Lenders Compliance Group

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Recess Appointment Gambit

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Some people just won't take No for an answer!

The most recent fool's errand is offered thanks to the irrepressible, litigious efforts of the State National Bank of Big Spring, Texas, and two advocacy groups, conservative think tank Competitive Enterprise Institute and the 60 Plus Association.

In State National Bank of Big Spring et al. v. Geithner et al. (U.S. District Court, DC, Case 1:12-cv-01032), the plaintiff seeks to disabuse the Consumer Financial Protection Bureau ("Bureau") of its constitutionality.

Here is one of the lawsuits that started droning high and mighty soon after the Bureau received its enumerated authorities in the summer of 2011.

The bank sued in June 2012, arguing that the Bureau has an inordinate amount of power because (1) the Bureau's director can't be removed at will, and (2) the agency's funding is routed around the congressional appropriations process.

A little over a year later, in August 2013, the case was booted, only to be resuscitated in July 2015 by the D.C. Circuit, since the appeals court found the bank has standing to challenge the Bureau's constitutionality – based on the fact that the Bureau regulated the remittance market, which is the bank's business. That said, there had been no enforcement action.

Lacking an enforcement action to protest, maybe the bank just wanted to get out in front of the problem before it started!

The bank went forward with a summary judgment challenge in November 2015.

In any event, about the 2012 suit's allegation: the claim is that the law creating the Bureau, Title X of the Dodd-Frank Wall Street Reform and Consumer Protection Act, is unconstitutional. The bank claimed the president's inability to remove the Bureau's director without good cause violates the separation of powers doctrine, a claim, the Bureau argues, that ignores Supreme Court precedent.

This gambit has been pushed hither and yon for some time. For instance, right from the start there has been a challenge to the recess appointment of Richard Cordray to be the Bureau's first director. President Barack Obama used a recess appointment to put Mr. Cordray in charge of the Bureau, albeit only after mostly Republican senators refused to vote on his nomination. Their opposition was based on the structure and congressional oversight of the Bureau, not really at all based on Mr. Cordray's credentials.

But Conservatives have long held that the recess appointment violated the Constitution, engendering the recess appointment itself by keeping the Congress technically open by holding a series of *pro forma* sessions, gaveling in sessions for minutes or seconds, in order to meet the lowest bar for being open for business.

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So, we're back in court!

Now, the Bureau has asked a Washington, D.C., federal court for summary judgment. Filing last Friday, the Bureau asserts that the bank's challenge to the Bureau's constitutionality can't get around long-standing precedent supporting legislators' authority to create independent agencies.

Here's two the pivotal quotes:

> "SNB's arguments that Title X violates constitutional separation-of-powers principles rest on policy arguments with no support in the constitutional text or judicial precedent."
>
> "The challenged provisions of Title X – considered either individually or collectively – are consistent with Articles I and II of the Constitution, as they have been interpreted and applied by the Supreme Court."

The Bureau argues that the Supreme Court had ruled in 1935, in Humphrey's Executor v. United States, that Congress has the authority to create independent agencies with overseers appointed by the president who can only be removed for good cause.

Thus, asserts the Bureau, the authority is grounded in the establishment of the Federal Communications Commission, which was at issue in that case, or any of several other federal agencies, including the Securities and Exchange Commission, that are considered to have been created under the same authority.

Given precedent, the Bureau's view is that, whether or not the Bureau is headed by a single, appointed director or several commissioners (or multiple directors or a phalanx of overseers), is entirely irrelevant and nugatory. In defending the single appointee, the Bureau's brief states: "If anything, it should be easier for the president to hold accountable a single officer than several."

Furthermore, the Bureau stated that the foregoing argument didn't appear in the bank's complaint and that it can't raise the claim now in its own motion for summary judgment filed in early November. Indeed, it is argued that the bank was not harmed by the rules approved by Director Cordray, and, in cases where the bank claims it was harmed, invalidating them would not serve to correct the injuries alleged by the bank.

From a regulatory perspective, the Bureau is correct with respect to the validity of rules approved by the Bureau's director. Even if the court were to consider the validity of rules approved by Director Cordray during his recess appointment, the D.C. Circuit has upheld such rules when later ratified by an agency.

I think you can see how this Hatfields and McCoys battle can get very complicated.

I expect this species of litigation to find its way into the dustbin of history.

Still, as Alexander Pope said, "Hope springs eternal in the human breast."

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