Banking and Finance Law Daily Wrap Up,TOP STORY—D.C. Cir.: Split decision opens door to challenging CFPB constitutionality,(Jul. 24, 2015)

By Richard A. Roth, J.D.

A Texas state bank has standing under the Constitution to challenge the Dodd-Frank Act's creation of the Consumer Financial Protection Bureau and the recess appointment of Richard Cordray as CFPB Director, the U.S. Court of Appeals for the District of Columbia has determined. However, the bank does not have standing to challenge the creation of the Financial Stability Oversight Council, the court decided. Also, a group of state attorneys general lacks standing to challenge the Federal Deposit Insurance Corporation's orderly liquidation authority (*State National Bank of Big Spring v. Lew*, July 24, 2015, Kavanaugh, B.).

The opinion partially overturned a 2013 decision by the U.S. District Court for the District of Columbia that dismissed the suit in full (see *Banking and Finance Law Daily*, Aug. 2, 2013). According to the district court judge, the bank and the attorneys general did not have standing because they were unable to establish that the Dodd-Frank provisions caused or imminently threatened an injury.

The appellate court was careful to limit its decision only to whether the bank and the state officials have standing to sue. It expressed no opinion on the merits of any of the claims.

Challenged Dodd-Frank provisions. State National Bank of Big Spring and attorneys general of 10 states claim that several Dodd-Frank Act consumer protection and financial stability provisions violate the U.S. Constitution in a number of respects. The bank also asserts that President Obama could not use his recess appointment authority to appoint Cordray as bureau director.

Specifically, the suit claims that:

- The organization of the CFPB is unconstitutional because independent agencies must be led by multiple-member commissions, not by a single director. Also Congress gave the CFPB so much power that the non-delegation doctrine was violated.
- President Obama exceeded his authority when he appointed Cordray during a three-day intra-session Senate recess. Under *NLRB v. Noel Canning*, three days was not long enough to allow the exercise of the recess appointment authority (see *Banking and Finance Law Daily*, June 26, 2014).
- The creation of the FSOC violates both the non-delegation doctrine and separation of powers principles because the council has unchecked power to decide which financial

companies should be designated systemically important financial institutions that are subject to additional regulation.

- The creation of the orderly liquidation authority, which will allow the FDIC to liquidate failing financial companies that pose a significant financial stability risk, would allow the FDIC to alter the priority of creditors in violation of the guarantee of uniform bankruptcy laws and non-delegation and due process principles.

Standing and ripeness. The appellate court summarized the issue of standing as an inquiry into whether the bank or states had suffered an injury in fact that was caused by the law and that the court could redress. If standing existed, a second issue arose—was this the right time to allow the challenge, i.e. was the complaint ripe for adjudication?

Challenge to CFPB. As a general rule, there is little doubt that a regulated company has standing to challenge the validity of a law or rule under which it is regulated, the court began. The Texas bank is regulated by the CFPB, and the bureau already has taken at least one action, the adoption of a rule on international remittance transfers, that has imposed obligations and costs on the bank. There was no reason not to follow the general rule and decide the bank has standing, the court decided.

When the bank should be permitted to bring the challenge was the second question. A regulated company should not be required to violate a law and risk enforcement penalties in order to challenge that law, the court said. That the bank was challenging the legality of the CFPB rather than the validity of a CFPB regulation was not relevant. The challenge was ripe.

Challenge to recess appointment. Little additional analysis or space was devoted to whether the bank could challenge Cordray's recess appointment. The bank had standing to challenge the appointment, and the issue was ripe, for the same reasons, the court said.

However, the court explicitly noted that Cordray had subsequently been confirmed in the post by the Senate and thereafter had ratified everything he had done during the recess appointment. The significance of those facts had to be considered by the trial court.

Challenge to FSOC. On the other hand, the bank could not show how it was injured by the Dodd-Frank creation of the FSOC.

The FSOC had the authority to designate a financial institution as a SIFI based on the danger that the company's failure could pose to financial stability. The bank had not been given that designation and, based on its size and activities, it was not under any threat of being designated. However, the bank claimed that it competed with GE Capital Corporation, which had been designated as a SIFI, and that the designation helped GE Capital by reducing its funding costs.

The court did not accept that argument. It was difficult for the bank to claim an injury from the unlawful regulation of a competitor, and any benefit GE Capital might receive from the unlawful regulation was "too attenuated and speculative" to satisfy the causation requirement of standing.

Challenge to orderly liquidation authority. The attack on the creation of the FDIC's orderly liquidation authority was brought by the state attorneys general, not the Texas bank. Their claim was based on financial company investments made by states and state pension funds. These investments meant that the states would be creditors in any future liquidation of the companies, and the OLA meant the states could be deprived of the uniform treatment of their claims. That risk meant their investments were worth less than they would be in the absence of the OLA, the state officials asserted.

According to the court, uncertainties doomed the states' theory. A state would be harmed only if a company in which it had invested came under the OLA, and then only if the state was treated differently than other creditors in the same situation. Standing could not be based on speculation over how the government might act in a possible future situation.

The states had not shown that any uncertainty over future events actually has harmed the current value of their investments, the court added. Moreover, if the states had standing under their theory, then any investor could challenge any bankruptcy-related law by claiming that the law made his investment worth less.

A second basis for standing raised by the states also was rejected. According to the states, Dodd-Frank deprived them of a right to uniform treatment that previously was guaranteed by the Bankruptcy Code. If the claim was that an executive action had deprived the states of a statutory right, they would have standing, the court conceded. However, in this case, Congress had enacted a law that superseded a prior law. That only could be challenged under the Constitution, and the absence of a real or threatened injury meant the states did not have standing for a Constitutional challenge.

The case is No. 13-5247.

Attorneys: Gregory F. Jacob (O'Melveny & Myers) for State National Bank of Big Spring. Patrick R. Wyrick, Office of the Attorney General for the State of Oklahoma for the state attorneys general. Daniel Tenny, U.S. Department of Justice.

Companies: State National Bank of Big Spring