



## INDUSTRY NEWS

# Texas vs. the CFPB

By **Melissa Robbins Coutts**

Plaintiffs, the Texas Bankers Association, the American Bankers Association, and Rio Bank of McAllen, Texas, filed suit in the federal district court for the Southern District of Texas challenging the validity of the Consumer Financial Protection Bureau (CFPB)'s final rule implementing Section 1071 of the Dodd-Frank Act ("Rule"), and seeking to enjoin the CFPB from implementing and enforcing the Rule. *Texas Bankers Association v CFPB*, 2023 WL 4872398 (S.D. Texas July 31, 2023). The Rule would have required covered financial institutions to collect and report to the Bureau data on applications for credit for small businesses.

At the heart of the case is the CFPB's funding structure. 12 U.S.C. § 5497(A)(1) describes the CFPB's funding structure as follows: "[e]ach year (or quarter of such year) ... the Board of Governors shall transfer to the Bureau from the combined earnings of the Federal Reserve System, the amount determined by the Director to be reasonably necessary to carry out the authorities of the Bureau under Federal consumer financial law." 12 U.S.C. § 5497(A)(1). The statute also provides that "[i]f funds obtained by or transferred to the Bureau Fund shall not be construed to be Government funds or appropriated monies." 12 U.S.C. § 5497(C)(2). Further, "funds derived from the Federal Reserve System ... shall not be subject to review by the Committees on Appropriations of the House of Representatives and the Senate." *Id.* § 5497(a)(2)(C).

Previously, the Fifth Circuit conceptualized this structure as one where "Congress did not

merely cede direct control over the Bureau's budget by insulating it from annual or other time limited appropriations. It also ceded indirect control by providing that the Bureau's self-determined funding be drawn from a source that is itself outside the appropriations process—a double insulation from Congress'[] purse strings." *Cnty. Fin. Servs. Ass'n of Am., Ltd. v. CFPB*, 51 F.4th 616, 638-39 (5th Cir. 2022), *cert. granted*, 143 S.Ct. 978 (2023) (emphasis in original) (hereinafter "CFSA"). The Fifth Circuit's conclusion in CFSA that the CFPB's payday lending rule was invalid as it was promulgated using the CFPB's unconstitutional funding, which the court found to violate the Appropriations Clause of the U.S. Constitution.

To succeed in obtaining injunctive relief against enforcement of the Rule, the Texas Plaintiffs had to prove: (1) a substantial likelihood of success on the merits, (2) a substantial threat of irreparable injury if the injunction is not issued, (3) that the threatened injury if the injunction is denied outweighs any harm that will result if the injunction is granted, and (4) that the grant of an injunction will not disserve the public interest. Relying on the Fifth Circuit's decision in CFSA that the CFPB's funding structure was unconstitutional, the District Court found the Plaintiffs met the first prong of the test that they were likely to succeed on the merits.

To meet the second prong of the test, irreparable injury, Rio Bank produced evidence that implementation of the Rule would cost \$250,000, with \$20,000 to be incurred in 2023. The Texas Bankers Association submitted additional evidence predicting that the Final

Rule would cost \$100,000 per community bank. Finally, the American Bankers Association submitted evidence that its members would incur the following costs: 88% would need to hire a mean of three more full-time employees; 73% would need to update commercial operating software at a median cost of \$29,029; 33% would need to purchase commercial software at a median cost of \$131,133; and 67% would need to purchase software to assist with data submission at a median cost of \$23,297. The District Court was persuaded that these costs were more than de minimis and met the threshold to establish injury.

Reviewing the final two elements, the District Court found the equities and public interest favor a stay. Therefore, the Court granted a preliminary injunction precluding the CFPB from enforcing the Rule pending either a final judgment in the case or a reversal of the CFSA decision, which is pending before the Supreme Court. Although the plaintiffs had requested a nationwide injunction, the Court limited the injunction to only the plaintiffs and their members.

**Melissa Robbins Coutts** is a Partner in the firm's San Diego office and is the Managing Attorney of the Civil Litigation and Evictions Departments. After obtaining a B.A. in English and a B.S. in Criminal Justice from Northern Arizona University in 2003, Coutts graduated Cum Laude from California Western School of Law in 2006. Before joining the firm, she clerked for the Hon. Ruben B. Brooks of the U.S. District Court for the Southern District of California. Coutts is admitted to practice in all state and federal courts in California and Arizona and the Ninth Circuit Court of Appeals. Coutts has received an AV Preeminent® rating from Martindale Hubbell, ranking her at the highest level of professional excellence for legal knowledge, communication skills and ethical standards.