

## [Banking and Finance Law Daily Wrap Up, TOP STORY—9th Cir.: Ratification solved problems created by invalid Cordray recess appointment, \(Apr. 15, 2016\)](#)

Banking and Finance Law Daily Wrap Up

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By [Richard A. Roth, J.D.](#)

The invalidity of Richard Cordray's recess appointment as Director of the Consumer Financial Protection Bureau did not deprive the federal courts of jurisdiction over a CFPB enforcement action, and his subsequent ratification of bureau actions resolved any constitutional problems, according to the U.S. Court of Appeals for the Ninth Circuit. The court also affirmed nearly all of the order for relief entered by a federal district judge against an attorney who engaged in an abusive mortgage assistance program (*CFPB v. Gordon*, April 14, 2016, Owens, J.).

In its enforcement suit, the CFPB asserted that California attorney Chance Edward Gordon attempted to evade restrictions on his ability to charge up-front fees for mortgage relief services by creating a two-piece program. First, under his "Pre-Litigation Monetary Claims Program," he sold to homeowners across the country legal products that his advertisements claimed would help them with their mortgage loan disputes. Second, he promised to provide legal services free of charge, but only to homeowners who first bought the Pre-Litigation Monetary Claims Program. Gordon previously charged clients for the same services, the court noted.

According to the district court judge, the attorney's activities violated both the Dodd-Frank Act ban on unfair, deceptive, or abusive acts or practices and the up-front payment ban of Reg. O—Mortgage Assistance Relief Services (12 CFR Part 1015) (see [Banking and Finance Law Daily, July 29, 2013](#)).

**Challenges on appeal.** The attorney did not just claim that the judge incorrectly found legal and regulatory violations. He asserted that because Cordray's recess appointment as director was invalid, and the enforcement action began before Cordray's appointment was approved by the Senate, the bureau could not enforce the Dodd-Frank Act or Reg. O. U.S. Constitution Article II, on appointments, and Article III, on federal court jurisdiction, both left the bureau powerless to act until a director was confirmed.

**Standing to sue.** Article III gives the federal courts jurisdiction over "cases and controversies," and a case or controversy exists only if the plaintiff has standing to sue. A private plaintiff must claim a particularized interest to show standing, the appellate court said; however, the government can rely on the need to vindicate the public interest.

When the CFPB sued the attorney, it was asserting "the public interest in making Gordon's victims whole and preventing him from further fleecing vulnerable homeowners," according to the court.

Congress authorized the CFPB to bring enforcement suits in federal court. The CFPB was part of the executive branch of government and, regardless of whether a bureau director had been confirmed, the executive branch had standing to sue to vindicate the public interest, the court said.

The court also distinguished between problems under the Article II Appointments Clause and Article III. An invalid appointment did not affect the jurisdiction of the federal courts. No court—not even the Supreme Court—ever had suggested the contrary, the court asserted.

**Dissent.** Judge Sandra Ikuta disagreed with the majority opinion's standing analysis. "[N]o one had the executive power necessary to prosecute this civil enforcement action in the district court," she said, so no one could rely on the executive branch's standing to assert the public interest.

Only a CFPB director confirmed by the Senate would be an officer of the United States who had executive authority, the dissenter said. No one else in the CFPB had the authority, and Cordray could not delegate

authority he did not possess before he was confirmed. As a result, neither Cordray nor the CFPB had standing at the time the suit was filed.

Judge Ikuta specifically said that her jurisdiction and standing analysis would apply to all enforcement actions the bureau filed in the 18 months before Cordray's appointment was confirmed. All should be dismissed, she argued.

**Ratification.** The CFPB conceded that Cordray's recess appointment was invalid under [NLRB v. Noel Canning](#). The Appointments Clause issue now was whether Cordray's Aug. 30, 2013, ratification of actions taken by the bureau before his July 16, 2013, Senate confirmation applied to the bureau's July 2012 enforcement suit. The court said that the ratification resolved the Appointments Clause problem.

Cordray could ratify the CFPB actions prior to his confirmation because he could have taken those actions at the time of the ratification and, had he been confirmed, he could have taken those actions when they were taken, the court decided. The ratification was effective even if it was taken with no review. In other words, Cordray could simply "rubberstamp" the bureau's previous actions.

Judge Ikuta disagreed with the ratification analysis as well. If a federal court is to have jurisdiction over a case, standing to sue must exist when the case is filed. Since the CFPB did not have standing to sue when it filed the enforcement action, ratification could not create it retroactively.

**UDAAP violations.** The district court judge properly decided, without a trial, that the attorney had violated the UDAAP ban, the appellate court then said. The marketing materials the attorney used misled homeowners into believing that he was affiliated with the U.S. government, and his unsupported claims to the contrary were not enough to create an issue of fact that demanded a trial.

The affidavits, exhibits, and depositions made equally clear that he had control over the marketing materials and knew what they contained, the court continued. Moreover, the contracts that homeowners eventually signed could not cure these misrepresentations—"A later corrective written agreement does not eliminate a defendant's liability for making deceptive claims in the first instance," the court said.

**Reg. O violations.** The attorney's Reg. O violations were just as clear, the court continued. The only defense he offered was that he was not covered by Reg. O because rather than charging for his mortgage assistance services, he offered them pro bono. The court easily rejected that assertion as merely an effort to evade the regulation, adding that contract language to the contrary was irrelevant.

**Remedies.** The court's review of the remedies ordered by the district court judge offered Gordon a slim ray of sunshine. While the injunction that banned him from offering mortgage relief services for three years was said to be appropriate, the monetary judgment might have gone a bit too far.

The district court judge ordered Gordon to pay more than \$11.4 million, based on the amount that he took in between January 2010 and July 2012. While ordering disgorgement and restitution was appropriate, neither the Dodd-Frank Act nor Reg. O was in effect for that entire time span. For example, Reg. O only took effect on Dec. 30, 2011. The appellate court sent the monetary judgment order back to the district court for the judge to consider whether it was proper to include in the judgment money collected before the law and regulation took effect.

The case is [No. 13-56484](#).

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Companies: Gordon and Associates; National Legal Source; Resource Law Center; Resource Law Group; Resource Legal Group; The C E G Law Firm; The Law Offices of C. Edward Gordon; The Law Offices of Chance E. Gordon

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