freddie were placed in conservatorship. HERA also gave the Treasury Department temporary authority to purchase the Enterprises' securities, and, in 2012, the FHFA and Treasury Department imposed a "Net Worth Sweep" that replaced the prior dividend structure with one that requires Fannie and Freddie to pay Treasury their entire net worth on a quarterly basis, minus a small buffer (the Third Amendment).

The District Court dismissed the complaint, and, on appeal, a divided three-judge panel rejected the plaintiffs' claim that the defendants exceeded their statutory powers. In a rehearing *en banc*, the Fifth Circuit concluded that the FHFA is unconstitutionally structured but refused to set aside the Net Worth Sweep.

**Brief's main arguments.** The plaintiffs' [brief](#) to the Supreme Court makes four arguments. First, that their statutory claim is not barred by the Succession Clause in HERA. Plaintiffs fall within the zone of interests arguably protected by HERA and their statutory claim is also direct under the standard traditionally applied to distinguish direct from derivative shareholder claims. Injured shareholders can sue directly when an action increases the value of a favored class of a corporation's stock to the detriment of all others. The Net Worth Sweep removed the plaintiffs from the Enterprises' capital structures, and this action visited a direct injury on the plaintiffs without regard to its effect on Fannie and Freddie. Even if the Court concludes that the plaintiffs' statutory claim is derivative, the Succession Clause is best read as permitting shareholder derivative claims against the conservator. The defendants' position that only the conservator can sue the conservator for exceeding its statutory powers by imposing the Net Worth Sweep would render the statute unconstitutional as a matter of procedural due process.

Second, the FHFA exceeded its statutory authority when it imposed the Net Worth Sweep, because the Net Worth Sweep dissipated assets that the FHFA is required to preserve. Whatever the scope of the FHFA's discretion as conservator, it exceeds its authority when it takes steps that are antithetical to its conservatorship mission.

Third, as an independent agency headed by a single Director, the FHFA's structure violates the separation of powers based on the Court's decision last term in *Seila Law LLC v. CFPB*, 140 S. Ct. 2183 (2020).

Fourth, the appropriate remedy for the plaintiffs' constitutional claim is to set aside the Third Amendment. The Court has often vacated the actions of federal officials who acted without constitutional authority, and any lesser remedy would leave litigants with little incentive to bring separation of powers claims.

Attorneys: Charles J. Cooper, David H. Thompson, Peter A. Patterson, and Brian W. Barnes (Cooper & Kirk, PLLC) and Charles Flores (Beck Redden LLP) for Patrick Collins and other Fannie Mae and Freddie Mac shareholders.

Companies: Fannie Mae; Freddie Mac

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