

## [Banking and Finance Law Daily Wrap Up, TOP STORY—S.D.N.Y.: CFPB structure found unconstitutional, \(Jun. 22, 2018\)](#)

Banking and Finance Law Daily Wrap Up

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By [J. Preston Carter, J.D., LL.M.](#)

Holding that the Consumer Financial Protection Bureau's structure is unconstitutional, the U.S. District Court for the Southern District of New York found that the Bureau lacks the authority to bring claims under the Consumer Financial Protection Act and, therefore, terminated it as a party to a lawsuit against RD Legal Funding, alleged to have scammed former NFL players and 9/11 medical workers into taking cash advances on payouts from settlement agreements that functioned as usurious loans, void under New York state law. However, according to the court, the New York Attorney General has independent authority to bring claims under the CFPB. The Court concluded that the "NYAG has alleged plausibly claims under the CFPB and under New York law," and it denied RD Legal Funding's motion to dismiss the complaint ([Consumer Financial Protection Bureau v. RD Legal Funding LLC](#), June 21, 2018, Preska, L.).

**Constitutionality.** RD Legal Funding argued that the CFPB is unconstitutionally structured and, therefore, lacks the authority to bring claims under the CFPB. The court acknowledged the decision of the U.S. Court of Appeals for the District of Columbia Circuit in *PHH Corp. v. CFPB* (see [Banking and Finance Law Daily](#), Jan. 31, 2018), which found that the CFPB's single director structure was not unconstitutional, but said, "Of course, that decision is not binding on this Court." Instead, the court agreed with the dissenting opinion of Judge Kavanaugh that the CFPB "is unconstitutionally structured because it is an independent agency that exercises substantial executive power and is headed by a single Director."

However, the court went beyond Kavanaugh's opinion that the remedy would be to sever the "for-cause removal provision." Instead, it agreed with Judge Henderson's dissenting opinion that "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) [the for-cause removal provision] is at the heart of Title X [Dodd Frank], I would strike Title X in its entirety."

**Ratification.** Another issue addressed by the court was the CFPB's Notice of Ratification, in which it attempted to ratify its decision to file this enforcement decision prior to the appointment of the CFPB's Acting Director, Mick Mulvaney, asserting that, because the President may remove Mulvaney at will, RD Legal Funding may not obtain dismissal on the grounds that the instant action was initially filed by a Director at the CFPB removable only for cause. However, the court dismissed that argument, agreeing with RD Legal Funding that the CFPB's Ratification does not address accurately the constitutional issue raised in this case, which concerns the structure and authority of the CFPB itself, not the authority of an agent to make decisions on the CFPB's behalf.

**Hensarling statement.** House Financial Services Committee Chairman Jeb Hensarling (R-Texas) [applauded](#) the decision for confirming "what House Republicans have said all along, that the Bureau's structure is unconstitutional." He added that the Financial CHOICE Act, passed by the House on June 8, 2017, fixes the constitutional defects identified by the District Court by subjecting the Bureau to the control of the people's elected representatives.

**ABA response.** Responding to the ruling, the America Bankers Association released a [statement](#) that it "has long believed that the Bureau should be more accountable to Congress and that a five-member, bipartisan commission—as originally envisioned in drafts of the Dodd-Frank Act—would balance the Bureau's needs for independence and accountability, while broadening perspectives on rulemaking and enforcement."

**Consumer groups expect reversal on appeal.** The Consumer Federal of America [stated](#) that the court's "order is likely to be reversed on appeal because it cobbles together some of the most extreme views of the CFPB and also severability jurisprudence." [According to](#) the Center for Responsible Lending, "The impact of the district court's decision is unclear, but this extreme ruling disregards the holding of the full D.C. Circuit Court of Appeals, which affirmed the agency's constitutionality."

Public Citizen [also expects](#) the decision to be overturned on appeal. "Applying longstanding U.S. Supreme Court precedent, the en banc D.C. Circuit Court of Appeals correctly ruled earlier this year that the CFPB's structure is constitutional. Congress created the CFPB to protect American consumers from big banks and financial industry rip-offs, which is why the financial industry is working so hard to destroy the agency."

The case is [No. 17-cv-890](#).

Attorneys: Benjamin Zachary Konop for the CFPB. Melvin L. Goldberg, Office of the Attorney General, for People of the State of New York. Eric Todd Kanefsky (Harris, St. Laurent & Chaudhry LLP) and Jeffrey M. Hammer (McDermott Will & Emery LLP) for RD Legal Funding LLC, RD Legal Funding Partners, LP and RD Legal Finance, LLC.

Companies: RD Legal Funding LLC; RD Legal Funding Partners, LP; RD Legal Finance, LLC

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