

[Banking and Finance Law Daily Wrap Up, CONSUMER FINANCIAL PROTECTION BUREAU—Constitutionality of CFPB structure questioned on appeal of payday lender case, \(Apr. 20, 2018\)](#)

Banking and Finance Law Daily Wrap Up

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By [Colleen M. Svelnis, J.D.](#)

The issue of whether the structure of the Consumer Financial Protection Bureau violates Article II of the Constitution and the Constitution's separation of powers is at the heart of an interlocutory appeal to the United States Court of Appeals for the Fifth Circuit in a case branching out from an [action](#) brought by the CFPB in the Southern District of Mississippi against a payday lender.

The CFPB brought an action against All American Check Cashing, Inc., alleging that it had engaged in unfair, deceptive, and abusive practices in its check cashing and payday lending business. All American, located in Madison, Miss., offered its services at approximately 50 stores in Mississippi, Alabama, and Louisiana. The CFPB also charged Mid-State Finance, Inc. (doing business as Thrifty Check Advance), along with All American's owner, Michael Gray.

Certified by district court. While hearing the case, the District Court for the Southern District of Mississippi considered the following questions [brought](#) by All-American and the other defendants for certification for interlocutory appeal:

1. Does the structure of the CFPB violate Article II of the Constitution and the Constitution's separation of powers?
2. Do principles of fair notice and due process prevent the CFPB from enforcing the Consumer Financial Protection Act's prohibition against "unfair," "deceptive," and "abusive" acts, 12 U.S.C. § 5536(a)(1)(B), without defining those terms?

The court [granted](#) the [motion](#) as to the first issue for appeal to the Fifth Circuit, stating that the question of whether the structure of the CFPB is unconstitutional based on its single-director status presents a "controlling question of law" that has not yet been decided by the Fifth Circuit. The court further noted that there is "substantial ground for difference of opinion as to this issue as exhibited by the differences of opinion amongst the jurists in the United States Court of Appeals for the District of Columbia who have considered the issue." The court cited [PHH Corp. v. CFPB](#) and noted that three judges dissented from the D.C. Circuit's decision *en banc* in this case (See [Banking and Finance Law Daily](#), Jan. 31, 2018). Finally, the court stated that the immediate appeal of this question would materially advance the ultimate termination of the litigation because the case would not be able to proceed in the event the CFPB is not a constitutionally authorized entity.

However, the court found that grounds were not satisfied for the second question, finding no substantial ground for difference of opinion as to whether the terms "unfair," "deceptive," and/or "abusive" have been adequately defined by other federal statutes from which Congress borrowed when enacting the CFPA. Therefore, the court certified only the first question for appeal. The court ordered all proceedings in the case stayed pending decision by the Fifth Circuit as to whether it will consider the certified question.

Petition for appeal. All-American, Mid-State, and Gray filed a [petition](#) with the Fifth Circuit for permission to appeal to address the issue of the constitutionality of the structure of the CFPB. The petition asserts that answering this controlling question of law in All American's favor would terminate the litigation. The petition calls the issues "a threshold, case-dispositive, issue that will completely terminate the present litigation if decided in All American's favor." According to the petition, interlocutory appeal is appropriate "because there are substantial

grounds for a difference of opinion regarding an unsettled yet controlling question of law that would dispose of this case and that this is an issue over which "reasonable jurists" disagree."

All-American's petition states that the Director's "unaccountability" is concerning because "he may unilaterally decide 'how to enforce, when to enforce, and against whom to enforce the law' and 'what sanctions and penalties to impose.'" All-American concludes that the "proper forum for resolving these issues is on appeal, not on a petition regarding whether to hear the appeal."

CFPB answer. The CFPB argued in its [answer](#) that the petition states that it is unconstitutional for the Bureau to be led by a Director who can be removed by the President only for cause, but the Bureau is currently led by an Acting Director who can be removed at will. The Bureau argues that because of this, it is not a "controlling question of law."

The CFPB also argues in its answer that an interlocutory appeal will not "materially advance the ultimate termination of the litigation" because the case can be resolved promptly in the district court either on the Bureau's pending summary judgment motion or at trial, which was scheduled to begin in less than three months. The Bureau argued that if the petition was granted, it will likely delay, not advance, termination of the litigation.

'Certain to recur'. However, in its [reply](#), All-American pointed out that the constitutional issue is certain to recur, as soon as the Acting Director, whose tenure is limited by law, steps down, and a successor is nominated in the next few months.

All-American also argues that the CFPB's contention that resolution of the constitutional question "will not materially advance the litigation" fails to accept the reality of the district court's orders. "As the district court explained, there is no point adjudicating the summary judgment motion or putting the parties and the Court through a lengthy and expensive trial when the core question of the CFPB's legitimacy remains unsettled."

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Companies: All American Check Cashing, Inc.; Mid-State Finance, Inc.

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