

SECOND CIRCUIT COURT UPHOLDS CONSTITUTIONALITY OF CFPB FUNDING

CFPB v. Law Offs. of Crystal Moroney, ___ F.4th ___ (2d Cir. 2023).

<https://law.justia.com/cases/federal/appellate-courts/ca2/20-3471/20-3471-2023-03-23.html>

The Consumer Financial Protection Bureau (“CFPB”) was created under Title X of the Dodd-Frank Wall Street Reform and Consumer Protection Act to regulate consumer financial products and services.¹ This Act granted the CFPB the authority to draw funds from the Federal Reserve System’s earnings and exempted it from relying on annual spending bills from Congress for its budget.² In 2017 and 2019, the CFPB issued administrative subpoenas in the form of civil investigative demands (“CIDs”) to Moroney, a legal services provider, pursuant to an investigation into its debt collection practices. While the 2017 CID was later withdrawn, the 2019 CID sought similar documents and information.

The CFPB ratified the 2019 CID and petitioned to enforce it against Moroney in district court, following the Supreme Court’s ruling in *Seila Law*³ that the removal provision for the CFPB director was unconstitutional. The district court granted the CFPB’s petition, and Moroney promptly appealed to the Second Circuit on four grounds, arguing that:

1. the CID was void *ab initio* under *Seila Law*,
2. the CFPB’s funding structure violated the Appropriations Clause of Article I of the Constitution,
3. Congress violated the nondelegation doctrine in creating the CFPB’s funding structure, and
4. the CID was an unduly burdensome administrative subpoena.

The Second Circuit unanimously upheld the district court’s decision, rejecting all four of Moroney’s grounds. First, the CID was not void *ab initio* under *Seila Law* because there was no causal link between the unconstitutional removal provision of the CFPB director and the issuance of the CID. The Second Circuit relied on the concurring opinion of Justice Kagan in *Collins v. Yellen*,⁴ which held that “plaintiffs alleging a removal violation are entitled to injunctive relief ... *only when* the President’s inability to fire an agency head affected the complained-of

decision.”⁵ The court concluded that Moroney failed to show that the unconstitutional removal provision had any bearing on the causal link of the enforcement action being challenged. The Second Circuit rejected Moroney’s attempt to distinguish *Collins* from this case⁶ and held that the harm caused by the unconstitutional removal provision was equally significant regardless of the type of relief sought.

Second, the CFPB’s funding structure was constitutional under the Appropriations Clause because it was authorized by a statute passed by Congress and signed into law by the President.⁷ The funding structure was authorized by specific statutory provisions under the Consumer Financial Protection Act (“CFPA”), which set a cap of 12% on the amount of annual funding that the CFPB could draw from the Federal Reserve System and required that the funds remain available until the CFPB fulfilled its duties and responsibilities.⁸ The CFPA also mandated that the CFPB seek appropriations from Congress through the appropriations process if it needed additional funding beyond the 12% limit.⁹ Because Moroney did not dispute the authorization of the CFPB’s

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funding structure under the CFPA, the Second Circuit concluded that the CFPB’s funding structure was constitutional.

The Second Circuit diverged from the recent ruling of the Fifth Circuit regarding the constitutionality of the CFPB’s funding structure.¹⁰ In *Cnty. Fin. Servs. Ass’n of Am., Ltd. v. CFPB*, the Fifth Circuit held that Congress violated the Appropriations Clause and the separation of powers by exempting the CFPB from time-limited appropriations and allowing it to draw funding from a specific source within the Federal Reserve System, thus ceding direct and indirect control over the CFPB’s funding.¹¹ In contrast, the Second Circuit looked to the text



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The Second Circuit referred to historical practices of English, colonial, and state governments to show that its approach was consistent with the Founders' understanding of the appropriations process at the time of the Constitution's enactment. In England, appropriation required securing every expenditure prescribed by law with a purpose, limit, and fund.¹² Similarly, Congress prescribed the purpose, limit, and fund for the CFPB's appropriation in the CFPB with five objectives on funding and limiting the appropriation.¹³

Third, the CFPB's funding structure was found constitutional under the nondelegation doctrine. The Second Circuit concluded that Congress had provided an intelligible principle in several provisions of the CFPB to guide the CFPB in setting and spending its budget, thereby avoiding an improper delegation of legislative power. The Second Circuit noted that the Supreme Court had found an improper delegation only twice in the past 80 years, when Congress delegated unfettered legislative power to the President without any guidance.¹⁴ The CFPB's funding structure complied with the nondelegation doctrine because the CFPB provided specific guidance on how to set and spend its budget, which was more definite than overruled arcane precedents.

Finally, the Second Circuit found Moroney had not met its burden to show that the CID was an excessively burdensome administrative subpoena and improperly intruded on its privileged attorney-client relationships. Moroney argued that the CID was not issued for a valid purpose because it sought privileged and confidential information in the practice of law. However, the Second Circuit concluded that the CID was legitimately issued by focusing solely on Moroney's debt-collection practices and possible violations of the FDCPA.¹⁵ Moreover, Moroney failed to provide sufficient detail to establish the application of privilege or to identify specific privileged and confidential documents. The Second Circuit also disagreed with Moroney's argument that the 2019 CID was largely duplicative of the 2017 CID, to which Moroney had already responded, because Moroney had not met its burden to prove that the 2019 CID was unreasonable.

As a result, the Second Circuit affirmed the district court's decision to enforce the CID against Moroney. The Second Circuit held that the ruling in *Seila Law* did not render the CID void, the CFPB's funding structure conformed with the Appropriation Clause of Article I and the nondelegation doctrine, and the CID properly requested material on Moroney's debt collection practices and potential FDCPA violations.

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preceding the Appropriations Clause and determined the Constitution explicitly allowed funding through two years of time-limited appropriations without any implicit limit on the funding source beyond the congressional authorization.

1 See 12 U.S.C. § 5491

2 See 12 U.S.C. § 5497(a).

3 *Seila L. LLC v. Consumer Fin. Prot. Bureau*, 140 S. Ct. 2183 (2020).

4 141 S. Ct. 1761 (2021). *Collins* addressed a similar issue to *Seila Law* regarding the removal provision of an independent agency.

5 *Id.* at 1801 (emphasis added).

6 *Collins* sought retrospective relief while this case sought prospective relief. See *id.* at 1780.

7 See U.S. Const. art. I, § 9, cl. 7.

8 See 12 U.S.C. §§ 5497(a)(2)(A), (B), (c)(1).

9 *Id.* § 5497(e).

10 See *Cnty. Fin. Servs. Ass'n of Am., Ltd. v. Consumer Fin. Prot. Bureau*, 51 F.4th 616, 638-39, 642 (5th Cir. 2022).

11 *Id.* at 639.

12 See 7 Alexander Hamilton, *The Works of Alexander Hamilton* 532 (John C. Hamilton ed. 1851).

13 See 12 U.S.C. § 5511(b) which provides: (1) consumers are provided with timely and understandable information to make responsible decisions about financial transactions; (2) consumers are protected from unfair, deceptive, or abusive acts and practices and from discrimination; (3) outdated, unnecessary, or unduly burdensome regulations are regularly identified and addressed in order to reduce unwarranted regulatory burdens; (4) Federal consumer financial law is enforced consistently, without regard to the status of a person as a depository institution, in order to promote fair competition; and (5) markets for consumer financial products and services operate transparently and efficiently to facilitate access and innovation.

14 See *A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495 (1935); *Panama Refining Co. v. Ryan*, 293 U.S. 388 (1935).

15 While the CFPB does not have enforcement authority against attorneys engaged in the practice of law, it has enforcement authority over attorneys engaged in the offering or provision of a consumer financial product or service that is not offered or provided as part of, or incidental to, the practice of law, occurring exclusively within the scope of the attorney-client relationship. See 12 U.S.C. § 5517(e)(1)-(2)