

THE
NATIONAL LAW REVIEW

CFPB and NYAG File Opening Briefs with Second Circuit in RD Legal Funding Case

Monday, March 18, 2019

The [CFPB](#) and [New York Attorney General](#) have filed their opening briefs in their appeals to the Second Circuit in *RD Legal Funding*. The CFPB [filed an appeal](#) from Judge Preska's June 21, 2018 decision, as amended by her September 12 order, in which she ruled that the CFPB's single-director-removable-only-for-cause structure is unconstitutional, struck the CFPB (Title X of Dodd-Frank) in its entirety, and dismissed the CFPB from the case. The NYAG [filed an appeal](#) from Judge Preska's dismissal on September 12, 2018 of all of the NYAG's federal and state law claims, and her subsequent September 18 order amending the September 12 order to provide that the NYAG's claims under Dodd-Frank Section 1042 were dismissed "with prejudice." (Section 1042 authorizes state attorneys general to initiate lawsuits based on UDAAP violations.)

Ballard Spahr
LLP

Article By [Ballard Spahr LLP](#)
[Alan S. Kaplinsky](#)
[Consumer Finance Monitor](#)

[Constitutional Law](#)
[Financial Institutions & Banking](#)
[Litigation / Trial Practice](#)
[2nd Circuit \(incl. bankruptcy\)](#)

Both the CFPB and NYAG argue that the CFPB's structure is constitutional under controlling U.S. Supreme Court precedent and that if the Second Circuit determines that the Dodd-Frank Act's for-cause removal provision that limits the President's authority to remove the CFPB Director is unconstitutional, it should sever the provision rather than strike all of Title X as Judge Preska did.

The NYAG makes the following two additional arguments:

- Even if the Second Circuit concludes that the for-cause removal provision cannot be severed from Title X, it should not invalidate Dodd-Frank Sections 1041 or 1042. As noted above, Section 1042 authorizes state AGs to enforce the CFPB's UDAAP prohibition. Section 1041 preserves state consumer protection laws to the extent they are not inconsistent with the provisions of Title X. The NYAG argues that these provisions are "wholly unrelated" to the for-cause removal provision.
- Even if the Second Circuit concludes that the CFPB's structure is unconstitutional and strikes Title X in its entirety, the Second Circuit must nevertheless reverse the district court's dismissal of the NYAG's state law claims for lack of subject matter jurisdiction. According to the NYAG, the district court has jurisdiction because such claims involve an embedded federal issue, namely whether the federal Anti-Assignment Act (AAA) voids only the assignment of a substantive claim against the United States, or whether it also voids the assignment of the proceeds of such a claim in a private contract. (RD Legal Funding purchased at a discount, for immediate cash payments, benefits to which consumers were ultimately entitled under the September 11th Victim Compensation Fund of 2001 (VCF). The district court concluded that the assignments of VCF benefits were void under the AAA.)

The CFPB's defense of its constitutionality is at odds with the position of the Department of Justice. [In opposing the petition for certiorari](#) filed by State National Bank of Big Spring (which the Supreme Court [denied](#)), the DOJ argued that while it agreed with the bank that the CFPB's structure is unconstitutional and the proper remedy would be to sever the Dodd-Frank for-cause removal provision, the case was a poor vehicle for deciding the constitutionality issue. If the CFPB's structure is found to be unconstitutional, and severing the for-cause removal provision is determined to be the appropriate remedy, a Democratic President might have the ability to remove Ms. Kraninger without cause before the end of her five-year term.

The Bureau's constitutionality is also currently before two other circuits, the Ninth and Fifth Circuits. On January 9,

2019, the Ninth Circuit heard oral argument in [Seila Law](#). On March 12, 2019, the [Fifth Circuit](#) heard oral argument in All American Check Cashing's interlocutory appeal.

Copyright © by Ballard Spahr LLP

Source URL: <https://www.natlawreview.com/article/cfpb-and-nyag-file-opening-briefs-second-circuit-rd-legal-funding-case>