Banking and Finance Law Daily Wrap Up, TOP STORY—Trump's CFPB chief choice wins first round in court, (Nov. 29, 2017)

Banking and Finance Law Daily Wrap Up

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By Richard A. Roth, J.D.

Consumer Financial Protection Bureau Deputy Comptroller Leandra English, who is suing to prevent Mick Mulvaney, President Donald Trump's choice for acting CFPB director, from taking office, was denied a temporary restraining order on Nov. 28, 2017. Former CFPB Director Richard Cordray appointed English to be the Bureau's Deputy Director, hours before his own resignation took effect, planning that she would be acting director until a permanent replacement was approved by the Senate. However, Trump appointed Mulvaney to the position, claiming that he had the authority to do so under the Federal Vacancies Reform Act.

Those who support Cordray's action claim that the Dodd-Frank Act makes clear that the Bureau's deputy director automatically steps in for the director. In denying the TRO, U.S. District Judge Timothy J. Kelley ruled that English had failed to demonstrate a substantial likelihood that she would prevail on that claim.

Dueling appointments. The Dodd-Frank Act creates the position of deputy director and says that the deputy director "shall serve as acting Director in the absence or unavailability of the Director" (12 U.S.C. §5491(b)). English argues that this specific statutory provision displaces the President's ordinary authority to fill vacancies.

The Department of Justice's Office of Legal Counsel has said that the Dodd-Frank language is relevant and that Cordray's resignation can be considered to make the director unavailable. However, the Justice Department disputes the claim that the Dodd-Frank Act language displaces the President's appointment authority. Instead, both the Vacancies Reform Act (5 U.S.C. §3347(a)) and the Dodd-Frank Act are relevant to the situation, the Justice Department memo says, and the President can choose to appoint an acting director rather than allow the CFPB deputy director to become the acting director (see *Banking and Finance Law Daily*, Nov. 27, 2017).

A memorandum by CFPB General Counsel Mary E. McLeod, first reported by Politico, agrees with the Justice Department analysis.

Reactions. Many immediate reactions to the judge's decision addressed policy and political concerns without considering the legal positions the two sides have advanced. Predictable responses resulted.

For example, Rep. Dennis A. Ross (R-Fla), who is Senior Deputy Majority Whip and a member of the Financial Services Committee, characterized the decision as rejecting the Bureau's "rich tradition of ignoring the will of the people and the rule of law." Consumer Bankers Association President and CEO Richard Hunt argued that the issue would not have arisen, and the CFPB would be more stable, if it were led by a bipartisan five-member commission rather than an individual director.

On the other hand, both Public Citizen and the Center for Responsible Lending asserted that the CFPB must retain its independence in order to protect consumers. The Bureau should be led by an individual who is committed to consumer protection, not by one who has made his hostility to the CFPB clear, according to Public Citizen President Robert Weissman.

Mulvaney "has no business leading an independent consumer agency that he has voted against and vowed to destroy," said Sen. Catherine Cortez Masto (D-Nev). She claimed that his first action as acting director was "to stop payments to seniors, servicemembers and other consumers that had been harmed by big bank misconduct."

Companies: Center for Responsible Lending; Consumer Bankers Association; Public Citizen

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