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## D.C. Circuit Saves Merits of CFPB Challenges for Another Day

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(l-r) Brett Kavanaugh, Judith Rogers, and Nina Pillard. Photos: Diego M. Radzinski/NLJ

The U.S. Court of Appeals for the D.C. Circuit spent several hours on Wednesday weighing whether corporations and state attorneys general had legal standing to challenge the existence of the federal Consumer Financial Protection Board, the merits of their challenges notwithstanding.

In the final minutes, Judge Brett Kavanaugh shifted gears.

Could he get a “peek,” he asked, at the merits? More specifically, assuming the court found the challengers did have standing and the cases moved forward—and eventually came back before the D.C. Circuit—Kavanaugh was interested in their argument that having an agency headed by one person was a problem.

Randall Miller of Venable, lead attorney for one of the challengers, sprang into action, speaking rapidly as the final seconds of his argument time ticked down. Unlike regulatory agencies where multiple people were appointed to make important decisions, such as the Federal Trade Commission or the Securities and Exchange Commission, he said, the consumer protection board concentrated power in the hands of just one person.

History supported multimember decision-making for a regulatory agency as big and as powerful as the board, Miller said. He argued that such a setup acted as a restraint on an agency’s ability to bring enforcement actions.

It isn’t clear if the D.C. Circuit will ultimately dig into the single- versus multiple-member issue or the many other constitutional challenges that Miller and the other challengers raised. The judges first have to decide whether federal district judges were wrong to dismiss two cases challenging the agency’s existence before reaching the merits.

Miller is representing Morgan Drexen, which provides legal support services to lawyers handling debt relief matters. Morgan Drexen, which was facing an investigation by the agency, filed the constitutional challenge to its existence in July 2013 in the U.S. District Court for the District of Columbia. Shortly after, the agency filed an enforcement action against the company in a California federal court, claiming it was charging illegal upfront fees for debt relief services and deceiving customers.

The judge presiding over the D.C. case, U.S. District Judge Colleen Kollar-Kotelly, [dismissed Morgan Drexen’s lawsuit in October 2013](#). Kollar-Kotelly said she wouldn’t exercise her jurisdiction to hear the case because Morgan Drexen could raise its constitutional claims in defending against the enforcement action in California.

The judge also found that the company’s co-plaintiff, Connecticut solo practitioner Kimberly Pisinski, lacked standing to sue. Pisinski had hired Morgan Drexen to provide legal support services.

Judges Cornelia Pillard and Judith Rogers pressed the agency’s lawyer, senior litigation counsel John Coleman, to respond to Pisinski’s claims that the agency’s enforcement action and investigation would hurt her legal practice.

Coleman said Pisinski wasn’t accused of wrongdoing in the enforcement action, and that she couldn’t show that she couldn’t find another legal support company. Coleman said Pisinski also couldn’t show that the court could fix any harm she suffered. Kavanaugh noted that if the agency was declared unconstitutional, it was “obvious” how that would remedy Pisinski’s situation.

In the other case, which was argued before Morgan Drexen's case on Wednesday, a group of private plaintiffs and state attorneys general also lodged constitutional challenges to the consumer protection agency's existence. U.S. District Senior Judge Ellen Segal Huvelle ruled in August 2013 that the parties lacked standing to sue.

O'Melveny & Myers partner Gregory Jacobs argued for the private plaintiffs, led by State National Bank of Big Spring, a three-branch bank in Texas. Jacobs said that—contrary to Huvelle's opinion—the bank was subject to “direct regulation” by the agency and faced concrete costs and market harm from that regulation.

Oklahoma Solicitor General Patrick Wyrick argued on behalf of the 11 state attorneys general who joined the bank's lawsuit. Wyrick said the states were subject to the federal Dodd-Frank Act, the law that established the consumer protection agency, as creditors of large financial institutions.

Daniel Tenny, a lawyer with the U.S. Department of Justice, argued for the government.

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