
New York Federal Court Rules That The Bureau of Consumer Financial Protection Is Unconstitutional, Continuing A High-Stakes Debate

By Thomas A. Brooks, Jane C. Luxton, Joann Needleman / Jun 22, 2018

In an ongoing, high-profile legal debate, court opinions on the constitutionality of the structure of the Bureau of Consumer Financial Protection (“Bureau”) – previously known as the Consumer Financial Protection Bureau (“CFPB”) – continue to apply different legal analyses, positioning the issue for a possible U.S. Supreme Court resolution. On June 21, 2018, in *CFPB and The People of the State of New York v. RD Legal Funding, et al.*, Judge Loretta Preska of the District Court for the Southern District of New York ruled the Bureau’s creation as an independent agency with a Director removable only for cause, and not at will like other Presidential appointees, violates constitutional considerations of “history, liberty, and presidential authority.” Rejecting a contrary January 31, 2018 *en banc* opinion by the D.C. Circuit in *PHH Corp. v. CFPB*, 881 F.3d 75, as non-binding in her Circuit, Judge Preska relied on Judge Brett Kavanaugh’s dissent in *PHH* in holding that the Bureau’s structure “violates Article II of the Constitution.” Going even further, Judge Preska held this constitutional infirmity requires invalidation of Title X of the Dodd-Frank Act in its entirety, refusing to follow Judge Kavanaugh’s proposed, more limited remedy of severing the parts of the law that limited the President’s ability to supervise, direct, and remove the Bureau Director at will.

The *RD Legal* case involved allegations that various corporate entities and their owner offered cash advances to consumers who had judgments entered in their favor. Targeted included the National Football League (“NFL”) Concussion Litigation class members (“NFL Class Members”) and individuals waiting for payouts from settlement agreements from the NFL or who qualify for compensation under the September 11th Victim Compensation Fund of 2001 (“VCF”). The Bureau and the New York Attorney General, then Eric T. Schneiderman, claimed that the defendants misled these consumers into entering into agreements represented as valid and enforceable but, in reality, these payments functioned as usurious loans that were void under state law.

If Judge Preska’s views hold, all actions by the Bureau since its inception could be in jeopardy. This decision not only affects Bureau activities under Richard Cordray, but it could similarly invalidate actions taken by Mick Mulvaney, since he was appointed as Acting Director of the Bureau after Cordray’s departure in Fall 2017.

It would seem logical that the Bureau would appeal this decision to the Second Circuit Court of Appeals. If the Circuit Court were to uphold Judge Preska’s decision, it would set up a circuit split that could be resolved only by the United States Supreme Court. However, given the new direction of the Bureau under Mulvaney’s leadership, a Bureau appeal appears less certain.

Currently two other federal cases are pending that challenge the constitutionality of the Bureau’s structure. In *CFPB v. All-American Check Cashing*, the Federal District Court for the Southern District of Mississippi denied the Defendant’s Motion for Judgment on the Pleadings, relying on the D.C. Circuit’s holding in *PHH*. However, in April 2018, the Fifth Circuit granted Defendants’ Certification of Questions for Interlocutory Appeal on one issue: “Does the structure of the Consumer Financial Protection Bureau (CFPB) violate Article II of the Constitution and the Constitution’s separation of powers?” If the Fifth Circuit disagrees with the D.C. Circuit, the issue would be primed for Supreme Court review.

In *CFPB v. Ocwen Financial Corporation et al.*, now before the Federal District Court for the Southern District of Florida, the Bureau recently filed a notice with the Court requesting the case be dismissed because Mulvaney, as the “Acting” Director, is removable at will under provisions of the Federal Vacancies Act and also because the Acting Director has ratified the decision to bring the *Ocwen* lawsuit; based on these facts, the Bureau argues, the Defendants’ constitutional challenge no longer applies. However, Judge Preska specifically addressed the identical “ratification” argument by the Bureau in *RD Legal* and rejected it outright, holding:

Here, the constitutional issues presented by the structure of the CFPB are not cured by the appointment of Mr. Mulvaney. As Defendants point out, the relevant provisions of the Dodd-Frank Act that render the CFPB’s structure unconstitutional remain intact. ...Furthermore, Mr. Mulvaney cannot serve past June 22, 2018 (210 days after the vacancy arose), unless the President nominates a new Director, and then only until the new Director is appointed. Thus, there will likely be a new Director appointed in the coming months who will be subject to the for-cause removal provision. Therefore, the Ratification does not cure the constitutional deficiencies with the CFPB’s structure as the CFPB argues. Accordingly, the Court rejects the Notice of Ratification to the extent the CFPB argues that the Ratification renders Defendants’ constitutional arguments moot.

Lawyers for the Bureau have made the same ratification argument in *All-American Check Cashing*. Some have suggested that the Bureau’s filings in *Ocwen* and *All-American Check Cashing* cases are an effort to avoid arguing the constitutionality of the agency’s structure. The *RD Legal* decision may very well change that strategy, however.

In April, the Acting Director urged Congress to make the Bureau more accountable to the American people. If the Bureau appeals the *RD Legal* decision, and in the interim a new Director is confirmed by the Senate, the Bureau will be forced into the political quagmire of advocating for one unaccountable director. On the other hand, the court’s holding adds further questions to the Bureau’s authority, and enforcement targets are likely to continue challenging the Bureau’s authority outside the D.C. Circuit, based on constitutional arguments. The continued uncertainty of the Bureau’s structure will likely reinforce calls for bringing a bi-partisan commission to this controversial agency.

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