Details of Lawsuit Challenging the CFPB, FSOC Constitutionality Cordray Recess Appointment, With Observations About Standing Issues

by Keith R. Fisher

This attachment accompanies my blog posting about the lawsuit challenging the constitutionality of the CFPB, the Financial Stability Oversight Council (FSOC), and the recess appointment of Richard Cordray as Director. *State National Bank of Big Spring, Texas, et al. v. Geithner, et al.*, No. 1:12-cv-01032-esh. As noted there, the plaintiffs are a small ($275 million) national bank in Texas, and two non-profit organizations in the metropolitan Washington, D.C. area: the 60 Plus Association, a 7-million member seniors advocacy organization, and the Competitive Enterprise Institute, a conservative public-interest organization.

Defendants include the Treasury Secretary, the Comptroller of the Currency, the Chair and Acting Chair of the Federal Reserve Board and the FDIC, respectively, CFPB Director Cordray, the CFPB itself, the Chairs of the SEC, CFTC, and NCUA, the FSOC, and a member of the FSOC.

The complaint, which reads in places more like a brief than a set of factual allegations, challenges the constitutionality of the Bureau because --

A. it is variously described in Dodd-Frank as an "Executive agency" and an "independent bureau" that is "established in the Federal Reserve System";

B. it has authority to regulate and bring enforcement actions under its UDAAP authority without the legislation defining what "unfair," "deceptive," and "abusive" practices are;

C. it has jurisdiction over "myriad pre-existing 'Federal consumer financial laws'" previously administered by other federal agencies;

D. it has supervisory authority with respect to many diverse entities subject to federal consumer protection laws;

E. it has "aggressive investigation and enforcement powers"; and

F. it operates and exercises the foregoing broad (and sometimes undefined) powers without being subject to any checks and balances, including

    i. Congress's "power of the purse"

    ii. unrestricted power on the part of the President to fire the Director, and

    iii. the same degree of judicial deference to its interpretations of Federal consumer financial laws that would obtain "if the Bureau were the only agency authorized to apply, enforce, interpret, or administer the provisions of such Federal consumer financial law." (In my view, the purpose of this statutory deference provision (Dodd-Frank § 1022(b)(4)(B)) seems intended merely to accord *Chevron*

In several instances, it is difficult to discern what constitutional infirmity is being alleged. Item (A) points out a statutory inconsistency but nothing of constitutional moment. Item (B) is a typical legislative technique where Congress prefers to have statutory terms defined by agency rulemaking and is not typically considered constitutionally suspect.

Item (C) seems merely an allegation of injury in fact (requisite for standing) to the plaintiff bank, though the particulars here seem somewhat flimsy. The allegation is that the CFPB promulgated a rule imposing new disclosure and compliance requirements with respect to international remittance transfers. The complaint alleges that these increase the cost of providing those services to the bank's customers "to an unsustainable level," as a result of which the bank decided to cease offering these services. Apart from the unlikelihood that an unduly large amount of international remittance business would be generated in Big Spring, Texas or that the cost of providing such services would be "unsustainable," it would seem that the increased compliance burden applies to all banks, making this the sort of generalized injury that does not confer standing upon taxpayers invoking injury based on that status. One would normally assume, moreover, that marginal increased compliance cost would be passed on to customers, as is the case with most regulatory compliance costs. In any event, the complaint fails to allege that the bank has actually lost revenues as a result of discontinuing this service and that it would have lost revenues.

Item (D) alludes to the diversity of those potentially subject to CFPB regulation. That may be a policy concern, but it does not seem constitutionally problematic. Item (E) could describe many federal agencies -- especially the federal bank regulators -- and challenges to their powers have thus far survived constitutional challenges. Finally, the "power of the purse" allegation on Item (F), could likewise apply to the federal bank regulators -- the Federal Reserve, the FDIC, and the OCC -- which are also funded independently from the congressional appropriations process. Moreover, the appointments of the Comptroller, FDIC board members, and Fed Governors all exceed the length of a presidential term, and not all such officials serve at the pleasure of the President. Indeed, a famous New Deal era Supreme Court decision held that FDR acted unconstitutionally when firing a member of an independent agency like the Federal Trade Commission.

It goes without saying that these sorts of allegations also represent no more than generalized injuries, rendering dubious the standing of these plaintiffs.

Note that the complaint does not mention that the plaintiff bank, being considerably smaller than $10 billion in assets, is not generally subject to examination by the Bureau.

As part of its effort to assert standing, the plaintiff bank also alleges that it exited the consumer mortgage lending business in October 2010 because of "regulatory uncertainty" stemming from what is characterized as an open-ended grant of authority to the Bureau in this area. Lots of regulated entities operate under regulatory uncertainty, however. Exiting the business seems like an extreme solution and is not, in any event, alleged to have been compelled by any final agency action of the Bureau. Indeed, the bank appears to have exited at least 9 months before the

statutory transfer date and well over a year before the Bureau had a Director and commenced regulating.

The complaint also alleges that the ability of the FSOC, established pursuant to Dodd-Frank Title I, to designate certain institutions as "systemically significant" gives them a funding advantage over smaller institutions like the plaintiff bank. In general, however, the same institutions that would qualify as SIFIs under Dodd-Frank were already considered by "too big to fail" and enjoyed the same funding advantage. This, too, would be a generalized injury. Apparently to get around that problem, the complaint displays some ingenuity by focusing solely on the designation of *nonbank* systemically significant entities as creating even more competitors with a funding advantage. The complaint also challenges the lack of meaningful judicial review of such FSOC determinations and the absence of a private right of action to challenge them. The question remains, however, whether conclusory allegations without any demonstration of specific injury are enough either to confer standing or to survive a motion to dismiss in the era of heightened pleading requirements after the Supreme Court's *Twombly* and *Iqbal* decisions.

Finally, the complaint challenges the validity of the recess appointment of Director Cordray, about which we have previously blogged. We have noted the unavailability of standing to bring such a challenge until someone could establish injury in fact resulting from final agency action by the Bureau. This complaint falls short of alleging any such final agency action affecting the bank, and merely challenges the appointment based on the lack of a Senate "recess" during the period in question.

We anticipate the filing of a motion by the Justice Department to dismiss the complaint in the near future and will follow future developments with interest.