

Client Alert

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Further Setback for the CFPB Director's Authority?

By Andrew M. Smith, Nancy R. Thomas, and Marc A. Hearron

A split panel of the U.S. Court of Appeals for the Third Circuit issued a [decision](#) yesterday holding that a “recess” appointment to the National Labor Relations Board (NLRB) was unconstitutional and invalid. *NLRB v. New Vista Nursing and Rehabilitation*, Nos. 11-3440, 12-1027, 12-1936 (3rd Cir. May 16, 2013). Like the District of Columbia Circuit Court’s ruling in *Noel Canning v. NLRB*, 705 F.3d 490 (2013), the Third Circuit ruled that the president’s authority to make “recess appointments” applies only to appointments made between sessions of Congress and does not apply to appointments made during congressional sessions. The ruling calls into question, yet again, the validity of the recess appointment of Richard Cordray to the CFPB.

The Third Circuit decision concerns an appointment to the NLRB made by President Obama during a two-week adjournment of the Senate in 2010. Although the District of Columbia Circuit’s ruling concerned a recess appointment in 2012, both courts reached the same conclusion. They held that the “recess appointments” clause in the Constitution applies only to breaks between sessions of the Senate (“intersession breaks”). It does not apply to breaks within sessions or breaks in Senate business that make the Senate unavailable to provide advice and consent (“intrasession breaks”).

Unlike *Noel Canning*, though, the Third Circuit did not reach the issue of whether the President can exercise recess appointment authority only for vacancies that arise during the recess. The Third Circuit opinion also includes a lengthy dissent.

IMPACT ON RICHARD CORDRAY'S APPOINTMENT

Like the *Noel Canning* decision, the Third Circuit’s ruling has no direct effect on the recess appointment of Richard Cordray to the CFPB. However, Richard Cordray’s appointment was the same type of intrasession appointment invalidated in both decisions. Accordingly, as discussed in our Client Alert on *Noel Canning*, both decisions could provide a basis to challenge certain CFPB rulemaking and supervisory activities.¹

WHAT HAPPENS NEXT?

The Obama administration already has filed a petition for *certiorari* with the Supreme Court seeking review of the *Noel Canning* decision. Noel Canning’s counsel has said publicly that Noel Canning will not oppose Supreme Court review. Most observers expect the Supreme Court to grant review.

¹ For more information, see our earlier Client Alert at <http://www.mofo.com/files/Uploads/Images/130129-CFPB-Setback.pdf>.

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As it did in the D.C. Circuit, the Obama Administration very well may decide to forgo any further review in the Third Circuit and instead file a follow-on petition for *certiorari* to provide additional grounds for the need for Supreme Court review. Should the Obama administration seek rehearing *en banc*, it seems unlikely that the Third Circuit would grant the request. In light of the expectation that the Supreme Court will grant review, the Third Circuit could conclude there is no reason for *en banc* review of an issue the Supreme Court will consider shortly.

If the Supreme Court does grant review, the case would be heard next term and the Supreme Court would rule by the end of June 2014.

We will continue to monitor and report on developments related to recess appointments, including any challenges to the Richard Cordray appointment.

Contact:

Andrew M. Smith

(202) 887-1558

andrewsmith@mofo.com

Nancy R. Thomas

(213) 892-5561

nthomas@mofo.com

Marc A. Hearron

(202) 778-1663

mhearron@mofo.com

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