

Client Alert

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The Latest Judicial Holding in the Ongoing Debate About the CFPB: SDNY Judge Holds That the Agency's Structure Is Unconstitutional and Dismisses the Agency From the Lawsuit

Over the past year Hunton & Williams LLP (now Hunton Andrews Kurth LLP) has released articles discussing reform efforts related to the Dodd-Frank Wall Street Reform and Consumer Protection Act (Dodd-Frank) and the Consumer Financial Protection Bureau (CFPB),¹ which, as we stated, was created as a brand-new, start-up independent agency under Dodd-Frank. The first article was a discussion about the questions of the constitutionality of the CFPB due to its arguably unchecked authority to exercise executive power through the CFPB's investigative and enforcement authority,² legislative power through rulemaking authority³ and judicial power through its authority to rule on enforcement actions with any appeals on such actions being taken to the director of the CFPB.⁴ Perhaps due to its unprecedented and unchecked power, one appellant panel held that the structure of the CFPB is unconstitutional, only to be reversed on the issue in an *en banc* opinion rendered on January 31 of this year.⁵ The focus then turned to the acting CFPB director Mick Mulvaney who some have argued was single-handedly destroying all the reform efforts the CFPB had successfully concluded under its former director Richard Cordray.⁶ In the wake of all the controversy about the CFPB abusing its power or not yielding enough reform comes the latest development from the judicial branch regarding the structure of the CFPB, which again raises questions about the ability of the agency to bring new claims or perhaps even enforce past consent decrees.

Is the CFPB Unconstitutional?

Currently, the answer depends on where your case is pending. On Thursday, June 21, 2018, a New York federal district court judge found the CFPB to be unconstitutionally structured, expressly disagreeing with the DC Circuit's *en banc* holding to the contrary and adopting the views expressed by Judge Brett Kavanaugh in the original *PHH* opinion and in his dissent from the *en banc* opinion rendered this past January.⁷

US District Judge Loretta A. Preska reached her finding as part of her decision to dismiss the CFPB's suit brought jointly last year with New York's Attorney General Eric Schneiderman accusing RD Legal, a New

¹ See <https://www.hunton.com/en/insights/dodd-frank-reform-alerts.html> for the series of articles related to this topic.

² See 12 U.S.C. §5562.

³ See 12 U.S.C. §5512(b).

⁴ See 12 U.S.C. §5563.

⁵ *PHH Corporation v. Consumer Financial Protection Bureau*, 839 F. 3d 1 (D.C. Cir. 2016), rehearing *en banc* granted, order vacated (D.C. Cir. 2017), reversed *en banc*, 881 F.3d 75 (Jan. 31, 2018).

⁶ See e.g., <https://www.hunton.com/en/insights/dodd-frank-reform-alerts.html> (summarizing actions taken in Mulvaney's first three months as acting director of the CFPB).

⁷ *Consumer Financial Protection Bureau et al. v. RD Legal Funding LLC et al.*, case number 1:17-cv-00890, in the US District Court for the Southern District of New York.

Jersey-based settlement advance firm, of scamming 9/11 first responders and NFL retirees with high-cost loans. She specifically rejected the DC Circuit majority *en banc* opinion in the *PHH* case and held that the CFPB's structure is unconstitutional.

She flatly said she isn't bound by the DC Circuit's *en banc* majority opinion and found it unpersuasive: "Respectfully, the court disagrees with the holding of the *en banc* court and instead adopts Sections I-IV of Judge Brett Kavanaugh's dissent (joined in by Senior Circuit Judge A. Raymond Randolph), where, based on considerations of history, liberty, and presidential authority, Judge Kavanaugh concluded that the CFPB 'is unconstitutionally structured because it is an independent agency that exercises substantial executive power and is headed by a single director.'"⁸ Judge Preska, however, disagreed with Judge Kavanaugh and held that the structure of the CFPB could not be remedied through for-cause removal as she explained: "Also most respectfully, the Court disagrees with Section V of Judge Kavanaugh's opinion wherein he determined the remedy to be to 'invalidate and sever the for-cause removal provision and hold that the Director of the CFPB may be supervised, directed, and removed at will by the President.' Instead, the Court adopts Section II of Judge Karen LeCraft Henderson's dissent wherein she opined that 'the presumption of severability is rebutted here. A severability clause "does not give the court power to amend" a statute. Nor is it a license to cut out the "heart" of a statute. Because section 5491(c)(3) is at the heart of Title X [Dodd Frank], I would strike Title X in its entirety.'"⁹

Judge Preska thus dismissed not only the CFPB's claims under the Consumer Financial Protection Act (CFPA) and New York state law, but she also held that the agency could not remain in the lawsuit, explaining: "Because the CFPB's structure is unconstitutional, it lacks the authority to bring claims under the CFPA and is hereby terminated as a party to this action."¹⁰

Will the CFPB Appeal?

Currently, the CFPB has not stated whether it will appeal Judge Peska's ruling. Attempts at legislative reform of the CFPB are still unresolved. The one certainty that can be stated in conclusion is that there is no certainty. Stay tuned as we continue to provide updates of the ongoing developments related to these matters.

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⁸ *Id.* at 104.

⁹ *Id.* (internal citations omitted).

¹⁰ *Id.* at 6. The suit was not dismissed altogether because Judge Peska ruled that New York had independent authority to bring the claims.