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Omen for Your Company's Future? Supreme Court's Decision in *Seila Law v. CFPB*

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On June 29, 2020, the Supreme Court handed down a potentially seminal decision in *Seila Law v. Consumer Financial Protection Bureau*. On its face, *Seila Law* appears to apply only to debt collectors and some of their practices. But the scope of the decision is potentially much broader and could extend well beyond that context. First, it may affect other industries regulated by the Consumer Financial Protection Bureau (CFPB), including, for example, pay-day lenders. Second, it may affect many more agencies than just the CFPB, including the Federal Communications Commission (FCC), the Federal Trade Commission (FTC), and the Consumer Product Safety Commission (CPSC). Here, briefly, is what companies in the broad array of industries regulated by these agencies need to know.

The Court's opinion in *Seila Law* holds that the law creating the CFPB unconstitutionally limits the right of the President of the United States to remove its Director, who is the head of the agency. Under the law creating the CFPB, the President appoints the Director of the CFPB for a five-year term and can remove the Director only for cause. While similar laws protect some boards and commissions appointed by the President, only three other agencies are headed by a single officer who cannot be removed by the President except for cause. The Supreme Court held that CFPB's structure unconstitutionally interfered with the President's constitutional power, as the chief executive officer of the United States, to oversee the Executive Branch.

But in striking down the law prohibiting the President to remove the Director of the CFPB except for cause, the Supreme Court went further. The Court held that there were only two established exceptions allowing Congress to curb the President's power to remove federal officials in the Executive Branch with or without cause: (1) to remove members from a board governing an

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agency exercising quasi-judicial or quasi-legislative powers, not executive powers to set policy or administer or enforce the laws; or (2) to remove inferior officers with limited tenure and/or lacking policymaking or significant administrative authority. Under that narrow interpretation of Congress's power to limit the President's authority, many other agencies – even those with multi-member boards – could be found to be unconstitutionally constituted.

The typical remedy when an agency is improperly constituted is to declare any actions taken by the agency to be null and void. In *Seila Law*, the plaintiff argued that a subpoena issued by the CFPB was invalid because the statutory structure of the CFPB was unconstitutional. But while the case was pending in the courts, the CFPB's Director was replaced by an acting director, not confirmed by the Senate whom the President could remove without cause. The CFPB argued that the acting director ratified the subpoena and that the subpoena was therefore valid. The Supreme Court decided to send the case back to the lower courts to develop the facts and determine whether the acting director had cured the subpoena's otherwise constitutional infirmity.

The logic of the Supreme Court's opinion demonstrates its underlying power. Under *Seila Law*, the Court could conclude in a future case that *Seila Law* articulates the only two instances in which Congress could constitutionally prevent the President from removing an officer in the Executive Branch without cause. If so, the President would have the immutable authority to remove any superior officer from any agency whose powers extended beyond quasi-judicial or quasi-legislative power to encompass executive power to make policy or administer or enforce the laws. This would include at least those commissioners of boards that govern executive agencies such as the Federal Communications Commission, the Consumer Product Safety Commission, and probably the Federal Trade Commission and Securities and Exchange Commission. It might also extend to agencies like the Federal Deposit Insurance Corporation and other independent federal agencies that regulate the financial sector. If any of these agencies were found to be structured unconstitutionally because the President's removal authority had been illegally restricted, the regulations or other actions of that agency could be invalidated.

In a case that on its face appears to affect only debt collectors, the Supreme Court has thus created a weapon for creative lawyers that might be useful in a wide-ranging arena of conflicts between federal regulators and the companies they regulate. While the force of this weapon is not yet clear and may yet turn out to be more of a mouse than a lion, its potential power is undeniable. *Seila Law* demonstrates yet again the importance of having good legal counsel who are familiar with developments in appellate and other areas of the law who, working together collaboratively, can spot issues that may be useful and appropriate to use in your particular situation. At Butzel Long, we will continue to keep you informed when issues like these arise and are prepared to use them to your greatest advantage when the situation requires.

Joseph G. Cosby
202.454.2880
cosby@butzel.com