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Locke Lord QuickStudy: Second Circuit Decides CFPB Funding ?Structure Is Constitutional, Setting up Circuit Split for ?Supreme ?Court

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On March 23, 2023 a three-judge panel of the U.S. Court of Appeals for the Second Circuit unanimously ruled in *Consumer Financial Protection Bureau v. Law Offices of Crystal Moroney, P.C.* ("Moroney") that the CFPB's funding structure does not violate the U.S. Constitution. The decision is contrary to the Fifth Circuit's decision last year in *Community Financial Services Association of America, Ltd. v. Consumer Financial Protection Bureau* ("Community Financial Services"), creating a circuit split. The Supreme Court has granted the CFPB's petition for certiorari seeking review of the Fifth Circuit's *Community Financial Services* decision and is scheduled to hear that case in its next term.

In *Moroney*, the Second Circuit considered two questions. First, whether a CFPB Civil Investigative Demand ("CID") issued to Moroney was void *ab initio* under the Supreme Court's decision in *Seila Law*. In *Seila Law*, the Supreme Court held that the CFPB's leadership ?structure, specifically that the President could only remove the CFPB Director for cause, was unconstitutional. Second, whether the CFPB's funding structure violated the Constitution's Appropriations Clause and nondelegation doctrine, which if it did, would render the CID unenforceable. The court answered "no" to both questions.

First, the Second Circuit decided that any question about whether the CID was void under *Seila Law* was foreclosed by the Supreme Court's subsequent decision in *Collins v. Yellen*. In *Collins*, the Supreme Court held that "the relevant inquiry for determining whether an officer 'lacked constitutional authority and that [her] actions were therefore void *ab initio*' is whether the officer 'in question [was] **properly appointed**,' not whether she was **properly removable**." The court explained that there was "no dispute" that the CFPB Director was properly appointed at the time the CFPB issued the CID. Thus, the CID was not void *ab initio*.

As to the second question, the court declined to follow the Fifth Circuit's decision in *Community Financial Services*, instead concluding that the CFPB's funding structure did not violate either the Appropriations Clause or the nondelegation doctrine. In *Community Financial Services*, the Firth Circuit decided that because Congress structured the CFPB to draw its funding directly from the Federal Reserve instead of the annual Congressional appropriations process, Congress had "ceded control" of the funding process in violation of the Appropriations Clause. The *Moroney* court disagreed, holding that it could find no support for the Fifth Circuit's conclusion in Supreme Court precedent or the Constitution's text. In the *Moroney* court's view, the Appropriations Clause allows for funding directly from the Federal Reserve, so long as Congress has previously authorized the funding. The court reasoned that by enacting the Consumer Financial Protection Act (which established the CFPB), Congress

had authorized funding of the CFPB, and thus had not impermissibly ceded control of the CFPB's funding. Accordingly, the Court held that the CFPB's funding structure did not conflict with the Appropriations Clause.

The Court also found that the CFPB's funding structure did not offend the nondelegation doctrine, which prohibits Congress from improperly delegating its authority to an executive agency. The Court held that, under the doctrine's "lenient standard," Congress had provided an "intelligible principle" in the Consumer Financial Protection Act to guide the CFPB in setting and spending its budget, consistent with the nondelegation doctrine.

In response to the Second Circuit's decision, Moroney may petition the Supreme Court for certiorari. Because the Supreme Court has already agreed to consider these issues in *Community Financial Services*, the Supreme Court may consolidate the cases. Or, it may decide to withhold a decision on Moroney's petition until it hears and decides *Community Financial Services*. In either event, the constitutionality of the CFPB's funding structure is likely to be decided—and this circuit split resolved—in the Supreme Court's next term. How the Supreme Court's decision could affect the CFPB's ongoing investigations and actions remains to be seen.

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