

# RECENT DEVELOPMENTS

was reimbursed by the DOE, and assigned its rights and title to the DOE for collection purposes. In 1999, the DOE filed suit in federal court seeking judgment on the unpaid student loans. Wagstaff raised the issue of whether all six notes were valid. After the DOE determined that all six notes were valid it resumed efforts to collect the debt administratively by offsetting Wagstaff's tax refunds in 2005 and 2006 and it approved the garnishment of her wages in 2005.

In 2005, Wagstaff filed suit in federal court alleging a claim under the Fair Debt Collection Practices Act ("FDCPA"). The DOE filed a motion to dismiss, or in the alternative, for summary judgment. In granting the motion, the district court held that it lacked subject matter jurisdiction and that Wagstaff failed to raise a genuine issue of material fact as to any of her claims and that the DOE was entitled to judgment as a matter of law.

**HOLDING:** Affirmed.

**REASONING:** The issue of whether Congress waived the sovereign immunity of the United States by enacting the FDCPA was one of first impression for the Fifth Circuit. "In order to hale the federal government into a court proceeding, a plaintiff must show that there has been a valid waiver of sovereign immunity."

"A waiver of the Federal Government's sovereign immunity must be unequivocally expressed in statutory text . . . and will not be implied." "Moreover, a waiver of the Government's sovereign immunity will be strictly construed, in terms of its scope, in favor of the sovereign." A statute's legislative history cannot supply a waiver that does not appear clearly in any statutory text. "Absent a waiver of sovereign immunity, the federal government is immune from suit." Finally, "[t]he absence of such a waiver is a jurisdictional defect."

The court found Wagstaff failed to cite a single provision in the FDCPA that unequivocally and expressly waives the sovereign immunity of the United States. Instead, she argued that the DOE waived its own sovereign immunity by acting through a third party to collect on her student loan debt, filing suit in 1999 to enforce judgment on her debt, and informing her that she had a right to bring suit in federal court to seek review of the decision to garnish her wages. The court rejected these arguments based on the longstanding principle that only Congress can waive an executive agency's sovereign immunity. The court held that because the FDCPA does not contain an unequivocal and express waiver of sovereign immunity, the district court correctly held that it lacked subject matter jurisdiction in this case.

## CONSUMER CREDIT

### FAIR CREDIT REPORTING ACT AMENDMENT IS NOT RETROACTIVE

*Killingsworth v. HSBC Bank Nevada, N.A.*, 507 F.3d 614 (7th Cir. 2007).

**FACTS:** The court consolidated two cases that required them to determine whether an amendment to the Fair Credit Reporting Act ("FCRA") eliminating private rights of action, had an impermissible retroactive effect when applied to FCRA claims that accrued prior to the amendment's effective date.

Killingsworth received a prescreened credit card offer from Household Bank prior to August 2004. She claimed the offer contained FCRA disclosures that were not clear and conspicuous. Sawyer applied for auto insurance with Ensurance Insurance Services, Inc. ("Ensurance") in October 2004. Ensurance obtained his credit report in connection with that application. Sawyer alleged Ensurance violated the FCRA by charging him a higher rate based on negative information in his credit report without giving him notice of that adverse action, and by using his initial credit information for subsequent renewals of his policy when corrected credit information would have qualified him for a lower rate.

Both plaintiffs filed class action lawsuits. The district court dismissed both complaints based on section 311 of the Fair and Accurate Credit Transactions Act of 2003 ("FACTA"), which amended the FCRA to eliminate enforcement of certain FCRA provisions by private civil suit. *See* 15 U.S.C. § 1681m(h)(8). Sawyer and Killingsworth argued that the amendment, effective December 1, 2004, impaired rights they possessed prior to the new statute's effective date and therefore had an impermissible retroactive effect if applied to them.

**HOLDING:** Reversed and remanded.

**REASONING:** Section 1681(m) presented a threshold issue in both appeals of whether FACTA eliminated private causes of action for the particular violations of the section. If applied retroactively, § 1681m(h) would eliminate both of their claims. Unless Congress expressly calls for retroactivity, courts presume an enactment has prospective effect. The defendants argued that Congress did specify FACTA's reach, but through negative implication. The court found that § 312(f) of FACTA preserved private causes of action for liability that accrued prior to FACTA's date of enactment, but the court found defendant's argument did not hold because FACTA had different enactment and effective dates. Drawing a negative inference from § 312(f) fails to distinguish between FACTA's enactment and effective dates, or account for claims arising between the two dates. Were the court to apply it here, the negative implication argument would simply conflate FACTA's enactment and effective dates. The court found the latter date would have no meaning if all claims accruing after the date of enactment were extinguished without regard to the effective date.

The court found Congress had not clearly spoken to the question of whether § 1681m(h)(8) applied to FCRA claims that arose between FACTA's enactment and effective dates. The court sought to determine whether the application of § 1681m(h)(8) would impair rights a party possessed when he acted, increase a party's liability for past conduct, or impose new duties with respect to transactions already completed. If the statute would have any of these effects, the "traditional presumption" of prospectivity would apply.

Prior to FACTA's effective date, Killingsworth had a right of private civil action for damages, a right that would have been impaired had § 1681m(h)(8) been applied retrospectively. The

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court held that the amendment, therefore, had an impermissible retroactive effect on claims like Killingsworth's that accrued prior to its December 1, 2004 effective date. Because Sawyer's allegations straddled the effective date, the conduct alleged prior to the effective date might establish an FCRA violation thus making dismissal improper.

## NATIONAL BANK ACT PREEMPTS STATE LAW CLAIM

Rose v. Chase Bank USA, N.A., 513 F.3d 1032 (9th Cir. 2008).

**FACTS:** Plaintiffs, all California residents, brought this action on behalf of an ostensible class of holders of credit cards issued by Chase Bank. ["Chase"] Chase extended credit to its credit card holders by mailing them a preprinted check or draft, commonly known as a "convenience check." The convenience checks were commonly attached to a letter or invitation from the bank, and perforated so that they could be torn off and used. The convenience check, if cashed, resulted in a charge against the user's credit card account, as well as associated finance charges or transaction fees. Plaintiffs cashed those convenience checks and incurred those charges or fees.

California Civil Code § 1748.9(a) provides that "a credit card issuer that extends the cardholder credit through convenience checks must, in clear and conspicuous language, disclose on the front of an attachment that is affixed to the checks the following information: (1) That use of the check will constitute a charge against your credit account; (2) The annual percentage rate and calculation of finance charges associated with the use of the attached check or draft; and (3) Whether the finance charges are triggered immediately upon the use of the check or draft."

Plaintiffs alleged Chase violated California Civil Code §§ 1748.9(a)(1) and (a)(3). Plaintiffs' first claimed that Chase violated California's Unfair Competition Law ("UCL"), by committing an "unlawful" business practice, owing to Chase's alleged violations of §§ 1748.9(a)(1) and (a)(3) when it failed to make the pursuant disclosures. Second, plaintiffs' claimed that Chase violated California's UCL by committing a "fraudulent" business practice, or engaging in "deceptive or misleading advertising" when it failed to make those disclosures, regardless of whether Chase's actions violated § 1748.9. Third, plaintiffs' claimed that Chase violated California's UCL by committing an "unfair" business practice when it failed to make those disclosures (again, regardless of whether its actions violated California Civil Code § 1748.9).

After removing the case to federal court, Chase moved for judgment on the pleadings on all three of plaintiffs' claims. The district court held that each of the plaintiffs' claims were preempted by the National Bank Act ("NBA") and granted Chase's motion for judgment on the pleadings in its entirety and entered judgment.

**HOLDING:** Affirmed.

**REASONING:** The appellate court, reviewing the case *de novo*, discussed the history of the NBA noting that federal law preempts state law with respect to national banking. Additionally, the NBA vested in nationally chartered banks enumerated powers and "all such incidental powers as shall be necessary to carry on the business of banking" including the power to "loan money on personal security," which is at issue in the instant case. The power to "loan money on personal security" is the power pursuant to which Chase here extended credit to its cardholders via convenience checks. Where Congress has explicitly granted a power to a national bank without any indication that Congress intended for that power to be subject to local restriction, Congress is presumed to have intended to preempt state laws, such as § 1748.9.

Plaintiffs alternatively contended that even if their first claim was preempted, their second and third claims survive because those claims are not predicated on a violation of § 1748.9. Regardless of the nature of the state law claim alleged, however, the proper inquiry is whether the "legal duty that is the predicate of" plaintiffs' state law claim falls within the preemptive power of the NBA or regulations promulgated thereunder. Here, from the face of plaintiffs' complaint, the district court correctly found Chase's alleged legal duties that underlie plaintiffs' UCL claims for "deceptive" or "unfair" business practices are the same purported duties to disclose imposed by § 1748.9 and are preempted by the NBA. Accordingly, the district court correctly dismissed plaintiffs' second and third claims.

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