

**Tuesday, July 10, 2018**

**New York Southern District Court finds the CFPB Unconstitutional in CFPB v. RD Legal Fund, LLC.**

Theodore J. Hamilton, Esq. Wetherington Hamilton, P.A. Tampa, Florida  
*To prevent tyranny and protect individual liberty, the Framers of the Constitution separated the legislative, executive, and judicial powers of the new national government. To further safeguard liberty, the Framers insisted upon accountability for the exercise of executive power. The Framers lodged full responsibility for the executive power in a President of the United States, who is elected by and accountable to the people. (Judge Kavanaugh Dissent, PHH Corp v. CFPB, 881 F.3d 75 (D.C. Cir. 2018))*

The winds of judicial change are slow but they are also steady. The recent decision by District Judge Loretta A. Preska from the Southern District of New York in CFPB v. RD Legal Fund, LLC reflects the continuing concern by many in the judiciary that the legislation setting up the Consumer Financial Protection Bureau (CFPB) as contained in the Dodd Frank act is unconstitutional. Consumer Financial Protection Bureau and the People of the State of New York v. RD Legal Funding, LLC et. al, 2018 WL 3094916, (S.D. New York, 2018).

The RD Funding case involves an action by CFPB and the New York Attorney General against RD Legal Funding and Roni Dersovitz, its founder. The Complaint filed by the CFPB and the NY Attorney General, alleges violations of the Federal and New York Consumer Financial Protection Act for the same actions. The case involves allegations by the New York AG and the CFPB relating to the Defendants' funding practices provided to those receiving award letters from the Federal Victim Compensation Fund of 2001. In the case, the Defendants filed a Motion to Dismiss the case for various grounds including the unconstitutionality of the CFPB. This blog will only address the decision as it relates to the unconstitutionality of the CFPB. The Court denied most of the grounds contained in the Motion to Dismiss as filed. However, the RD Funding Court granted the Motion to Dismiss finding the CFPB unconstitutional and thus without authority to file suit. The Court cited the recent DC circuit case of PHH Corp. V CFPB, 881 F.3d 75 (D.C. Cir. 2018). However, Judge Peska in the RD Funding case, stated specifically that she disagreed with the en banc holding in the PHH decision. Going a step further, Judge Preska adopted Sections I-IV of the dissent by Judge Brett Kavanaugh in the PHH decision.

The Kavanaugh dissent in the PHH decision expressed concern in finding the CFPB the only Federal agency headed by one director not expressly subject to Presidential appointment. All other such agencies not subject to Presidential appointment, such as the FTC, are headed by a multi-member commission. Ultimately, Judge Kavanaugh found this "combination – power that is massive in scope, concentrated in a single person, and unaccountable to the President – triggers the important Constitutional question at issue in this case." Judge Kavanaugh found history, liberty and Presidential Authority mandated the change of the CFPB to an executive agency subject to Presidential approval. However, Judge Kavanaugh stopped short of eliminating the CFPB altogether.

Judge Peska, in the RD Legal case, used the decision by Judge Kavanaugh in finding the CFPB “unconstitutionally structured because it is an independent agency that exercises substantial executive power and is headed by a single Director.” However, the RD Legal decision goes even further than the Kavanaugh dissent in PHH by finding the Court cannot sever the CFPB as part of the Dodd Frank Act. The RD Legal Court found the structure of the CFPB unconstitutional in its entirety and granted the Motion to Dismiss filed by the Defendants as to the CFPB. The decision by Judge Peska in RD Legal, continues a trend by the United States judiciary of finding issues with the CFPB setup. These decisions continue to weaken the authority of the CFPB. This weakening authority serves to trump the ability of the CFPB to file enforcement actions in U.S. District Court. The continuing actions of President Trump, along with the continuing judicial movement to find the CFPB unconstitutional among the District Courts may ultimately lead to the demise of the CFPB or at least its reformation as an executive agency.