MISCELLANEOUS

FIFTH CIRCUIT RULES THAT THE CONSUMER FINANCIAL PROTECTION BUREAU'S INDEPENDENT FUNDING STRUCTURE IS UNCONSTITUTIONAL

Community Financial Services Association of America Ltd. v. Consumer Financial Protection Bureau, ___ F. 4th. ____ (5th. 2022).
https://scholar.google.com/scholar_case?case=10705294411988676288&hl=en&as_sdt=6&as_vis=1&oi=scholarr

FACTS: Community Financial Services Association of America and Consumer Service Alliance of Texas (collectively, "Plaintiffs") sued the Consumer Financial Protection Bureau ("Defendant") on behalf of payday lenders and credit access businesses, arguing that Defendant's Payday Lending Rule (the "Rule") was invalid because its funding structure is unconstitutional. Each year, Defendant, who is funded directly by the Federal Reserve instead of periodic congressional appropriations, requests an amount "determined by the Director to be reasonably necessary to carry out the" agency's functions. The Federal Reserve is required to transfer that amount so long as it does not exceed twelve percent of the Federal Reserve's "total operating expenses." Plaintiffs contend that Defendant's funding mechanism violates the Appropriations Clause of the Constitution and the separation of powers principles enshrined in it.

After Plaintiffs filed suit, Defendant announced it intended to engage in a "notice-and-comment rulemaking effort" to amend the Rule, and, as a result, the district court entered a stay. After revising the Rule, the court lifted its stay and Plaintiffs amended their complaint. Both parties filed cross-motions for summary judgment. The district court granted summary judgment for Defendant, concluding that Defendant's self-funding mechanism did not violate the Appropriations Clause because it was "expressly authorized by statute," and Congress enacted it. Plaintiffs appealed.

HOLDING: Reversed.

REASONING: Following the district court's holding, Defendant argued that its funding scheme was not unconstitutional because it was enacted by Congress. The court rejected this argument because the Appropriations Clause requires more than Congress's mere enactment of a law– it requires an appropriation. Using Defendant's reasoning, no federal statute could ever violate the Appropriations Clause because Congress enacted it. The court reasoned that our Constitution›s structural separation of powers requires the rejection of Defendant's argument. The Appropriation Clause gives Congress exclusive control over the federal purse and requires Congress to use this authority to "preserve individual liberty from the encroachments of executive power." The court concluded that Defendant's funding scheme violated the Appropriations Clause and the separation of powers required by it because Defendant requests, and receives, money directly from the Federal Reserve rather than relying on annual appropriations as other agencies are required to do.

This self-actualizing, perpetual funding mechanism gives Defendant power that the Constitution meant to belong to Congress. The constitutional problem is more acute because of Defendant's broad authority. First, a single director has all the power rather than a multi-member board or commission. Second, its ability to create substantive rules for various industries, prosecute violations, and levy penalties against private citizens, essentially allowing it to act as a legislature, prosecutor, and court.

The double-insulation structure essentially makes Defendant free from Congressional oversight, which is a violation of the Constitution's separation of powers.

Defendant also argued that the court should find its funding structure constitutional because every prior court that had considered its funding structure had found it to be constitutional. The court disagreed with the prior court's decisions, rejecting this argument. Prior courts that found Defendant's funding structure constitutional relied on the fact that a handful of other agencies are also self-funded when making their decisions. Here, the court here decided this was an unfair comparison because, when compared to other self-funded agencies, Defendant's funding structure goes a significant step further. Defendant has a double-insulated funding structure and is self-directed. This structure allows Defendant to wield more enforcement and regulatory authority than the other self-funded agencies previous courts have used as comparisons. The double-insulation structure essentially makes Defendant free from Congressional oversight, which is a violation of the Constitution's separation of powers. Thus Defendant, and its funding authority, the Federal Reserve, are outside of the appropriations process. This double-insulation led to the court vacating Defendant's Rule due to its unconstitutional funding scheme.

The immediate impact of this decision could be widespread, retroactively affecting all prior regulations set forth by Defendant by opening them to attack on the grounds of invalidity. However, if Defendant is able to rectify its funding structure to fall within the strictures of the Constitution, this case may prove to be an endorsement of Defendant's broad rulemaking power.

TEXAS FEDERAL COURT ISSUES STAY PENDING FIFTH CIRCUIT MANDATE

Consumer Fin. Prot. Bureau v. Populus Fin. Grp., Inc., ___ F. Supp.3d ___ (N.D. Tex. 2022).
https://www.consumerfinancemonitor.com/wp-content/uploads/sites/14/2022/11/1544000-1544980-https-ecf-txnd-uscourts-gov-doc1-177115548931-1.pdf

FACTS: Plaintiff, Consumer Financial Protection Bureau ("CFPB"), and Defendant, Populus Financial Group, Inc. ("ACE"), agreed on a Motion for Entry of Order Staying Case Pending Final Resolution of Fifth Circuit Decision in

Community Financial Services Association of America Ltd v. CFPB (the "Motion").
HOLDING: Granted.
REASONING: The court ordered that all proceedings in this action should be stayed until after the Fifth Circuit issued its mandate in Community Financial Services Association of America Ltd v. CFPB. It also ordered that any party could move the court to extend the stay or to lift the stay before it expired on its own terms if they showed good cause. The parties must file a Joint Report within forty-five days of the conclusion of the stay showing how the parties wished to proceed.

NON-SIGNATORIES ARE BOUND TO THE CONTRACT'S CHOICE OF FORUM PROVISION UNDER THE EQUITABLE DOCTRINE THAT BINDS NON-SIGNATORIES WHO ARE "CLOSELY-RELATED" TO THE CONTRACT

Franlink Inc. v. BACE Servs., Inc., 50 F.4d 432 (5th Cir. 2022). https://law.justia.com/cases/federal/appellate-courts/ca5/21-20316/21-20316-2022-09-28.html

FACTS: Amy and Craig Wells (collectively, "the Wells") contracted with Plaintiff Franlink Incorporated ("Link") under a franchise agreement to operate Defendant staffing company BACE Services ("BACE") in Florida. The agreement included a covenant not to compete and a non-solicitation provision. Link formally terminated the agreement upon discovering that the Wells were operating a competing staffing company, PayDay, and were diverting and soliciting former Link clients to it.

Link filed a complaint in the Southern District of Texas based on the forum selection provision of the franchise agreement. It named BACE, the Wells, and PayDay—all non-Texas residents—as defendants. Non-signatory PayDay filed a motion to dismiss for lack of personal jurisdiction. The district court denied the motion. PayDay appealed.
HOLDING: Affirmed.
REASONING: Payday argued that, as non-signatory, it was not bound to the agreement's forum selection clause. Without the forum selection clause, the district court lacked jurisdiction over PayDay. The appellate court disagreed.

The closely-related doctrine binds a non-signatory to a forum selection clause when the non-signatories enjoyed a sufficiently close nexus to the dispute or another signatory such that it was foreseeable that they would be bound. The court had never recognized this doctrine until now, although every other circuit court had. The court decided to apply it on a case-by-case basis considering the following factors: (1) common ownership between the signatory and the non-signatory, (2) direct benefits obtained by the contract at issue, (3) knowledge of the agreement generally, and (4) awareness of the forum selection clause particularly. The court concluded that PayDay was bound by the agreement's forum selection clause under the closely-related doctrine because PayDay was fully owned and operated by the Wells, who were signatories to the franchise agreement through BACE. Moreover, PayDay, through the Wells, enjoyed a direct economic benefit from the contract and was aware of the agreement and the forum selection clause. Thus, since PayDay met the requirements of being closely related to the contract, it was bound to the choice of forum provision.

The closely-related doctrine binds a non-signatory to a forum selection clause when the non-signatories enjoyed a sufficiently close nexus to the dispute

ARTICLE III STANDING REQUIRES A CONCRETE INJURY EVEN IN THE CONTEXT OF A STATUTORY VIOLATION

Perez v. McCreary, Veselka, Bragg, & Allen, P.C., ___ F.4th ___ (5th Cir. 2022). https://law.justia.com/cases/federal/appellate-courts/ca5/21-50958/21-50958-2022-08-15.html

FACTS: Appellant McCreary, Veselka, Bragg & Allen, P.C. ("MVBA") sent a letter to Appellee Mariela Perez ("Perez") demanding payment of a delinquent debt. The limitations period on that debt had run but the letter did not disclose that.

Perez sued MVBA, alleging that MVBA violated the FDCPA by making a misrepresentation in connection with an attempt to collect her debts. Both parties moved for summary judgment. Although factual disputes precluded summary judgment, the trial court held that the violation of Perez's statutory rights under the FDCPA constituted a concrete injury-in-fact because those rights were substantive, not procedural. The district court reasoned that because the suit related to Perez's substantive right to be free from misleading information, her claim was therefore distinguishable from a "bare procedural violation" of the FDCPA that would not be cognizable under *Spokeo, Inc. v. Robins,* 578 U.S. 330 (2016). MVBA appealed.
HOLDING: Reversed.
REASONING: Perez argued that the violation of her rights under the FDCPA itself qualified as a concrete injury-in-fact.

The court disagreed, noting that for purposes of Article III standing, *Spokeo* concluded that the "[d]eprivation of a procedural right without some concrete interest that is affected by the deprivation . . . is insufficient to create Article III standing." Similarly, under *Transunion v. Ramirez* 594 U.S.___ (2021), injuries are concrete only if they bear a "close relationship" to injuries that American courts have traditionally recognized as concrete.

Here, Perez did not show that she suffered any tangible loss or material risk of harm as a result of MVBA's debt-collection letter, nor did she offer a common-law analog to the injuries she claimed. Perez could not establish a concrete injury in connection with MVBA's alleged violation of the FDCPA. As such, the court held that Perez lacked Article III standing to bring suit.

TELEPHONE CONSUMER PROTECTION ACT COVERS CALLS TO THE CELL PHONES OF BUSINESSES AS WELL AS INDIVIDUALS

Chennette et al. v. Porch.com Inc. et al., ___ F. 3d. ___ (9th Cir. 2022).
https://cdn.ca9.uscourts.gov/datastore/opinions/2022/10/12/20-35962.pdf

FACTS: Plaintiffs-Appellants Nathan Chennette and other home improvement contractors (collectively, "Plaintiffs") used their cell phone numbers for residential and business purposes. Some Plaintiffs registered their numbers on the national do-not-call ("DNC") registry. Defendants-Appellees GoSmith, Inc., and Porch.com, Inc., (collectively, "Defendants") sell client leads to home improvement contractors. Defendants solicited Plaintiffs by sending automated text messages via automatic telephone dialing systems ("ATDS") without Plaintiffs giving Defendants their cell phone numbers or consent to receive text messages from them.

Plaintiffs filed suit, alleging Defendants violated the Telephone Consumer Protection Act ("TCPA"). Specifically, Plaintiffs argued that Defendants' use of ATDS violated section 227(b) of the TCPA. They also alleged that Defendants' solicitation messages to Plaintiffs' numbers registered on the DNC registry violated section 227(c) of the TCPA. The district court dismissed Plaintiffs' cause of action for lack of statutory standing. Plaintiffs appealed.

HOLDING: Reversed and remanded.

REASONING: Defendants argued that since Plaintiffs were home improvement contractors, and not individuals, section 227(b) of the TCPA did not extend to Plaintiffs, and they were thus not "within the zone of interest protected by the law invoked" for statutory standing. Defendants further argued that because Plaintiffs used their cell phones both for personal calls and for calls associated with their home improvement business, they did not qualify as a "residential" subscriber under section 227(c) of the TCPA. The court disagreed with both of Defendants' arguments.

First, the court concluded that since section 227(b) of the TCPA prohibits the use of ATDS and provides that "a person or entity" may recover money damages or obtain injunctive relief, the most natural reading of "entity" includes a business. Therefore, the home improvement contractor Plaintiffs had statutory standing under the term "entity" in section 227(b) of the TCPA.

The court also concluded that Plaintiffs had standing under section 227(c) of the TCPA. Since the TCPA did not define "residential", the court reviewed the FCC's regulations, as well as the orders and opinions of other district courts. Noting FCC guidance and order from a majority of district courts, the court held that Plaintiffs' registered cell phones used for both personal and business purposes "are presumptively 'residential' within the meaning of section 227(c)." Though the FCC declined to provide precise guidance on whether the phone number used for both business and personal purposes could be residential, the FCC's 2003 TCPA Order presumed the number on the DNC registry as "residential" because wireless subscribers often used their wireless phones in the same manner as residential lines. Furthermore, the majority of the district courts decided a phone used for both personal and business purposes could be residential, depending on whether such presumption could be rebutted.

The court reasoned that Defendants could rebut the presumption after discovery by showing Plaintiffs' cell phones should be properly regarded as business rather than "residential lines. Specifically, the presumption could be rebutted by considering the following factors: (1) how plaintiffs hold their phone numbers out to the public; (2) whether plaintiffs' phones are registered with the telephone company as residential or business lines; (3) how much plaintiffs use their phones for business or employment; (4) who pays for the phone bills; and (5) other factors bearing on how a reasonable observer would view the phone line. Here, since the presumption could not yet be rebutted, Plaintiffs had standing under section 227(c).

Under the dissent's view, the court should have deferred to the FCC's limitations as to who can sue telemarketers under the TCPA.

The dissent favored the FCC's narrower interpretation of section 227(c). The dissenting opinion chastised the majority for usurping the role of the FCC by creating its own regulatory framework for determining whether a cell phone qualified as a residential line. Specifically, under the dissent's view, the court should have deferred to the FCC's limitations as to who can sue telemarketers under the TCPA because Congress had "explicitly left a gap for the agency to fill…." *Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 843-44 (1984). Indeed, when Congress enacted the TCPA, a cell phone was not "residential" under the dictionary definition, and common usage showed a residential line was distinct from a cell phone. Congress thus knew how to refer to a cell phone when it wanted to but chose not to use language referring to cell phones in section 227(c). Therefore, the dissent argued that because the FCC's 2003 TCPA Order suggesting the protection of privacy rights of wireless phones on the DNC registry was protected only if the wireless phones were used (1) in their homes and (2) in the same manner as residential lines, the majority incorrectly assumed the term "residential" referred to a purpose of how the cell phone was used.

WASHINGTON SUPREME COURT FINDS A CONTRACTUAL ONE-YEAR LIMITATION PERIOD IN A RESIDENTIAL CONSTRUCTION CONTRACT IS UNCONSCIONABLE AND VOID

Tadych v. Noble Ridge Constr., Inc., ___ P.3d ___ (Wash. 2022).
https://www.courts.wa.gov/opinions/pdf/1000499.pdf

FACTS: Petitioners-Appellants Gregory and Sue Tadych contracted Respondent-Appellee Noble Ridge Construction Inc. ("Noble Ridge"), to build a custom home. The contract's warranty provision had a one-year limitation barring the Tadychs from filing any claims arising from the construction after one year of occupancy. Two months prior to the warranty expiration date,

the Tadychs noticed shifting and unlevel flooring in their house. Noble Ridge assured them that those were minor issues and promised to repair them. Additional issues arose in the house after the one-year limitation period, but Noble Ridge never made any repairs. After a construction expert discovered severe defects in a thorough inspection, the Tadychs sued Noble Ridge for breach of contract.

The trial court granted summary judgment in favor of Noble Ridge and dismissed the Tadychs' complaint, concluding that the one-year limitation period had expired. The Court of Appeals affirmed. The Tadychs appealed to the Supreme Court of Washington.

HOLDING: Reversed and remanded.

REASONING: On appeal, the Tadychs argued that the one-year limitation clause was unconscionable. The court agreed.

The court held that the one-year limitation provision was unenforceable and void because it was substantively unconscionable. The court analyzed the unconscionability of the contract provision by applying a number of factors: (1) the expertise of the parties, (2) which party drafted the contract, and (3) whether the provision at issue was separately negotiated or bargained for. Here, all the factors weighed against Noble Ridge as the Tadychs had no expertise in legal contract drafting, the contract was drafted by Noble Ridge, and the one-year limitation provision was neither bargained for, nor negotiated separately. The limitation provision was included within the warranty section of the contract and had "little, if anything, to do with a warranty." The provision also deprived the Tadychs of the six-year statute of limitations to seek damages for faulty construction. Based on the factor analysis, the court concluded that the contract provision severely eliminated established statutory rights and therefore was unconscionable and void.

The one-year limitation provision was unenforceable and void because it was substantively unconscionable.