One Minute Memo®

D.C. Circuit to Hear Appeal in Fight to Control CFPB

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Seyfarth Synopsis: *A federal judge on Wednesday denied a request to remove Mick Mulvaney as the CFPB's acting director, finding that the President has authority to appoint the acting director despite former CFPB Director Cordray's attempt to handpick his successor.*

On January 10, 2018, Judge Timothy Kelly of the U.S. District Court for the District of Columbia and a Trump Administration appointee denied Consumer Financial Protection Division ("CFPB") Deputy Director Leandra English's request for preliminary injunctive relief that would displace current CFPB Acting Director Mick Mulvaney. Former CFPB Director Richard Cordray resigned effective at midnight on November 24, 2017, triggering a political showdown. That day, Cordray designated English as the CFPB's Deputy Director and purported to name her as his successor. At the same time, the President announced that he had appointed Mulvaney, the Director of Management and Budget, as Cordray's replacement.

On November 26, 2017, English filed a lawsuit against the President and Mulvaney, requesting declaratory and injunctive relief that would restrain the President from appointing an acting director other than her, direct the President to withdraw Mulvaney's appointment, and prohibit Mulvaney from serving as acting director. After a hearing, the Court denied English's request for emergency relief, finding that English had not shown a likelihood of success on the merits and had otherwise failed to meet the prerequisites for emergency relief.

On December 6, English filed an amended complaint and moved for a preliminary injunction seeking substantially the same relief. The Court held a hearing on the motion on December 22. In its decision, issued on Wednesday, the Court found that once again English was not likely to succeed on the merits of her claim nor was she likely to suffer irreparable harm absent the injunctive relief sought. The Court also noted that the "balance the equities and the public interest also weigh against granting the relief."

In reaching its second decision, the Court relied largely on the Federal Vacancies Reform Act of 1998 ("FVRA"), which permits the President to appoint a temporary officer to a vacant position without Senate confirmation if the President and Senate cannot promptly agree on a replacement. The Court rejected English's argument that the CFPB Director position was excluded from the FVRA and that Dodd-Frank instructs that the Deputy Director shall serve as acting Director in the absence of the Director. Instead, the Court found that reading the two statutes together, Dodd-Frank requires that the Deputy Director "shall" serve as acting Director, but that under the FVRA the President "may" override that default rule.

On January 12, English filed her notice of appeal in the U.S. Court of Appeals for the D.C. Circuit, challenging the district court's decision. In her notice, she requested expedited review of the appeal because a new director could be nominated and confirmed before she can become the acting director.

Meanwhile, the Lower East Side People's Federal Credit Union, an entity regulated by the CFPB, filed a similar lawsuit in the U.S. District Court for Manhattan. The credit union has filed a motion for a preliminary injunction removing Mulvaney as acting director and instating English as the acting director. The Trump Administration opposes that motion and has filed a competing motion to dismiss the credit union's complaint for lack of subject matter jurisdiction. The court held a hearing Friday on the dueling motions, and we expect the court to rule on the motions promptly, perhaps as early as this week.

Seyfarth Shaw continues to monitor the developments in "the battle of the directors" and will keep its readers apprised of updates.

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