Consumer Finance Monitor (Season 6, Episode 12): SCOTUS Hears Oral Argument in Cases Challenging Biden Administration Student Loan Forgiveness Plan: Observations and Predictions

Speakers: Alan Kaplinsky and Tom Burke

Alan Kaplinsky:

Welcome to our award-winning Consumer Finance Monitor Podcast, where we explore important new developments in the world of consumer finance, what they mean for your business, your customers, and the industry. This is a weekly show brought to you by the Consumer Financial Services Group at the Ballard Spahr Law Firm, and I'm your host, Alan Kaplinsky, the former Group Practice Leader for 25 years, and now Senior Counsel of the Consumer Financial Services Group at Ballard Spahr. And I'm pleased to be moderating today's program.

For those of you who want even more information, don't forget about our blog, also known by the name of Consumer Finance Monitor. We've posted our blog since 2011. It was launched at the same time that the CFPB became operational, on July 21, 2011. There is a lot of relevant industry content there. We also regularly host webinars on subjects of interest to those in the industry. So to subscribe to our blog, or to get on the list for our webinars, please visit us at ballardspahr.com. And if you like our podcast show, please let us know about it. Leave us a review on Apple Podcasts, Google, or wherever you get your podcasts. Also, please let us know if you have any ideas for other topics that we should consider covering on our show, or speakers that we should consider inviting as guests on our show.

So today I'm joined by what I would say is a frequent guest, who is also a colleague of mine at Ballard Spahr, and let me introduce you first to Tom Burke. Tom is a partner at Ballard Spahr, in our Philadelphia office, and he's a member of both the Consumer Financial Services Group and the White Collar Criminal Team. He litigates student lending matters across the country on behalf of lenders, guarantors, and loan servicers. Tom has represented clients in major enforcement actions, class actions, and other prominent student loan litigation, and he regularly advises clients on related student loan regulatory issues, and state licensing issues as well.

So Tom, a very warm welcome to you. Really delighted to have you back on our show.

Tom Burke:

Thank you, Alan. I'm thrilled to be here.

Alan Kaplinsky:

Okay. And of course, by your introduction, I think people probably already have figured out what we're going to talk about today. Because we've spoken several times about the Biden Administration's efforts to implement a student loan forgiveness program that would cancel, forgive, wipe out, whatever you want to call it, about $400 billion in federal student debt. As we have discussed, that program was challenged in federal court in several separate cases, and two of those cases have now made their way to the US Supreme Court, and have already been argued before that court.

Before we get to our analysis of where those cases stand, can you just take a minute to explain in general terms what the Biden administration has been trying to do here, and whether there was any historical precedent for it?

Tom Burke:

Sure, Alan. You're completely right. We've talked about this issue several times, both when this student loan forgiveness plan was being contemplated, after it was announced, and then after lower courts ruled on it. And so here we are some two years down the road.

The program itself, we know what it looks like now. It is a proposal by the Biden Administration to cancel, through executive power, by the US Secretary of Education, approximately $10,000 in federal student loan debt per borrower, with an additional $10,000 per borrower for individuals who received Pell Grants, which are an indicator of economic need. And cumulatively, you're talking about $10,000 to $20,000 per person for over 40 million people. And so when you do the math on that, you get to an astounding number of approximately $400 billion in federal debt that would be canceled, forgiven, or otherwise cleared.

In terms of historical president, there really is none. There was a lot of debate in the early days over this program, when people were thinking about it, where Speaker Pelosi said that he did not think the President could do it. President Biden himself said that he thought there were serious constraints on his ability to do it. And so the Department of Education has done really nothing of this magnitude, even on a smaller scale, with respect to canceling loans, without a pre-approved congressional program in the nature of public service loan forgiveness, or some other very specific statutory construct.

Alan Kaplinsky:

Okay. Let's get into the specific cases, Tom. There are two of them, two separate challenges that were brought, two separate lawsuits brought before two different courts. But the cases now have made their way up to the US Supreme Court, and they were consolidated for oral argument. Can you tell us why there are two cases? What's the difference between the two cases? Who are the plaintiffs in each case? And how did the lower courts rule in each case?

Tom Burke:

Sure. So in the immediate aftermath of this program being announced back in August of last year, there were probably about 10 challenges that were filed in different forms around the country. Many of those were kind of winnowed out on fairly uncontroversial legal grounds, but two were left standing, and the first of those was what was widely regarded as the most serious challenge, brought by the state attorney generals of six states, those six states being Missouri, Arkansas, Nebraska, Iowa, Kansas, and South Carolina. So all traditionally red states, brought by Republican state attorneys general. That challenge was based on the notion that these states would be negatively impacted by the loan forgiveness program in various ways.

In the case of Missouri, which is the most prominent now, Missouri has a state entity that is a loan servicer, and it services a huge number of loans that are in that federal portfolio. And the argument would be that that entity, which is called MOHELA, would be negatively impacted by the cancellation, because it would lose a huge amount of its operating revenue if it were not making servicing fees on that portfolio, and that in turn would hit the pocketbook of Missouri. Other states had similar arguments, but the focus right now is on Missouri.

In terms of the legality, the Biden Administration had announced a while back that it was exercising its authority under the Heroes Act, which is a statute passed in the aftermath of 9/11 that allows the Secretary of Education to waive or modify various components of federal law with respect to student loans in the aftermath of a national emergency. And there are some bells and whistles in terms of constraints on that ability, but the state attorneys general argued that this, the contemplated forgiveness of $400 billion in student loans, was not within the ambit of what Congress authorized when it passed that statute, the Heroes Act.

The second challenge was brought by two individual borrowers who claimed that the Department of Education did not follow the traditional notice and comment period that is applicable to most forms of administrative rulemaking. And as a result, under the Administrative Procedure Act, that the executive action could not proceed. Those two individuals claimed that that had harmed them, because if they had the opportunity to comment on the rule making, they might have been able to influence it in a way that would have given them more loan forgiveness. In other words, both of those individuals had been circumscribed out of certain elements of the forgiveness, and their argument was that they could have done better if they had been able to comment on the rule. Substantively, they're making the same argument, that the Heroes Act does not authorize the executive action, and therefore the Secretary could not avail itself of an exception to the Administrative Procedure Act's

notice and comment obligation. So in other words, two different roads to get to the same place. Both plaintiffs are arguing that the executive action is unlawful, and they're both trying to stop it.

In each instance, there was a ruling in favor of the plaintiffs. Specifically in the state attorneys general action, they lost in the district court, and the Eighth Circuit Court of Appeals reversed, finding that the state attorneys general likely had demonstrated standing and a likelihood of success on the merits. In the case involving the two individual borrowers, what's called the Brown case, a Texas district court ruled in their favor, and entered an injunction that would have stopped the loan forgiveness program from proceeding nationally. And as a result, both of those cases were appealed up to the US Supreme Court, where they were consolidated for argument because they present very similar issues.

Alan Kaplinsky:

The case brought by the two individuals, did that go to the Fifth Circuit first?

Tom Burke:

Technically it did, but it didn't stop there for very long. The Fifth Circuit didn't get a chance to do anything with it. It got fast tracked because of the fact that the Eighth Circuit case was already going to the Supreme Court.

Alan Kaplinsky:

Right. I got it. Okay. So oral argument took place on February 28, and you listened to the oral argument, Tom, but what were the key takeaways from the argument, number one? And number two, were you surprised by anything that happened at the argument?

Tom Burke:

Sure. So the first thing I'll note is that the argument on these two cases took almost four hours.

Alan Kaplinsky:

That's very unusual.

Tom Burke:

It is.

Alan Kaplinsky:

Very unusual. Usually you get an hour, I think, per case.

Tom Burke:

That's right. These were long arguments. And this case is of great importance, watched by many people, for good reason, because it presents an opportunity for these justices to put their judicial philosophies on display in ways that they typically do only in a few cases per term, where it's so pronounced, as to how their judicial philosophies impact these rulings. And I say that for two reasons. These cases present really interesting issues on standing, and also on the merits, meaning the extent to which the executive branch can exercise really tremendous power under an arguable grant of Congressional authority.

And so what you saw at oral argument was a dynamic where you have six justices who are appointed by Republican presidents, who are viewed as conservative, for good reason, because they have philosophies that are grounded in things like originalism, that typically have a more skeptical view of executive power, and maybe a more restrictive view of standing, and other doctrinal views that go along with that. You have three very progressive justices, in Justices Kagan, Sotomayor, and Justice Ketanji Brown Jackson. And the justices really wore on their sleeves their doctrinal views in this particular case.

And so by that I mean, let me start with the merits question, which is whether the executive branch has the authority to proceed with this loan forgiveness program. Last term, the Supreme Court decided a case in which it cemented its views on something called the Major Questions Doctrine. The Major Questions Doctrine is something the lower courts have kind of played around with, but the Supreme Court had not fully endorsed using that nomenclature. And the idea behind it is that where the executive branch is taking a big swing on an issue of great political, economic, or social importance, that it has to show that Congress spoke with particular clarity on authorizing that action. In other words, there is a heavy hand on the scale on the side of scrutiny of that action.

So in this case, this is likely to be one of the first couple instances where the Supreme Court applies that doctrine, and views the proposed executive action through this lens that has a significant predisposition to not allow the Congressional, the executive action to proceed. In other words, there's a kind of a home team advantage for the plaintiffs in this case under the Major Questions Doctrine.

So getting back around to the questions, there were no real surprises on the merits question of what the Heroes Act authorizes. All six conservative justices expressed considerable skepticism that Congress had actually authorized the Secretary to forgive $400 billion in loans, because the statute that they're relying upon does not say, "You can forgive loans." It says, "You can waive or modify certain provisions of federal law under the Higher Education Act, in response to national emergencies." Now, the three progressive justices took the exact opposite view, which is that the statute is a very broad grant of authority, that this is a national emergency, that being the COVID pandemic, and that Congress knew what it was doing when it said, "You can waive or modify anything under this statute," and that includes loan balances, that includes repayment obligations. So in that respect, there were no real surprises.

On the issue of standing, there were some surprises. Now, at the outset, I'll note, to reach that kind of juicy merits question that the conservative justices want to reach, they're put in the unusual position of having to take a more expansive view on standing than they would traditionally take. And by that, I mean you've seen conservative majorities over the years pare back the ability of plaintiffs to bring suit in federal court under Article III in various ways, by kind of ramping up the injury requirements for plaintiffs to have that standing. That includes the Spokeo decision a few years back, and in general, you would expect conservative justices to take a view of standing that is a little bit more restrictive. Likewise, you would expect progressive justices to take a view that they're typically pro-standing. They find that even a moderate injury or a slight injury may be enough under certain circumstances to bring that challenge.

Here, the incentives are reversed, right? For the conservative justices to get to the merits question, they have to find that these plaintiffs have standing, and likewise, the progressive justices, to allow this case, to allow the administration to proceed with this action, would have to find no standing. So both of these camps of justices are arguing an atypical position for them.

Several of the conservative justices took the expected line here, that the State of Missouri in particular does have standing by virtue of its relationship with that loan servicing entity I mentioned earlier, MOHELA. A few, however, expressed some skepticism. Specifically Justice Amy Coney Barrett asked questions that signaled that she was not totally on board with the idea that the state can proceed on the basis of injury to MOHELA, and that could signal some weakness in the conservative block. They can lose one vote, but they can't lose two votes on standing.

So attention then turned to Justice Kavanaugh, who like Justice Barrett has been certainly conservative during a short time on the bench. Not nearly as conservative as, for instance, Justice Thomas, however. And he did not ask as many pointed questions on standing as some of the other justices did. He signaled some potential openness to argument on that point. And so the surprise was, are the conservatives going to get there in terms of having five or six votes in favor of standing, or are they going to fall short? And we just don't know.

Alan Kaplinsky:

But you are convinced, Tom, that if they're able to find their way over the standing issue, that on the merits, they're going to rule against the program. I take it there's not much doubt in your mind, based on what you heard during the oral argument.

Tom Burke:

I don't have much doubt about that. Justice Kavanaugh did ask a few questions. He noted that in his view, some of the court's greatest moments had come where it restrained executive action, such as in instances relating to interment of Japanese citizens during World War II, and other cases where the court said, "No, you can't do that." And he queried whether this is an instance of that nature.

On the other side, you had Justice Sotomayor, who took a very aggressive, forthright view, almost as a matter of social policy, that there are 40-some million Americans out there who would be helped by this loan forgiveness, that in her view, they need that forgiveness, and that people are going to enter default on their loans if they don't get it.

So there's a real question of whether the US Secretary of Education is the person who has their finger best on the pulse of what student loan borrowers need, or whether Congress should really have the right of way on that. And my guess is that Justice Kavanaugh will come around. That on the merits,. It would be a 6-3 ruling against the administration.

Alan Kaplinsky:

Yeah. So you mentioned earlier that there are really three key doctrinal issues or questions in the case. One, the standing of the plans to bring the lawsuits, whether the so-called Major Questions Doctrine applies in these cases, and finally, whether the Heroes Act authorizes the administration a grant loan forgiveness on this issue. And I guess you really have almost already answered the question, but let me just make sure. Did the justices' questions give you any insight on how they might vote on these issues?

Tom Burke:

Yes. I did touch on that a little earlier. To be totally clear, though, I think it's likely from the questions, as you might have expected even before argument, that you will see 6-3, finding that at least one of the two sets of plaintiffs, probably the state attorneys general, have standing to bring suit. Certainly 6-3 that the Major Questions Doctrine applies, and very likely 6-3 that the Heroes Act does not authorize the administration to grant loan forgiveness of this nature.

Alan Kaplinsky:

So I read a number of media reports about the oral argument, and a lot of them focused on what a great oral advocate, the Solicitor General was representing the Biden Administration, Elizabeth Prelogar. I hope I pronounced her name correctly. And that she did a much more effective job at the oral argument than the advocate for the state attorneys general and for the two individual plaintiffs who brought the lawsuit. Some of the journalists even said she saved the administration's loan forgiveness plan. What do you make of that?

Tom Burke:

Let me be clear at the outset. I agree with everyone who says that she did a great job. She graduated from Harvard Law School the year after me. I did not know her there, but she went on to have a really spectacular career, and she has earned her position as US Solicitor General. This was a spotlight performance for her, given that she got to argue twice on each case. So she had the initial argument on each case, then she had a rebuttal on each case. So she was up there quite a bit, and she showed a lot of savviness in responding to the questions. She thought well on her feet. She did a great job. And I also agree that, although I thought the advocates on the other side did certainly a fair job, I thought that it's not surprising to me that people came away thinking she had the best performance there.

However, the major caveat here is that I think it's extremely difficult to influence the justices' thinking on major doctrinal issues that they've been dealing with their whole career, in some sense preparing their whole lives to rule on cases like this. Where you have justices who are really ingrained in Federalist Society rhetoric, who are well versed in all of these issues, it's hard to say something that's going to change the mind of a US Supreme Court Justice on a major issue like this. And so I think it is probably a stretch to say that she saved the plan. I think certainly she did a great job. I don't know what that will translate to for her in terms of results.

Alan Kaplinsky:

Yeah. No. I agree with you completely. I've attended many oral arguments in the course of my career, and I honestly think in practically every case, the justices had decided the way they were going to come out before the oral argument, and sometimes the last questions just to ... It's almost like a game with them.

I remember when Justice Scalia was alive and on the bench, he enjoyed the back and forth, and the give and take, and the sparring, and in part it was a game for him. So to me, the fact she had a spectacular oral argument in a case as important as this is going to mean practically nothing. At least that's my view of it.

So what happens next here in terms of timing? When would you expect an opinion to come down?

Tom Burke:

So I was not a US Supreme Court clerk, so I have no inside information on this process, but I'm aware that the court holds conferences internally, in which they assess how they expect to vote on various cases, usually the week of the argument or the week after, and they'll take a roll call of votes. The Chief Justice, if in the majority, will assign the majority opinion to be written, or keep it for writing. If the Chief Justice is in the dissent, then the most senior justice in the majority would assign the opinion. And so really right after the oral argument, the case is assigned for opinions. And so people are writing. There's someone writing the majority opinion. There is certainly, in this case, someone writing a dissenting opinion. There may be people considering concurring opinions. And given the wealth of significant issues in this case, it would not surprise me if there were concurring opinions.

In terms of the time for an opinion, this will be an end of term decision for sure. So the expectation would be June or July. Some people have speculated that given the theoretically time sensitive nature of getting loan forgiveness in borrowers' pockets, so to speak, that the court might rush it. I just don't see that. I think that this will be an opinion for the ages in some respects, either way, and they're going to take their time and make sure that every word is really well crafted. So I think we probably have a wait of about three to three and a half months before we see anything on this.

Alan Kaplinsky:

It could be by the end of June, I would think. They typically go on vacation right around that time. And during the last couple of weeks in June, they'll issue a lot of opinions that will come down. And since this got argued so late in the term, I wouldn't expect it before then.

Tom Burke:

I agree with that.

Alan Kaplinsky:

Let me ask, before we get to potential outcomes here, this whole issue of forgiveness, is it fair to say that it would not have become an issue at all had it not been for the pandemic? That it was a result of the pandemic, that the administration and the Department of Education imposed a moratorium on making payments on student loans, and then during the campaign for president, Biden made it a political issue that he would forgive some amount of political, of education loans? And some people wanted him to forgive all student loans. Was that the genesis of this thing?

Tom Burke:

That's right. So there was immediate congressional action after the pandemic started to pause, impose a moratorium on the payments of federal student loans, and to apply a 0% interest rate. So at the moment, apart from people who took out new loans during the pandemic to finance their education, the portfolio looks exactly as it did as of the beginning of 2020. And as you noted, this issue of forgiveness had come up on the presidential campaign trail before the pandemic, if I recall correctly. But the pandemic certainly accelerated the thinking of, "This could be additional relief that people need." And so this debate over the payment pause and the 0% interest rate has really run in parallel with the forgiveness debate.

Alan Kaplinsky:

Right. Right. And I take it, to clarify one other thing, people who had been paying their student loan debt on time, never went delinquent, they get no relief at all under the administration's program. There's no retroactive relief. So you could say that those poor people, the people who paid on time, are the ones who get punished under the program. That really is unfair, right?

Tom Burke:

So I haven't really commented on the public policy elements of the line drawn around this, but it came up at oral argument. And Justice Alito in particular pushed the fairness argument that you made, which is, how do you rationalize forgiven loans for people who did not make their payments, while not providing any benefit to people who worked a second job, or whatever the case may be, so that they could make their payments? And you're right. The program has no retroactive element. There is an income threshold that is necessarily a matter of arbitrary line drawing. There are certain kinds of loans that are eligible, while others are not. There are many ways you can point to this and say that there are winners and losers, and it's not clear whether that's fair.

Alan Kaplinsky:

Yeah. Yeah. So let's roll the clock forward. We're at the end of June. An opinion comes down. Let's assume a ruling against the administration. They find that there's standing. They find on the merits, applying the Major Questions Doctrine, that the Education Department and Biden went too far. Is that the end of the issue? Is there some alternative that the administration might come up with that might save the idea of loan forgiveness?

Tom Burke:

Yes, there is. There are two things that may happen in the event that the court enjoins the administration from proceeding right now under the Heroes Act. The first is that the administration may look to the Higher Education Act itself, and there have been people in the borrower forgiveness community, the consumer advocacy community, who have been saying that that's what the administration should have done the whole time. They said the Secretary of Education has the power under the Higher Education Act itself to cancel the loans, putting aside national emergency and so on. Now, I think that is an argument that is no stronger, possibly much weaker than the Heroes Act argument, which I didn't think was all that strong to begin with. And so in theory, the administration could try to push through the same exact program under different statutory authority.

Now, they'll be coming up on another presidential election in 2024. Whether they could do that in time to actually push it through and get it done before then, I doubt, and I'm not sure that President Biden would have the appetite to try for a second bite of the apple on this, depending on what the Supreme Court opinion looks like on it. In other words, a stern rebuke here, it may or may not be a fight that he finds politically, and from a policy perspective, worth taking on in terms of administration resources.

The second thing is that although the administration has said that it will resume payments, borrowers will have to begin making payments again, not long after the court rules on this issue. That's what the administration has said. However, nothing is really holding them to that. And so there is a widespread perception right now that if the administration loses before the Supreme Court, that it will again extend the payment pause, maybe through the end of the year, maybe longer, who knows? And at the moment, that issue is going to run on a separate legal track, in the sense that there was recently a high profile challenge filed to the payment pause itself, independent from the loan forgiveness issue.

Alan Kaplinsky:

Yeah. I want to get to a new lawsuit that just got initiated, but what happens if the administration wins? They win. They got a ruling on the merits in their favor. Or another option would be they find that there was no standing on the part of the plaintiffs. Would the people who oppose loan forgiveness have enough time to find another plaintiff who might have standing, and to immediately file a lawsuit and enjoin the payment, the payments from being made? Or do you think the administration would just, that day, send out the payments, and that would be the end of it? The issue would become moot?

Tom Burke:

The issue will become moot for two reasons. First, folks have now had at least seven or eight months to really think hard about who might have standing here, and try to bring those suits. So in other words, I think the cases that we see before the court right now are probably the most meritorious in terms of standing that we are ever going to see. I think they'd be really looking for dregs if it came to that, if these challenges lost.

I will note that interestingly, everyone conceded, the Supreme Court, that MOHELA itself would have standing to challenge this action. And if MOHELA, the Missouri student loan servicing entity, had brought the suit, that the standing issue would be off the table. However, MOHELA has not brought the suit, and I have no reason to think that MOHELA's view is going to change on that. So I don't expect a new dark horse contender for standing to show up.

Second, and this is probably more directly responsive to your point, the administration is going to enact this loan forgiveness at light speed the second that it gets the green light to do so. It has already what they call pre-approved upwards of 10 million borrowers, it might be more than that, based on existing documents that they have. And that will be a day one forgiveness event if they're allowed to do so by the Supreme Court. And then I think as to the balance of that portfolio, it will also happen very quickly thereafter.

So two reasons. The first is that I don't think anyone will have the standing, and second, the administration will move very quickly.

Alan Kaplinsky:

Okay. Let's talk about this new lawsuit that got filed very recently, challenging not the loan forgiveness, but the moratorium on monthly payments. Can you tell us what that lawsuit is predicated on, and where is it filed, and what's the status of that?

Tom Burke:

Sure. So the lawsuit was filed by a plaintiff called SoFi, which is a large lender of student loans and other financial products. The lawsuit was filed in the District of Columbia District Court, and it represents a challenge to the administration's ability to continue with the 0% interest rate, and the payment pause. And the gist of the argument is that although Congress had the ability to implement those things indisputably back in the early days of the pandemic, there was some question as to whether the executive branch could prolong it. Now, both administrations ultimately extended that period of the payment pause. The Trump Administration extended it for over six months, and then the Biden Administration has now extended it going on another few years. And so the question is, what has changed between then and now?

And there's an argument, I mean, certainly it's not an argument that legally, the national emergency is over. That's not to suggest that people are not still obviously experiencing the effects of the pandemic in various forms, but legally, the declaration of national emergency is over, and that at this point, the payment pause is too attenuated from the underlying emergency. And so the point is, "Hey, we've got to get back to normal at some point. People have this debt. It was not a surprise to them when they took the debt out. These are loans that everybody knowingly entered and planned to repay at some point. We've paused them for three years, and let's get back to normal." And that argument could resonate. But again, it's tough to say exactly when the executive branch's extension of that payment pause became legally impermissible.

Now, I think their argument, I think SoFi's argument on this presumably would be, "We don't have to show a specific date when it flipped from permissible to impermissible. We just have to show that now, today, it is no longer permissible."

Alan Kaplinsky:

I take it SoFi isn't trying to argue that it's retroactive to a particular date, and that all those payments that have not been made since that date have got to be immediately paid by the borrowers. They're looking for prospective relief. Am I right?

Tom Burke:

That's correct. Right.

Alan Kaplinsky:

Yeah. Yeah. One final thing I want to raise, I don't know if you have a reaction to it or not, Tom, but unrelated to these student loan cases, there was a case pending before the US Supreme Court called CFPB versus CFSA, Consumer Financial Protection Bureau against a trade association of payday lenders, where the Fifth Circuit Court of Appeals has brought a frontal attack on the Consumer Financial Protection Bureau, claiming that its entire funding structure is unconstitutional, because they're not subject to congressional appropriations. And this case has been put on ... They granted cert very recently, the Supreme Court. Not going to be argued until next term. A decision may not be forthcoming until sometime around a year from now.

But if they come down with an opinion expressing a lot of disdain for the administrative state, or for vesting too much power in the executive, or delegating at Congress, delegating too much power to the executive, I wonder if that might provide some clues as to how ... Even though I know the issues are completely different. In one case, it's a constitutional issue. In the other case it's a standing issue, and it's a statutory interpretation issue. But I'm wondering if we might see a clue.

Tom Burke:

Yes, Alan. I think the big question here is, how unified and how muscular will this six-justice conservative majority be? How much of a voting block will they be on these issues? And there's good reason to believe right now that they're going to be pretty unified. However, if the opinion comes down where you see some cracks in that, maybe it's 5-4 instead of 6-3, maybe the administration prevails 5-4, then I think that will give a lot more wind in the sails to the CFPB.

Right now, looking at the court lineup and looking at how these six justices have been basically handpicked for their kind of fealty to conservative doctrine over the years, and their ability to defend that doctrine with great intelligence and great writing, I'd be very surprised if we saw some of these more recently appointed justices break from the block. So I think they're going to be pretty unified on this, and I think that will be a real indicator of how they're likely to rule next term as well.

Alan Kaplinsky:

Yeah. Yeah. Okay. Good. So we've come to the end of our program today. Before we conclude, Tom, is there anything that we didn't cover today? Any question I may have overlooked where it's important that our audience be aware of anything else?

Tom Burke:

Well, I came into this hoping that I would give a capsule summary of the oral arguments, rather than reenacting them for our listeners, and I think that we've already gone into quite a bit of detail, so no. Although there's a lot more nuance in all of these arguments to unpack, because they did talk about it for four hours, I think we've hit all the high notes here.

Alan Kaplinsky:

Good. Good. Good. So, Tom, thank you very much for participating today, again, on very short notice. And I'm sure, I will extend the invitation right now, that when the opinion comes down, is it, say, probably the end of June, that sometime shortly thereafter, I want to have you back on our program to tell us how it came out.

Tom Burke:

I accept. I'll be here.

Alan Kaplinsky:

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