



California Court Denies Defendant's Challenge to CFPB Enforcement Authority

A California district court judge has denied a defendant's challenge to the authority of the Consumer Financial Protection Bureau to bring a civil enforcement action against the defendant in federal court. Judge Percy Anderson ruled that the challenge raised in *CFPB v. Chance E. Gordon, et al.* to the "recess appointment" of Bureau Director Richard Cordray on behalf of defendant, an attorney who operated a Southern California loan-modification business, was inadequately articulated and waived as a result.

In denying the defendant's motion for summary judgment and granting the CFPB's cross-motion for summary judgment, affirming the Bureau's claim for more than \$11 million in equitable monetary relief, the court's decision effectively brought the action to an end, barring a subsequent appeal or settlement between the parties.

Although the court acknowledged that Gordon's motion sought to challenge the constitutionality of President Barack Obama's appointment of Director Cordray on January 4, 2012, relying on arguments that were previously accepted by the circuit courts of appeal in both the District of Columbia and the Third Circuit in upholding challenged appointments made by President Obama on the same day, Judge Anderson held that the defendant's argument was not adequately addressed in the papers filed in support of his motion for summary judgment.

In a minute order dated June 26, 2013, Judge Anderson explained:

The Court has no occasion to pass on the constitutionality on [sic] Director Cordray's appointment

because Gordon has provided insufficient argument concerning the potential ramifications of invalidating that appointment. Specifically, even assuming that Director Cordray's appointment exceeded the President's powers under the Recess Appointments Clause, Gordon has not argued how, under the relevant statutes, that determination would prevent the CFPB from taking the actions it has in this instance. By failing to explain how, in the absence of a properly appointed or confirmed director, CFPB is unable to prosecute this action, Gordon has waived the argument that the CFPB lacks the authority to pursue its claims against him even if Director Cordray's appointment was unconstitutional...

Because Gordon has waived the argument that, even without a properly appointed or confirmed Director, the CFPB lacks the authority to pursue its claims against him, the Court has no need to address the constitutionality of Director Cordray's appointment because any such holding would not resolve the issue of the CFPB's authority to prosecute this action. The Court therefore declines to reach the merits of Gordon's attack on the constitutionality of Director Cordray's appointment. Instead, the Court concludes that Gordon has waived the argument that the CFPB may not act in the absence of a properly installed Director. Gordon's arguments concerning the constitutionality of Director Cordray's appointment are therefore an insufficient basis to deny the CFPB's Motion for Summary

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Judgment or to grant Gordon's Motion for Summary Judgment.

Although the *Gordon* ruling is the first to address the validity of the director's appointment, it offers little guidance beyond that these challenges must demonstrate both that the appointment failed to comport with the Recess Appointment Clause of the Constitution and that without a properly appointed director, the Bureau lacked authority to initiate civil enforcement actions against nonbanks. Now that the Senate has confirmed Mr. Cordray's appointment (read our article in InsideARM on the Senate confirmation of Director Cordray [here](#)), however, this issue should no longer impede the CFPB from exercising the full measure of its enforcement authority.

For more information about the content of this alert, please contact [Michael Mallow](#) or [Michael Thurman](#).

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