Bureau of Consumer Financial Protection Structure Ruled Unconstitutional

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It's a big deal when a federal trial court declares that the structure of a federal agency violates the U.S. Constitution. For folks in the credit business, including car dealers, it is an especially big deal when the agency involved is the Bureau of Consumer Financial Protection.

But that's what happened in a New York federal trial court. Here's the story.

A company called RD Legal Funding provided cash advances to individuals with claims or potential claims under class action settlements. Specifically as relates to this action, RD Legal provided cash advances to former National Football League players who are seeking an award under the NFL Concussion Settlement and to individuals who are seeking an award under the September 11th Victim Compensation Fund.

RD Legal provided cash advances to claimants up front in exchange for assignment of the claimants' interest in the ultimate settlement payout. Under the terms of the assignment, RD Legal would receive payment from the ultimate settlement payout that is larger than the amount of the cash advance. RD Legal structured these contracts as purchase and sale transactions, not as loans.

In 2017, in response to civil investigative demands from the BCFP and the New York attorney general, RD Legal sued both agencies seeking a declaratory judgment that its transactions were true sales.

The Bureau and the attorney general then sued RD Legal, alleging numerous violations of the Consumer Financial Protection Act and New York law. The allegations included that RD Legal misrepresented that it could help claimants get their settlement payouts faster, that RD Legal took invalid assignments of claimants' interests in the settlements, and that the cash advance agreements were extensions of credit that were usurious and void under state law.

RD Legal moved to dismiss, arguing, among other things, that the Bureau did not have authority to bring these claims because its structure was unconstitutional. The U.S. District Court for the Southern District of New York agreed and dismissed the Bureau's claims.

The court stated that it was not bound by, and declined to follow, the decision of the U.S. Court of Appeals for the District of Columbia Circuit in *PHH Corp. v. CFPB*, a 2017 decision that upheld the constitutionality of the Bureau's structure. Instead, the court ruled that the Bureau's structure is unconstitutional "because it is an independent agency that exercises substantial executive power and is headed by a single Director" removable only for cause.

Further, the court opined that it would be insufficient simply to hold that the director of the Bureau can be removed at will by the president and instead concluded that Title X of the Dodd-Frank Act should be invalidated in its entirety.

In reaching this conclusion, the court rejected the Bureau's argument that the appointment of Acting Director Mick Mulvaney, who is removable at will by the president, ratifies the decision to bring this action. The court found that ratification does not adequately address the constitutional issues posed by the Bureau's structure.

The court allowed claims by the New York attorney general to proceed. Importantly, the court found that the claims asserted under the CFPA were valid and noted that the attorney general has independent authority under the CFPA to bring claims in federal court to enforce violations of the CFPA. Thus, although the court dismissed the Bureau's claims under the CFPA, the court allowed the attorney general to proceed with those claims, as well as with the state law claims.

We've been down this rabbit hole before – that's the reference to the *PHH* case above. The matter of the BCFP's constitutionality can, and likely will, be appealed. Stay tuned.

Consumer Financial Protection Bureau v. RD Legal Funding, LLC, 2018 U.S. Dist. LEXIS 104132 (S.D.N.Y. June 21, 2018).
