Banking and Finance Law Daily Wrap Up, SUPREME COURT DOCKET—Recent decisions, cases, and petitions pending High Court review, (Nov. 17, 2021)

Banking and Finance Law Daily Wrap Up

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By Thomas G. Wolfe, J.D.

This *Banking and Finance Law Daily* feature presents a chart highlighting the decisions, arguments, briefs, and petitions on banking and finance issues before the current term of the U.S. Supreme Court.

A pair of mortgage borrowers have filed a petition with the U.S. Supreme Court asking the Court to review a June 2021 decision by the U.S. Court of Appeals for the First Circuit, which agreed with the lower federal district court that the Federal Housing Finance Agency and the government-sponsored enterprises (GSEs)—Fannie Mae and Freddie Mac—were not "government actors" subject to the borrowers' claims against them for alleged due-process violations under the Fifth Amendment to the U.S. Constitution; rather, the FHFA and GSEs were "private actors."

Affirming the lower court's dismissal of the mortgage borrowers' action, the First Circuit stated, "We hold that FHFA's temporary conservatorship over the GSEs does not constitute permanent authority," and the FHFA controls the GSEs "for the limited purpose of reorganizing, rehabilitating, or winding up their affairs (12 U.S.C. § 4617(a)(2))." Moreover, the fact that the Treasury "owns senior preferred stock in the GSEs," which, if exercised, would give the Treasury nearly 80 percent of the GSEs' common stock, "does not change the analysis," the First Circuit explained (see *Banking and Finance Law Daily*, June 11, 2021).

The borrowers had obtained loans secured by mortgages on their real property in Rhode Island, and the mortgage agreements gave their respective lenders the right to nonjudicially foreclose on the mortgages. Eventually, the mortgages and loans were sold to the Federal National Mortgage Association (Fannie Mae) while the FHFA was acting as Fannie Mae's conservator. When the borrowers eventually defaulted on their loans, Fannie Mae conducted nonjudicial foreclosure sales of the mortgaged properties under Rhode Island law. The mortgage borrowers then sued Fannie Mae and the FHFA in federal court alleging that, as "government actors," the FHFA and Fannie Mae had advanced the nonjudicial foreclosure sales, which violated the Fifth Amendment's prohibition against "any state deprivation of life, liberty, or property without due process of law."

Is the FHFA, Fannie Mae a "state actor?" In their petition in *Montilla v. Federal National Mortgage Association* (Sup. Ct. Docket No. 21-688), the mortgage borrowers ask: (1) "Whether the Federal National Mortgage Association, when under the conservatorship of the Federal Housing and Finance Agency, is a state actor for purposes of constitutional claims;" and (2) "Whether the Federal Housing and Finance Agency, when acting as conservator for the Federal National Mortgage Association, is a state actor for purposes of constitutional claims."

In support of their petition, the borrowers argue that the Supreme Court should grant their petition for certiorari because, among other things, "by passing off a Government operation as an independent private concern," the "Government can regulate without … accountability." The case "provides the Court with an opportunity to ensure that Executive agencies and any private entities they control are held accountable to their constitutional obligations," the borrowers contend. According to the petitioners, the First Circuit, "by its holding that Fannie Mae and the FHFA are private actors not subject to the Constitution's dictates, is preventing review of this important due process issue."

Supreme Court docket. For details about these and other petitions and cases pending before the Supreme Court, please consult this list. Issued opinions, granted petitions, pending petitions, and denied petitions are listed separately, along with a summary of the questions presented and the status of each case.

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Companies: Fannie Mae; Freddie Mac

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