

Banking and Finance Law Daily Wrap

Up, CONSUMER FINANCIAL PROTECTION BUREAU—Cordray could ratify earlier actions after Senate confirmation, (Jul. 14, 2016)

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

One part of a Texas bank's challenge to the Consumer Financial Protection Bureau has been rejected by a federal district judge who determined that CFPB Director Richard Cordray could, after being confirmed by the Senate, ratify actions he took under an earlier invalid recess appointment. While Cordray did not have the legal authority to approve regulations before his appointment was confirmed, his post-confirmation ratification of his actions was effective, the judge said ([State National Bank of Big Spring v. Lew](#), July 12, 2016, Huvelle, E.).

The judge deferred any decision on whether the Dodd-Frank Act structure of the CFPB violated the Constitution's separation of powers principles. That issue recently was argued before the U.S. Court of Appeals for the District of Columbia Circuit, *PHH Corp. v. CFPB*, she pointed out, and it was more efficient to wait for the appellate court to reach a decision. (PHH Corp. is a mortgage lender that is challenging the bureau's authority in an administrative enforcement proceeding under the Real Estate Settlement Procedures Act).

Invalid recess appointment. The origin of the problem was the Senate's failure to take action on Cordray's original July 18, 2011, nomination to lead the bureau. The President subsequently attempted to exercise his recess appointment authority to appoint Cordray, as well as three members of the National Labor Relations Board. When the Supreme Court decided in [NLRB v. Noel Canning](#) that the NLRB appointments exceeded President Obama's authority, it became clear that Cordray's appointment also was invalid.

However, Cordray had been renominated, and his second nomination was confirmed before the *Noel Canning* decision was issued. Six weeks later, Cordray announced that "To avoid any possible uncertainty," he was ratifying all actions he had previously taken.

Effect of ratification. The judge rejected the bank's assertion that Cordray could not later ratify actions that were invalid when they were taken, relying on District of Columbia Circuit opinions dealing with the Office of Thrift Supervision and the Federal Elections Commission, an opinion of the Third Circuit dealing with the NLRB, and an opinion of the Ninth Circuit that applied specifically to Cordray and the CFPB ([CFPB v. Gordon](#), discussed in *Banking and Finance Law Daily*, [April 15, 2016](#)).

The bank's three arguments against the effectiveness of the ratification all were rejected. First, the judge said, the actions were within the authority of the CFPB, as principal, when they were taken. It was unimportant that they were not within the authority of Cordray, as the agent. The bank argued that the adoption of a regulation could be ratified only if Cordray had the authority to adopt the regulation initially (however, in such a case, ratification would seem to be unnecessary).

Second, ratification did not require a new notice-and-comment period. The bank had not been prejudiced, the judge noted, because it had not offered comments the first time and had not said it would offer comments now.

Third, there would be no point in requiring the CFPB to reconsider the rules because Cordray simply would be revisiting his own decisions. Again, the absence of a reconsideration would not prejudice the bank.

Earlier proceedings. State National Bank of Big Spring was the lead plaintiff when the challenge to the CFPB and Cordray's authority was filed in 2012. In addition to the appointment and separation of powers claims that now are before the district court, the bank challenged the creation of the Financial Stability Oversight Council. Also, a group of state attorneys general challenged the creation of the Federal Deposit Insurance Corporation's orderly liquidation authority.

Following an initial dismissal by the district judge, the D.C. Circuit appellate court agreed that the bank did not have standing to raise its challenge to the FSOC and the state officials did not have standing to challenge the orderly liquidation authority. However, the bank's challenge to Cordray's appointment and the separation of powers claims were reinstated (see [State National Bank of Big Spring v. Lew](#), discussed in *Banking and Finance Law Daily*, [July 24, 2015](#)).

The case is [No. 12-1032 \(ESH\)](#).

Attorneys: Gregory Frederick Jacob (O'Melveny & Myers LLP) for State National Bank of Big Spring. Justin Michael Sandberg, U.S. Department of Justice, for Secretary of the Treasury Jacob J. Lew.

Companies: State National Bank of Big Spring

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