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BANK & LENDER LIABILITY

Litigation News and Analysis • Legislation • Regulation • Expert Commentary

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WHAT'S INSIDE

FRAUD

Bank's acceptance of altered check caused $96,000 in losses, suit says

An Alabama financial institution says in a lawsuit that Bank of America has improperly refused to reimburse it for more than $96,000 it lost when the bank accepted a fraudulent check from an unknown person and presented it to the plaintiff for payment.

***National Bank of Commerce v. Bank of America*, No. 18-cv-930, complaint filed, 2018 WL 3099369 (N.D. Ala. June 18, 2018).**

National Bank of Commerce says in a complaint filed in the U.S. District Court for the Northern District of Alabama that BofA accepted the check even though someone had changed the amount to be paid and the payee's name.

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Providing banking services to the legal marijuana industry: Mitigating risks to maximize potential rewards

By Hunter Robinson, Esq., Jay Wright, Esq., and Whitt Steineker, Esq.
Bradley Arant Boult Cummings LLP

Since 1996, when California became the first state to legalize marijuana (at the time, for medicinal purposes only), 28 additional states and the District of Columbia have legalized marijuana to some extent.

Public support for legalization continues to rise as more and more jurisdictions loosen their marijuana laws, with 64 percent of Americans in favor of legalization,[1] nearly double the percentage that supported legalization in 2000.

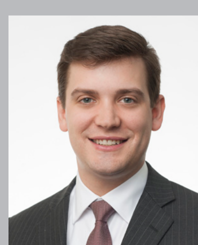
While the use and possession of marijuana is still illegal under federal law, the long-term outlook for the legal-marijuana industry appears strong. This emerging industry took in approximately $9 billion in sales in 2017, with that number expected to grow to $11 billion in 2018 and $21 billion in 2021.[2]

Despite these eye-popping numbers, the legal-marijuana industry is severely underserved by many of the industries it requires for support, perhaps none more so than the banking and financial services industry. Broadly speaking, the reason for this is obvious — the federal prohibition on marijuana found in the Controlled Substances Act.[3]

In light of that prohibition and the regulatory challenges that come with it, many financial institutions have decided that doing business with this industry is simply too risky.

But not all financial institutions share that view, and the number of institutions willing to reap the reward of engaging an underserved $11 billion industry continues to grow. Now, almost 400 banks and credit unions provide banking services to the legal-marijuana industry,[4] more than three times the amount that served the industry in 2014.

Like most decisions in the financial world, whether to do business with the legal-marijuana industry is a question of risk tolerance. While the risks in this arena are certainly higher than most, so too are the potential rewards given the relative scarcity of competition compared to other industries.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To assist in evaluating those risks, this article provides a brief overview of two key laws governing a financial institution's relationship with marijuana-related businesses: (1) the Bank Secrecy Act (BSA), and (2) the Federal Deposit Insurance Act's prohibition of "unsafe or unsound practices" for banks insured by the Federal Deposit Insurance Corporation (FDIC). Future articles will provide a more in-depth look into each.

THE BANK SECRECY ACT

The BSA[5] — along with its implementing regulations[6] promulgated by the Office of the Comptroller of the Currency (OCC) — establish various recordkeeping and reporting requirements for national banks, federal savings associations, and agencies of foreign banks.

> Almost 400 banks and credit unions provide banking services to the legal-marijuana industry.

The OCC, as well as the Treasury Department's Financial Crimes Enforcement Network (FinCEN) and Office of Foreign Assets Control (OFAC), all play a role in enforcing the BSA.

On February 14, 2014, FinCEN issued guidance that, by its terms, "clarifies how financial institutions can provide services to marijuana-related businesses consistent with their BSA obligations" (the FinCEN Guidance).

The FinCEN Guidance is expressly based on the Cole Memorandum[7] — Obama-era guidance from the Justice Department that directed federal prosecutors to take a hands-off approach to legal-marijuana businesses in states where marijuana had been legalized to some degree.

Although Attorney General Sessions rescinded the Cole Memorandum on

January 4, 2018,[8] FinCEN has since indicated that the FinCEN Guidance remains in effect.

While some nonetheless viewed Sessions' rescission of the Cole Memo as weakening the FinCEN Guidance, the pendulum may have swung back on April 13, when Colorado Senator Cory Gardner — who began blocking the confirmation of Justice Department nominees after Sessions rescinded the Cole Memo — announced that he received a commitment from President Trump "that the Department of Justice's rescission of the Cole Memo will not impact Colorado's legal marijuana industry."[9]

> Many view the regulatory environment for providing banking services to the legal-marijuana industry as more favorable for credit unions than their bank counterparts.

The White House confirmed that Senator Gardner's statement was "accurate," but did not offer details as to how the Administration would implement President Trump's directive. Given Trump's directive and FinCEN's indication that its Guidance remains in effect, financial institutions transacting with marijuana-related businesses should still look to the FinCEN Guidance to clarify their BSA obligations in this space.

The FinCEN Guidance requires that a financial institution engaging a marijuana-related business conduct substantial, and, importantly, continuing due diligence to determine whether that business is (1) complying with state law, (2) interfering with any of the eight priorities listed in the Cole Memorandum, or (3) otherwise engaging in "suspicious activity," including a list of "red flags" enumerated in the Guidance.

The institution must then file one of three marijuana-specific Suspicious Activity Reports (SAR), and continue filing SARs throughout its relationship with the marijuana-related business. Which of the three depends on what the institution uncovers in its due diligence:

- The institution should file a "Marijuana Limited" SAR if "it reasonably believes, based on its customer due diligence," that the business "does not implicate one of the Cole Memo priorities or violate state law[.]"
- The institution should file a "Marijuana Priority" SAR if "it reasonably believes, based on its customer due diligence," that the business "implicates one of the Cole Memo priorities or violates state law[.]"
- The institution should file a "Marijuana Termination" SAR if "it reasonably believes, based on its customer due diligence," that it must terminate its relationship with the business "to maintain an effective anti-money laundering compliance program[.]"

While the FinCEN Guidance mandates an onerous compliance program for financial institutions doing business with the legal-marijuana industry, the costs of such programs can be passed through to the legal-marijuana client. Given the dearth of supply and substantial demand for financial institutions willing to do business with them, such clients understand the need for and are willing to pay such fees.

'UNSAFE AND UNSOUND PRACTICES'

The FDIC provides deposit insurance to its member banks, and all federally — and nationally — chartered banks, and nearly all state-chartered banks, are required to have FDIC Insurance. FDIC-insured banks that engage in "unsafe or unsound practices" are subject to FDIC enforcement actions.

While the FDIC has broadly declared that "committing violations of law"[10] is an unsafe and unsound practice, courts have interpreted the phrase "unsafe or unsound practice" as a "flexible concept which gives the administering agency the ability to adapt to changing business problems and practices in the regulation of the banking industry."[11]

Given the federal prohibition on marijuana, providing banking services to legal-marijuana businesses can put an institution's FDIC Insurance at risk.

But a financial institution serving the legal-marijuana industry may be able to decrease the risk that the FDIC would deem such service an "unsafe and unsound practice" through certain actions, like limiting marijuana-related deposits to a small percentage of its total deposits to decrease liquidity risk and ensuring its employees are well-trained on its policies and procedures for serving the industry.

Notably, unlike their bank counterparts, credit unions are not supervised by the FDIC, and the FDIC does not insure their deposits. Those deposits are instead insured by the National Credit Union Administration (NCUA), which also supervises federally-chartered credit unions.

The NCUA has indicated that it will follow the FinCEN Guidance[12] when examining the federally-chartered credit unions it supervises, and state-chartered credit unions are not supervised by federal banking regulators.

For these reasons, many view the regulatory environment for providing banking services to the legal-marijuana industry as more favorable for credit unions than their bank counterparts.

TAKEAWAYS

Until marijuana is legalized at the federal level or Congress passes legislation protecting financial institutions that serve the legal-marijuana industry, providing banking services to that industry will be a risky endeavor.

But financial institutions can minimize that risk to an extent by building out a robust compliance program. While that program may be costly, financial institutions can recoup those costs through the fees they charge to the legal-marijuana client, which can provide a potentially lucrative opportunity for financial institutions willing to engage with the industry. WJ

NOTES

1 https://bit.ly/2lJzTrF

2 https://cnnmon.ie/2rYArXv

3 https://bit.ly/28fmFvt

4 https://bit.ly/2jZPMQp

5 https://bit.ly/2KzGud9

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Proposed revisions to the Volcker Rule — Prohibitions and restrictions on proprietary trading and certain interests in, and relationships with, hedge funds and private equity funds

By Mark V. Nuccio, Esq., and Gideon Blatt, Esq.
Ropes & Gray

On May 30, 2018, the Federal Reserve Board issued a notice of proposed rulemaking[1] and asked for comment on a proposed rule to simplify and tailor compliance requirements relating to the regulation implementing section 13 (commonly known as the "Volcker Rule")[2] of the Bank Holding Company Act ("BHC Act") (the "Proposal").[3]

The Proposal was developed jointly with the Office of the Comptroller of the Currency, the Federal Deposit Insurance Corporation, the Securities and Exchange Commission, and the Commodity Futures Trading Commission (together, the "Agencies").

In December 2013, the Agencies jointly issued a final rule (the "Final Rule") to implement the requirements of the Volcker Rule. The Volcker Rule generally prohibits a banking entity[4] from engaging in proprietary trading or acquiring or retaining an ownership interest in, or having certain relationships with, a hedge fund or private equity fund (a "covered fund").

The Final Rule also requires firms with significant trading operations to report certain quantitative metrics related to their trading activities and requires banking entities to establish a Volcker Rule compliance program. The Proposal represents a significant reconsideration of the Final Rule and portends a more workable Volcker Rule compliance regime.

The Volcker Rule generally prohibits a banking entity from engaging in proprietary trading or acquiring or retaining an ownership interest in, or having certain relationships with, a hedge fund or private equity fund.

Based on several years of experience implementing the Final Rule, the Agencies have introduced proposed changes with the intent of (i) tailoring the requirements of the regulation to focus on entities with large trading operations; and (ii) streamlining and simplifying regulatory requirements by eliminating or adjusting certain requirements and focusing on quantitative, bright-line rules where possible to provide clarity regarding prohibited and permissible activities.

The Proposal identifies opportunities, consistent with the statute, to incorporate additional tailoring of the application of the Volcker Rule based on the activities and risks of banking entities and to provide greater clarity about the activities that are prohibited and permitted. The comment period on the Proposal will be open for sixty (60) days after it is published in the Federal Register.

TAILORING BY SIZE OF TRADING ASSETS AND LIABILITIES — ESTABLISHMENT OF THREE CATEGORIES OF BANKING ENTITIES BASED ON TRADING ACTIVITY

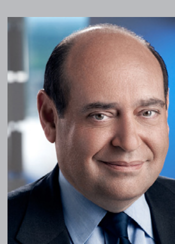
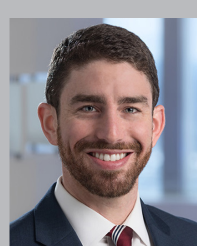
The proposal would establish three categories of banking entities based on trading activity.

Banking entities with significant trading assets and liabilities

Banking entities that, together with their affiliates and subsidiaries, have consolidated gross trading assets and liabilities (excluding obligations of or guaranteed by the U.S. or any U.S. agency) equal to or exceeding $10 billion would be required to have a comprehensive compliance program that would be tailored to reflect the requirements of the statute.

Banking entities with moderate trading assets and liabilities

Banking entities that, together with their affiliates and subsidiaries, have consolidated gross trading assets and liabilities (excluding obligations of or guaranteed by the U.S. or any U.S. agency) less than $10 billion but equal to or above $1 billion would be subject

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to reduced compliance requirements in light of their relatively smaller and less complex trading activities.

Banking entities with limited trading assets and liabilities

Banking entities that have, together with their affiliates and subsidiaries, consolidated gross trading assets and liabilities (excluding trading assets and liabilities involving obligations of or guaranteed by the U.S. or any U.S. agency) less than $1 billion would enjoy a rebuttable presumption of compliance with the rule.

CHANGES TO PROPRIETARY TRADING RESTRICTIONS

Revised definition of trading account and additional exclusions

Revised Definition of Trading Account

The statutory proprietary trading prohibitions apply to positions taken as principal for the trading account of a banking entity. The statute defines "trading account" as any account used for acquiring or taking positions in financial instruments principally for the purpose of selling in the near term (or otherwise with the intent to resell in order to profit from short-term price movements), and any other such accounts as the Agencies may by rule determine.

> The proposal represents a significant reconsideration of the final rule and portends a more workable Volcker Rule compliance regime.

The Final Rule implemented the statutory definition of trading account with a three-pronged definition: (i) "short-term intent prong" (subject to a rebuttable presumption),[5] (ii) the "market risk capital prong" and (iii) the "dealer prong."

The Proposal would replace the short-term intent prong with a prong based on the accounting treatment of a position (the "accounting prong"), while retaining the market risk capital prong[6] and the dealer prong.

The accounting prong would provide that the Volcker Rule trading account includes any account used by a banking entity to purchase or sell one or more financial instruments that is recorded at fair value on a recurring basis under applicable accounting standards, and would generally cover derivatives, trading securities and available-for-sale securities.

The Proposal would also eliminate the 60-day rebuttable presumption.

Expanded Liquidity Management Exclusion and New Exclusion for Trade Error Corrections

The proposal would expand the liquidity management exclusion to permit the purchase or sale of foreign exchange forwards, foreign exchange swaps, and physically-settled cross-currency swaps entered into by a banking entity for liquidity management purposes.

The Proposal would add a new exclusion from the definition of proprietary trading for trading errors and subsequent correcting transactions made on by a banking entity as principal to correct erroneously executed trades.

Permitted underwriting and market-making activities RENTD-related presumption

Under the Volcker Rule, transactions in connection with underwriting and market-making activities, to the extent designed not to exceed reasonably expected near-term demand of clients, customers, or counterparties ("RENTD"), are exempted from the prohibition on proprietary trading.

The Proposal would provide that the purchase or sale of a financial instrument by a banking entity is presumed not to exceed RENTD if the banking entity establishes underwriting and market-making internal risk limits for each trading desk (subject to certain conditions) and implements, maintains, and enforces those limits, such that the risk of the financial instruments held by the trading desk does not exceed such limits.

Reduced requirements for permitted risk-mitigating hedging activities

The Proposal would remove certain hedging requirements for all banking entities, reduced hedging requirements for banking entities that do not have significant trading assets and liabilities, and reduced hedging documentation requirements for banking entities with significant trading assets and liabilities.

Permitted trading activities of a foreign banking entity

Section 13(d)(1)(H) of the BHC Act permits certain foreign banking entities to engage in proprietary trading that occurs solely outside of the United States (the "foreign trading exemption"), subject to certain conditions.

The Proposal would eliminate the requirements that (i) no financing for the banking entity's purchase or sale is provided by any branch or affiliate of the banking entity that is located in the U.S. or organized under the laws of the U.S. or of any state and (ii) the purchase or sale, generally, is not conducted with or through any U.S. entity, and would modify another requirement to focus on whether the banking entity that engages in the purchase or sale as principal (including any relevant personnel) is located in the U.S.

CHANGES TO COVERED FUND ACTIVITIES AND INVESTMENTS

Comments sought on the definition of covered fund

The Final Rule defines covered fund to cover issuers of the type that would be investment companies but for section 3(c)(1) or 3(c)(7) of the Investment Company Act[7] (*i.e.*, hedge funds and private equity funds), with certain exclusions for specific types of issuers.

Without changing the definition of covered fund, the Proposal seeks comments on whether the definition should be further tailored to exclude certain additional types of funds (such as venture capital funds), whether to define covered fund with reference to certain fund characteristics (an alternative discussed in the preamble to the Final Rule), or whether to reference an existing definition (such as the SEC's Form PF definitions of "hedge fund" and "private equity fund").[8]

Activities permitted in connection with organizing and offering a covered fund

Beneficial treatment of the value of covered fund interests under the underwriting and market-making exemptions

Section 13(d)(1)(B) of the BHC Act permits a banking entity to purchase and sell securities and other instruments in connection with certain underwriting or market-making-related activities.

Under the Final Rule, so long as certain requirements are met, the prohibition on ownership or sponsorship of a covered fund does not apply to a banking entity's underwriting and market-making-related activities involving a covered fund.

The Proposal would, for a covered fund that a banking entity does not organize or offer, remove the requirement that the banking entity include in its aggregate fund limit and capital deduction the value of any ownership interests of the covered fund acquired or retained under the underwriting or market-making exemption in order to facilitate a banking entity's underwriting and market-making related activities for covered funds and to permit a banking entity to hold exposures consistent with the reasonably expected near term demand of clients, customers, and counterparties.

Expanded permitted risk-mitigating hedging activities

Section 13(d)(1)(C) of the BHC Act provides an exemption for certain risk-mitigating hedging activities. The Proposal would expand permitted risk-mitigating hedging activities to allow a banking entity to acquire a covered fund interest as a hedge when acting as an intermediary on behalf of a customer that is not itself a banking entity to facilitate the exposure by the customer to the profits and losses of the covered fund, so long as the activity is designed to mitigate risk.

Limitations on relationships with a covered fund

Comments sought on easing restrictions relating to covered transactions with covered funds

Section 13(f) of the BHC Act generally prohibits a banking entity that serves as investment manager, investment adviser, or sponsor to a covered fund (or that organizes and offers a covered fund pursuant to section 13(d)(1)(G) of the BHC Act) from entering into a transaction with such covered fund that would be a covered transaction as defined in section 23A of the Federal Reserve Act ("Federal Reserve Act").[9]

The Proposal requests comments on whether the exemptions provided in section 23A of the Federal Reserve Act and Regulation W[10] should be incorporated into the Volcker Rule, which would allow banking entities to extend credit to certain covered funds with which they are associated. This reopens a debate that the Final Rule had resolved against permitting the exemptions.

Permitted covered fund activities of a foreign banking entity

Increased parity for foreign banking entities' activities and investments outside of the U.S.

Section 13(d)(1)(I) of the BHC Act permits foreign banking entities to acquire or retain an ownership interest in, or act as sponsor to, a covered fund, so long as those activities and investments occur solely outside the United States and certain other conditions are met (the "foreign fund exemption").

The Proposal would remove as a condition of the foreign fund exemption the requirement that no financing for the banking entity's ownership or sponsorship of covered fund interests is provided by any branch or affiliate that is located in or organized under the laws of the U.S. in order to ease the burden on foreign banking entities' operations outside of the U.S. The other conditions of the foreign fund exemption will continue to apply.

Clarification of the SOTUS exemption's marketing restriction

Under the SOTUS (solely outside of the U.S.) covered fund exemption to the Volcker Rule prohibition on banking entities' investments in covered funds, foreign banking entities may invest in a covered fund so long as no ownership interest in the covered fund is offered for sale or sold to a resident of the U.S., known as the marketing restriction.[11]

Under the Proposal, an ownership interest in a covered fund is not offered for sale or sold by the foreign banking entity to a resident of the United States for purposes of the marketing restriction only if it is not sold and has not been sold pursuant to an offering that targets residents of the U.S.

Comments sought on treatment of non-covered fund mutual funds and extension of no-action policy statement for foreign excluded funds

The Proposal requests comment on how to approach treatment of certain funds, including U.S.-registered investment companies and foreign excluded funds[12], that are excluded from the definition of covered fund but remain subject to the Volcker Rule because they are considered banking entities.[13]

With respect to foreign excluded funds, the Proposal extends until July 21, 2019 the no-action period described in the Federal banking agencies' July 21, 2017 policy statement, assuming certain conditions are met. It had been due to expire on July 21, 2018. During this time the Federal Reserve Board's FAQ #14 will remain in effect.[14]

> The proposal would expand the liquidity management exclusion to permit the purchase or sale of foreign exchange forwards, foreign exchange swaps, and physically-settled cross-currency swaps entered into by a banking entity for liquidity management purposes.

TAILORED COMPLIANCE PROGRAMS AND PRESUMPTION OF COMPLIANCE FOR SMALLER BANKING ENTITIES

The Proposal attempts to more effectively tailor compliance program and reporting and metric collection requirements for certain banking entities based on their size and the nature of their activities in order to reduce burdens and uncertainty for smaller institutions, and would focus compliance program requirements on banking entities with the most significant and complex trading activities. The Proposal includes three categories.

Banking entities with significant trading assets and liabilities

Banking entities with significant trading assets and liabilities would be subject to the six-pillar compliance program requirement[15], the metrics reporting requirements, the underwriting and market-making compliance program requirements, the covered fund documentation requirements, and the CEO attestation requirement.

Banking entities with moderate trading assets and liabilities

Banking entities with moderate trading assets and liabilities would be required to establish a simplified compliance program and comply with the CEO attestation requirement.

Banking entities with limited trading assets and liabilities

Banking entities with limited trading assets and liabilities would be presumed to be in compliance with the Volcker Rule. These banking entities would not be required to establish a special Volcker Rule compliance program unless the appropriate Agency, based upon a review of the banking entity's activities, determines that the banking entity must establish a simplified compliance program.

SIMPLIFICATION OF REPORTING AND RECORDKEEPING REQUIREMENTS

The Proposal recommends certain amendments to Appendix A of the Final Rule to reduce compliance-related inefficiencies. WJ

NOTES

[1] https://www.federalreserve.gov/newsevents/pressreleases/files/bcreg20180530a1.pdf

[2] Section 13 of the BHC Act was added by section 619 of the Dodd-Frank Wall Street Reform and Consumer Protection Act ("Dodd-Frank Act"). Pub. L. No. 111-203; *see* Dodd-Frank Act § 619; 12 U.S.C. 1851.

[3] *Available at* https://www.federalreserve.gov/newsevents/pressreleases/files/bcreg20180530a1.pdf; *see also* Federal Reserve Staff Memo to the Board of Governors (May 25, 2018), *available at* https://www.federalreserve.gov/aboutthefed/boardmeetings/files/board-memo-20180530.pdf.

[4] The Final Rule, consistent with section 13 of the BHC Act, defines the term "banking entity" to include (i) any insured depository institution; (ii) any company that controls an insured depository institution; (iii) any company that is treated as a bank holding company for purposes of section 8 of the International Banking Act of 1978; and (iv) any affiliate or subsidiary of any entity described in clauses (i), (ii), or (iii).

[5] The "short-term intent prong" includes any account used by a banking entity to purchase or sell one or more financial instruments principally for the purpose of (a) short-term resale, (b) benefitting from short-term price movements, (c) realizing short-term arbitrage profits, or (d) hedging any of the foregoing. The Final Rule included a rebuttable presumption that the purchase or sale of a financial instrument is for the trading account if the banking entity holds the instrument for fewer than 60 days or substantially transfers the risk of the position within 60 days (the 60-day rebuttable presumption). See § __.3(b)(2) of the Final Rule.

[6] The market risk capital prong would be modified to include an account used by a foreign banking entity to purchase or sell one or more financial instruments, if the foreign banking entity is subject to a market risk capital framework imposed by its home country supervisor.

[7] Sections 3(c)(1) and 3(c)(7) of the Investment Company Act, in relevant part, provide exclusions from the definition of "investment company" for (1) any issuer whose outstanding securities are beneficially owned by not more than one hundred persons and that is not making and does not presently propose to make a public offering of its securities (other than short-term paper) (Section 3(c)(1)); or (2) any issuer, the outstanding securities of which are owned exclusively by persons who, at the time of acquisition of such securities, are "qualified purchasers" as defined by section 2(a)(51) of the Investment Company Act, and that is not making and does not at that time propose to make a public offering of such securities (Section 3(c)(7)). *See* 15 U.S.C. 80a-3(c)(1) and (c)(7).

[8] *See* Form PF, Glossary of Terms. Form PF uses a characteristics-based approach to define different types of private funds. A "private fund" for purposes of Form PF is any issuer that would be an investment company, as defined in section 3 of the Investment Company Act, but for section 3(c)(1) or 3(c)(7) of that Act. Form PF defines the following types of private funds: hedge funds, private equity funds, liquidity funds, real estate funds, securitized asset funds, venture capital funds, and other private funds.

[9] 12 U.S.C. 371c.

[10] 12 U.S.C. 371c(d); *see also* 12 CFR 233.41-233.43.

[11] *See* FAQ #13, "SOTUS Covered Fund Exemption: Marketing Restriction."

[12] Foreign excluded funds are certain foreign funds that are excluded from the definition of "covered fund" under the Final Rule with respect to a foreign banking entity.

[13] The Final Rule specifically excludes covered funds from the definition of banking entity.

[14] *See* FAQ #5, "Foreign Public Fund Seeding Vehicles," available at the public websites of the Agencies; FAQ #14, "How does the Final Rule apply to a foreign public fund sponsored by a banking entity?" available at the public websites of the Agencies.

[15] Like the Final Rule, the Proposal would provide that a six-pillar compliance program must include written policies and procedures, internal controls, a management framework, independent testing and audit, training for relevant personnel, and recordkeeping requirements.

Investor admits rigging bids in Florida online foreclosure auctions

A Florida real estate investor has admitted in federal court that he schemed with others to suppress competition at Palm Beach County's online public foreclosure auctions by rigging bids on foreclosed homes.

United States v. Stern et al., No. 17-cr-80204, plea agreement filed (S.D. Fla. June 20, 2018).

Stuart Hankin appeared before U.S. District Judge Kenneth A. Marra of the Southern District of Florida and pleaded guilty to charges of illegally conspiring to restrain trade in violation of the Sherman Act, 15 U.S.C.A. § 1, the Justice Department said in a statement.

> The rdefendant admitted he schemed with two co-defendants and others to allocate bids and obtain foreclosed properties at less-than-competitive prices over a three-year period.

In his plea agreement, Hankin admitted he schemed with two co-defendants and others to allocate bids and obtain foreclosed properties at less-than-competitive prices over a three-year period, according to the department.

FORECLOSURE SALES

The Florida state court system adjudicates foreclosure actions and enters final judgments in favor of lenders in successful actions within the state. The judgments are in the amount of the delinquent mortgage payments and any associated costs and fees, according to the November 2017 indictment.

After a judgment is entered against the mortgage borrower, the home is scheduled to be sold at auction subject to a reserve price set by the foreclosing lender. If the bids exceed the reserve price, the highest bidder wins the property, the charges said.

In Palm Beach County, which has held online auctions since 2010, the winner pays the sale proceeds to the county clerk, who deducts fees for holding the sale. The clerk's office pays the rest of the money to the foreclosing lender up to the judgment amount, and any remaining funds go to subordinate lienholders and then to the homeowner, the indictment said.

ILLICIT AGREEMENTS

Prosecutors claimed Hankin and co-defendant Christopher Graeve, who jointly owned a real estate investment company, conspired with defendant Avi Stern and other unidentified individuals to thwart the competitive online auction sale process between January 2012 and June 2015.

Hankin, Graeve, Stern and others discussed upcoming auctions and decided which of the co-conspirators would bid on particular properties. They also discussed the bid amounts and picked a pre-determined winner for each sale, the indictment said.

These illicit agreements allowed the conspiracy members to buy foreclosed homes at prices that were lower than what would have been realized at a legitimate auction, according to the charges.

The scheme caused the foreclosing lenders, the lienholders and the homeowners to receive less money than they would have obtained through a legal sale process, prosecutors said.

POSSIBLE PENALTIES

Judge Marra has set Hankin's sentencing for Jan.11, 2019. He faces up to 10 years in prison and a $1 million fine. In addition, as part of his plea agreement Hankin agreed to pay $160,000 in restitution to victims of the scheme.

Charges are still pending against Graeve and Stern, according to the DOJ. WJ

Related Filings:
Indictment: 2017 WL 9690355

See Document Section A (P. 19) for the indictment.

Debtor wins partial student loan discharge without showing undue hardship

By Michael Nordskog

A Wisconsin woman is entitled to a partial discharge of student loan debt she owes to her employer even though she did not show that repaying would cause her undue hardship, a bankruptcy judge has ruled.

In re Modeen, No. 17-11954; Manion v. Modeen, Adv. No. 17-71, 2018 WL 2970990 (Bankr. W.D. Wis. June 8, 2018).

U.S. Bankruptcy Judge Catherine J. Furay of the Western District of Wisconsin reduced the woman's monthly obligation from $700 to $200 using federal guidelines for income-based repayment plans.

The judge said the equities favored such relief, noting evidence that debtor Heather E. Modeen could not currently afford the higher payment.

EMPLOYER REFINANCES LOANS

In 2014 Modeen, an office manager at Manion's Wholesale Building Supplies Inc., was advised by a financial counselor that bankruptcy was the best way to address her money woes, according to Judge Furay's decision.

Concerned that her boss Gerald Manion, the company's chief financial officer, would disapprove of a bankruptcy filing, she consulted with him about her options, the decision said.

Manion said he would lend her funds to refinance her student loans and other obligations, and they executed an agreement in March 2016 that required her to pay nearly $700 per month, according to the decision.

Modeen made payments until January 2017, when she still owed $34,000, the opinion said, and then filed for Chapter 7 relief in May 2017.

Manion filed an adversary complaint in the bankruptcy case under Section 523(a)(8) of the Bankruptcy Code, 11 U.S.C.A. § 523(a)(8), seeking to exclude the debt from discharge.

Section 523(a)(8) bars student loans and other qualified educational loans from discharge, unless repaying the debt would pose an undue hardship to the debtor or the debtor's dependents. Modeen's student loans were qualified educational loans before her refinancing, the decision said.

Modeen said repaying her debt to Manion would cause "undue hardship" to her and her dependent daughter.

BRUNNER TEST FOR UNDUE HARDSHIP

In *In re Roberson*, 999 F.2d 1132 (7th Cir. 1993), the 7th U.S. Circuit Court of Appeals adopted the undue-hardship test of *Brunner v. New York State Higher Education Services Corp*., 831 F.2d 395 (2d Cir. 1987).

The *Brunner* court held that a debtor seeking to discharge student loans for undue hardship must show inability to maintain a "minimal" living standard if forced to repay, additional circumstances showing the debtor's financial condition is likely to persist and prior good faith efforts to repay.

Finding that Modeen "can barely cover her living expenses," Judge Furay said the debtor had established she could not maintain a minimal standard of living if compelled to repay Manion.

The debtor has also made good-faith effort to repay the student loans, the judge said.

But she found that Modeen had not shown the "exceptional hopeless" circumstances necessary for establishing that her financial situation will not improve, citing *Goulet v. Education Credit Management Corp*., 284 F.3d 773 (7th Cir. 2002).

Modeen's daughter is 18 and can reasonably be expected to find work to contribute toward her expenses, the judge said.

Moreover, the debtor has skills and certifications that have allowed her to remain continuously and gainfully employed, Judge Furay said.

"She is young, has many working years ahead of her and her income will likely increase over time," the judge said.

PARTIAL DISCHARGE

But Modeen's failure to pass muster under *Brunner* does not necessarily completely preclude discharge of her student loan debt, the judge said, citing *Tennessee Student Assistance Corp. v. Hornsby (In re Hornsby)*, 144 F.3d 433 (6th Cir. 1998).

That court said the facts and circumstances justified a partial discharge even though the debtor did not prove every element of undue hardship.

Judge Furay noted that the 7th Circuit has not directly addressed the issue, but she found that the equities favor such a solution in this case.

Modeen lives "paycheck to paycheck," has minimal savings and the parties agree that she cannot pay $700 per month, the judge said.

Judge Furay determined Modeen's ability to pay using the U.S. Department of Education's calculator for its income-based repayment plans.

The judge said the debtor will pay just over $200 per month, subject to recalculation each year based on her income and tax status.

Any unpaid balance remaining after 20 years will be discharged, the judge said. WJ

Attorneys:
Debtor: Howard D. White, White & Schilling, Eau Claire, WI; Stephen R. Zuber, Superior, WI

Plaintiff: John F. Hedtke, Hedtke Law Office, Duluth, MN

Related Filings:
Decision: 2018 WL 2970990

See Document Section B (P. 23) for the decision.

Judge threatens to remand suit over LendingTree deceptive marketing emails

By Dave Embree

A San Francisco federal judge has asked online lending platform LendingTree LLC to explain why a state court lawsuit over its allegedly deceptive marketing emails belongs in federal court given the plaintiffs' apparent lack of injury.

Soriano et al. v. LendingTree LLC, No. 17-cv-7078, 2018 WL 2317945 (N.D. Cal. May 22, 2018).

LendingTree as the removing party must demonstrate that the District Court has jurisdiction to hear the suit before it can rule on the lender's motion to dismiss, U.S. District Judge Maxine M. Chesney of the Northern District of California said in a May 22 order.

A federal court can hear a case only if the plaintiffs have standing to sue under Article III of the U.S. Constitution, which requires them to demonstrate an actual, concrete or imminent injury, according to Judge Chesney.

EMAIL MARKETING

LendingTree sent more than 130 unsolicited marketing emails to three California residents, according to a complaint filed last September in the San Francisco County Superior Court.

The emails contained the subject line "[Recipient] Confirm Your Personal Loan #987," even though none of the recipients had applied for a loan using LendingTree, the complaint says.

According to the suit, LendingTree violated a state law, Cal. Bus. & Prof. Code § 17529.5, that makes it illegal to send a commercial email with a subject line likely to mislead the recipient.

The subject lines from LendingTree's marketing emails falsely implied the recipient had been approved for a loan, when in fact the emails were only advertisements, the complaint says.

MOTION TO DISMISS

In December, North Carolina-based LendingTree removed the case to federal court under the federal diversity statute, 28 U.S.C.A. § 1332(a).

LendingTree then moved to dismiss the suit, arguing that the plaintiffs were not entitled to relief because they did not take any action in reliance on the allegedly deceptive subject lines of the marketing emails.

Judge Chesney May 22 delayed a scheduled hearing on LendingTree's motion to dismiss, instead asking the company to explain why the court had jurisdiction over the suit in the first place.

"The complaint does not allege facts to support a finding that any plaintiff suffered any type of concrete and particularized injury from her receipt of the challenged emails," Judge Chesney wrote.

Because the plaintiffs apparently lacked standing to sue in federal court, the judge ordered LendingTree to show cause why the case should not be remanded to state court. WJ

Attorneys:
Plaintiffs: Daniel L. Balsam, Alameda, CA; Jacob N. Harker, San Francisco, CA

Defendant: Kavon Adli and Seth W. Wiener, The Internet Law Group, San Ramon, CA

Related Filings:
Order: 2018 WL 2317945
Motion to dismiss: 2017 WL 9475218
Notice of removal: 2017 WL 9475219

National Park Service can't be sued over debit card receipt, 9th Circuit says

By Dave Embree

Sovereign immunity shields the National Park Service from a Montana resident's lawsuit alleging her identity was stolen after the agency printed her debit card expiration date on a receipt she received while visiting Yellowstone National Park, a federal appeals panel has ruled.

Daniel v. National Park Service et al., No. 16-35689, 2018 WL 2424494 (9th Cir. May 30, 2018).

The 9th U.S. Circuit Court of Appeals affirmed a lower court's finding that the federal agency did not violate the Fair Credit Reporting Act by printing a debit card's expiration date on a receipt for a pass to enter the park.

While the FCRA prohibits a "person" from printing such expiration dates on receipts, the three-judge panel said the statute does explicitly waive the federal government's sovereign immunity to such claims.

The panel also said the allegations fell short of establishing a plausible link between the date on the receipt and the identity theft.

FCRA CLASS ACTION

Stephanie Daniel of Gallatin County, Montana, used her debit card to purchase an entrance pass to Yellowstone in May 2015, according to her third amended complaint.

She received a printed receipt for the transaction that included the debit card's full, unredacted expiration date, the suit said.

When she returned home from Yellowstone, Daniel noticed fraudulent charges on the debit card she had used to buy the entrance pass, according to the complaint.

In March 2016 Daniel filed a proposed class action against the National Park Service in the U.S. District Court for the District of Montana.

She accused the agency of violating Section 1681c(g)(1) of the FCRA, 15 U.S.C.A. § 1681c(g)(1), which states "no person that accepts credit or debit cards for the transaction of business shall print … the expiration date upon any receipt provided to the cardholder."

Daniel said the fraudulent charges on her debit card were caused in part by the unredacted receipt she received from the agency.

The National Park Service moved to dismiss, claiming it was immune to such suits.

It also argued Daniel lacked standing to sue because she failed to show that her injury — the fraudulent use of her debit card — was "fairly traceable" to the receipt she received while visiting Yellowstone.

SOVEREIGN IMMUNITY

U.S. District Judge Susan P. Watters granted the park service's motion on sovereign immunity grounds. *Daniel v. Nat'l Park Serv.*, No. 16-cv-18, 2016 WL 4401369 (D. Mont. Aug. 17, 2016).

She acknowledged that the FCRA defines "person" broadly to include governmental agencies, but said it would lead to "potentially absurd results" to implicate the U.S. government every time the term appears in the statute.

If the federal government were implicated each time the FCRA uses the term "person," federal agencies such as the National Park Service would be subject to criminal liability, punitive damages and civil enforcement actions by the Federal Trade Commission, the judge said.

Because she disposed of the case on sovereign immunity grounds, Judge Watters did not address the agency's argument about Daniel's standing.

Daniel appealed.

"The FCRA broadly defines a 'person,'" U.S. Circuit Judge M. Margaret McKeown wrote for the unanimous 9th Circuit panel.

Despite this broad definition, the FCRA does not unambiguously waive the federal government's sovereign immunity, the panel said.

To bring a statutory claim for monetary damages against the federal government, the statute must contain an unambiguous waiver of sovereign immunity, according to the panel.

Yellowstone National Park in Wyoming REUTERS/Jim Urquhart

Echoing the District Court's reasoning, Judge McKeown said that including the U.S. government each time FCRA uses the term "person" would lead to "implausible results."

Additionally, the panel agreed with the National Park Service that Daniel lacked standing to sue, saying the facts could not plausibly show how information on a receipt could amount to identify theft.

"Merely asserting that a theft occurred at an unspecified time 'after' the debit card transaction — absent any other details — does not connect the dots," Judge McKeown wrote. WJ

Attorneys:
Plaintiff-appellant: Timothy M. Bechtold, Bechtold Law Firm, Missoula, MT

Defendant-appellee: Mark Stern and Henry C. Whitaker, U.S. Justice Department, Washington, DC

Related Filings:
9th Circuit opinion: 2018 WL 2424494
District Court order: 2016 WL 4401369
Brief supporting motion to dismiss: 2016 WL 7856672
Third amended complaint: 2016 WL 7756580

See Document Section C (P. 30) for the opinion.

CURRENCY

BNY Mellon clients seek class certification in ADR skimming suit

By Peter H. Hamner, Esq.

Bank of New York Mellon customers who say the bank overcharged them for currency conversions on their American depositary receipt dividends are asking a Manhattan federal judge to certify their proposed plaintiff classes.

In re Bank of New York Mellon ADR FX Litigation, No. 16-cv-212, memo supporting motion for class certification filed, 2018 WL 2247235 (S.D.N.Y. May 15, 2018).

In a memo filed in the U.S. District Court for the Southern District of New York supporting class certification, Diana Carofano, David Feige and the International Union of Operating Engineers Local 138 Pension Trust Fund say a class action is the most effective way to litigate because common issues of fact and law predominate over individual ones.

American depositary receipts are certificates representing ownership of public shares in a foreign company's equity or debt.

Carofano, Feige and the union pension fund are also asking the judge to appoint them and the Chester County Employees Retirement Fund as class representatives, and Lieff Cabraser Heimann & Bernstein and Kessler Topaz Meltzer & Check as co-class counsel.

The case is pending before U.S. District Judge J. Paul Oetken.

SKIMMING ALLEGATIONS

Carofano, Feige and another BNY Mellon customer sued the bank in January 2016 on behalf of its ADR customers, seeking damages for breach of contract and the implied duty of good faith, and improper conversion of customer funds.

The union pension fund filed a similar suit, and both were consolidated several months later.

According to the plaintiffs, BNY Mellon acts as a depositary bank for ADRs by holding foreign securities and issuing ADRs to investors while converting dividend distributions into dollars through foreign exchange trades.

As a depositary, the bank agreed to perform currency conversions for its customers as quickly and reasonably as possible and to recoup expenses only for executing the trades, the suit says.

The bank told clients it would give them the best rate on the foreign currency exchange trades, the suit says. Instead, it charged the worst rate of the trading day, keeping the difference, or spread, between the rates it claimed it would obtain and the actual exchange rate.

The New York attorney general and the U.S. Justice Department accused the bank of similar overcharges in 2011. *People v. Bank of N.Y. Mellon Corp.*, No. 09/114735, *complaint filed* (N.Y. Sup. Ct. Oct. 4, 2011); *United States v. Bank of N.Y. Mellon Corp.*, No. 11-cv-6969, *complaint filed* (S.D.N.Y. Oct. 4, 2011).

BNY Mellon settled those regulatory lawsuits for $714 million in 2015, admitting to charging clients the worst rates of the trading day, according to the suit.

DISMISSAL ATTEMPT

The bank moved to dismiss the private plaintiffs' consolidated suits, and in 2016 Judge Oetken granted and denied the motion in part. *Normand v. Bank of N.Y. Mellon*, No. 16-cv-212, 2016 WL 5477783 (S.D.N.Y. Sept. 29, 2016).

He said the plaintiffs sufficiently alleged BNY Mellon had breached its deposit agreements with clients by charging the worst rate despite assurances it would execute trades quickly and reasonably.

"Plaintiffs allege that [BNY Mellon] waited an impermissibly long time, selected the worst rate from that period and then remitted the money to plaintiffs, breaching the contract by failing to act 'as promptly as practicable,'" the judge said.

Judge Oetken dismissed the claims for breach of the implied duty of good faith and improper conversion as duplicative of the breach-of-contract claim.

However, he allowed the parties to file a consolidated amended complaint asserting similar claims.

CLASS CERTIFICATION

The plaintiffs are now seeking class certification of a "damages class" of ADR holders who received cash distributions from BNY Mellon and were charged a spread from Jan. 1, 1997, to the present.

They also seek certification of an "injunction class," seeking injunctive relief for holders of ADRs the bank sponsored.

They say a class action is superior to potentially "thousands" of individual suits addressing the same issues and the proposed classes meet the requirements for certification under Federal Rule of Civil Procedure 23.

The class members had similar deposit agreements with BNY Mellon, and the bank used the same standardized foreign currency exchange pricing practice, which it internally referred to as "the Bible," for its ADR conversions, the plaintiffs' memo supporting class certification says.

As a result, the evidence used to prove the class allegations will be substantially similar across the proposed classes, it says.

According to the memo, the bank "essentially concedes that the core liability issue — whether it breached the relevant contracts — is uniform for all class members" and damages can be determined on a classwide basis using the bank's own documents. WJ

Related Filings:
Memo supporting class certification: 2018 WL 2247235
Consolidated amended class action complaint: 2016 WL 6582096

MORTGAGE-BACKED SECURITIES

Cayman funds seek revival of $370 million MBS suit

By Peter H. Hamner, Esq.

A trio of Cayman Islands investment funds is urging a federal appeals court to reinstate a lawsuit accusing two New York banks of breaching their obligations as trustees for pools of mortgage-backed securities that lost more than $370 million in value.

Triaxx Prime CDO 2006-1 Ltd. et al. v. U.S. Bank National Association et al., No. 18-939, appellants' brief filed, 2018 WL 2537606 (2d Cir. June 1, 2018).

The funds — Triaxx Prime CDO 2006-1 Ltd., Triaxx Prime CDO 2006-2 Ltd. and Triaxx Prime CDO 2007-1 Ltd. — say in a brief filed June 1 in the 2nd U.S. Circuit Court of Appeals that a trial judge was wrong in finding they lacked standing to sue the banks.

U.S. District Judge Naomi Reice Buchwald of the Southern District of New York in March granted U.S. Bank NA and Bank of New York Mellon Corp.'s motion to dismiss the suit, ruling that the funds had relinquished their standing in an assignment of rights. *Triaxx Prime CDO 2006-1 Ltd. v. Bank of N.Y Mellon*, No. 16-cv-1597, 2018 WL 1417850 (S.D.N.Y. Mar. 8, 2018).

The brief says Judge Buchwald improperly focused on one contract clause, instead of the parties' agreements as a whole, to determine whether the funds had retained their right to sue to the trustees.

Read together, the agreements show that the parties intended to transfer only a security interest in the mortgage-backed notes and not the plaintiffs' litigation rights, the brief says.

The funds' suit originally also named JPMorgan Chase & Co. as a defendant, but the parties stipulated to dismiss the bank in April 2017.

SECURITIES AND TRUSTEE DUTIES

According to the suit, the Triaxx funds bought 45 trusts in 2006 and 2007 consisting of $4.3 billion worth of residential mortgage-backed securities. U.S. Bank is trustee for 33 of the trusts and BNY Mellon is trustee for the remainder, the suit said.

Mortgage-backed securities pay dividends drawn from borrowers' periodic principal and interest payments.

Triaxx pooled the trusts into "collateralized debt obligations," funds that issued notes to investors, the suit said.

Most of the underlying mortgages defaulted during the 2008 financial crisis, causing the notes to drop in value by $371 million, the suit said.

The Triaxx funds claimed the MBS trustees failed to protect investor interests because they did nothing despite knowing that the loans did not meet their promised underwriting characteristics.

The trustees allegedly breached their fiduciary duties under New York law and breached the contracts by not promptly enforcing the investors' rights.

STANDING SQUABBLE

U.S. Bank and BNY Mellon moved to dismiss the suit, arguing the funds did not have standing to sue because they had assigned their alleged rights to the banks as trustees.

Judge Buchwald agreed, finding that the trust agreements designated the banks to sue on behalf of investors.

She also tossed the fiduciary-duty claims after the plaintiffs agreed at oral argument to abandon them.

The funds are appealing the decision, claiming Judge Buchwald ignored "on-point" New York appellate cases on similar contractual issues that looked at the entire agreements and not just one provision.

According to the plaintiffs, a New York appellate court has held that a trustee of a CDO trust holds legal title to the collateral but the issuer retains equitable ownership. *Natixis Real Estate Capital Tr. 2007-HE2 v. Natixis Real Estate Holdings LLC*, 149 A.D.3d 127 (N.Y. App. Div., 1st Dep't 2017).

"This accords with the commercial expectations of the CDO participants, and with the time-honored principle that a limited assignment does not extinguish standing to sue," the funds say in their 2nd Circuit brief.

The funds also say Judge Buchwald did not take U.S. Bank's conflict of interest into consideration.

The trustee could have avoided the conflict of being both a defendant and a CDO trustee by authorizing Triaxx or the CDO trust's collateral manager to sue on behalf of investors, the brief says.

By ignoring the conflict, Judge Buchwald effectively ruled that U.S. Bank must sue itself in order for Triaxx to obtain a remedy for the alleged misconduct, according to the brief. WJ

Related Filings:
Appellants' brief: 2018 WL 2537606

Banks fight back against suit over stock lending boycott

By Peter H. Hamner, Esq.

Some of the world's largest banks are asking a New York federal judge to toss a lawsuit alleging they boycotted a stock lending platform in violation of federal antitrust laws to protect their competing joint venture platform in the $1.75 trillion stock lending market.

QS Holdco Inc. v. Bank of America Corp. et al., No. 18-cv-824, memo supporting dismissal filed, 2018 WL 2648997 (S.D.N.Y. June 1, 2018).

In a June 1 memo supporting dismissal, filed in the U.S. District Court for the Southern District of New York, the defendant banks argue that plaintiff QS Holdco Inc. lacks standing to sue the banks because it no longer owns the lending platform and did not retain the platform's litigation rights.

The defendants, all stock lending prime brokers, are Bank of America Corp., Credit Suisse Group AG, Goldman Sachs Group Inc., JPMorgan Chase & Co., Morgan Stanley, UBS Group AG and their affiliates.

QS Holdco owned the AQS stock lending platform. The defendants operate EquiLend, an over-the-counter exchange for securities lending, matching banks with securities lending customers for a fee, according to the suit.

In a stock lending arrangement, a customer lends securities to a prime broker that in turn lends them to other borrowers for cash collateral, which is put into liquid investments. The broker then sells the investments to repay the borrower in cash plus any interest earned on the investments.

Lending plays a crucial role in short selling, in which a security that is not owned or has been borrowed is sold with the idea that it can be bought at a future date at a lower price.

ALLEGED BOYCOTT

According to the Jan. 30 complaint, the banks created EquiLend in 2001 with other market participants to help facilitate the banks' stock lending programs.

Stock lending startup Quadriserv Inc. developed the AQS securities lending platform in 2001, and it reached an agreement with the Options Clearing Corp. in 2009 to act as a stock lending exchange with central clearing, the suit claims.

REUTERS/Brian Snyder

REUTERS/Arnd Wiegmann

Quadriserv later sold its rights in AQS to PDQ Inc., which became Glenview, Illinois-based QS Holdco, the complaint says.

A central clearing organization acts as an intermediary for anonymous trades to reduce counterparty and default risk by collecting collateral from buyers and sellers to cover potential losses if the deal is not completed.

Some of the defendant banks initially expressed interest in working with AQS, but they all grew concerned about the platform's threat to their profits and agreed to boycott AQS, according to the suit.

Because the defendant banks accounted for the majority of stock lending institutions, their rejection effectively killed Quadriserv's attempt to compete with EquiLend, the suit says.

Another competitor, known as SL-x, entered the market in 2010, and again the banks refused to work with the alternative stock lending platform and threatened to retaliate against clients that worked with SL-x, according to the complaint.

QS Holdco alleges the boycott violated Section 1 of the Sherman Act, 15 U.S.C.A. § 1; New York's Donnelly Act, N.Y. Gen. Bus. Law § 340; and its Deceptive Practices Act, N.Y. Gen. Bus. Law § 349. The complaint also claims unjust enrichment and tortious interference with business relations.

ALL ASSETS SOLD?

The banks are now seeking dismissal of the suit, claiming QS Holdco sold all its interests in the platform to EquiLend Clearing LLC, a subsidiary of defendant EquiLend Holdings LLC, in 2016.

According to their memo supporting dismissal, the asset purchase agreement between QS Holdco and EquiLend says the plaintiff unambiguously sold all of AQS' capital shares, intangible assets and other assets to EquiLend.

"Courts do not allow parties to selectively retrieve assets they have transferred under a corporate M&A agreement," the memo says.

In addition, a former shareholder cannot bring antitrust claims arising out of an alleged boycott, the defendants argue, citing *G.K.A. Beverage Corp. v. Honickman*, 55 F.3d 762 (2d Cir. 1995). A panel of the 2nd U.S. Circuit of Appeals held in *G.K.A.* that shareholders do not have standing because their antitrust injuries are derivative of the injured company. WJ

Related Filings:
Memo supporting dismissal: 2018 WL 2648997
Complaint: 2018 WL 702969

$96,000 loss

CONTINUED FROM PAGE 1

By accepting the fraudulent draft, the defendant breached check transfer warranties imposed under Alabama's Commercial Code, NBC alleges.

CHECK ALLEGEDLY ALTERED

On May 24, 2017, nonparty Corporate Billing LLC wrote a $425 check payable to Line Drive Transportation Inc., the suit says.

Corporate Billing held a checking account with Birmingham, Alabama-based NBC.

An unknown person altered the check without Corporate Billing's permission and changed the payee's name to "Scor Productions" and the amount to $96,425, according to the complaint.

Someone endorsed the check by writing "Scor Productions deposit only" on the back and presented the draft to BofA for payment, NBC alleges.

PAYMENT MADE

The bank accepted the check and paid the $96,425, the suit says.

> By presenting the check to the plaintiff for payment, the defendant made certain representations, or warranties, pursuant to the Alabama Commercial Code, the suit says.

BofA then presented it for payment to NBC, which paid the amount and charged it against Corporate Billing's account, according to the complaint.

But Corporate Billing notified NBC June 13, 2017, that the check had been fraudulently changed and was not properly payable, the suit says.

NBC notified BofA about the fraud several times and demanded a refund of the money, but BofA denied the plaintiff's claim in November 2017, the complaint alleges.

BREACH OF WARRANTIES?

By presenting the check to NBC for payment, BofA made certain representations, or warranties, pursuant to the Alabama Commercial Code, the suit says.

BofA warranted under Alabama Commercial Code, Ala. Code §§ 7-3-416, 7-3-417, 7-4-207 and 7-4-208, that it was entitled to make the payment request, that the check had not been altered and that the draft was not subject to any recoupment claims by any party, NBC says.

The bank breached these warranties and caused the plaintiff to lose $96,425 as well as the money it spent trying to obtain the refund, according to the complaint.

The suit seeks an award of $96,425 plus interest, costs and attorney fees. WJ

Attorneys:
Plaintiff: John P. Scott Jr., Starnes Davis Florie LLP, Birmingham, AL

Related Filings:
Complaint: 2018 WL 3099369

CASE AND DOCUMENT INDEX


Trusted answers
allow me
to be fearless.

STERN

2017 WL 9690355 (S.D.Fla.) (Trial Pleading)
United States District Court, S.D. Florida.

UNITED STATES OF AMERICA,
v.
(1) Avi STERN; (2) Stuart Hankin; and (3) Christopher Graeve, Defendants.

No. 17-80204-CR-MARRA/MATTHEWMAN.
November 2, 2017.

Criminal Indicment

Makan Delrahim, Assistant Attorney General, Antitrust Division, United States Department of Justice.

Marvin N. Price, Acting Deputy Assistant Attorney General, Antitrust Division, United States Department of Justice.

Michelle O. Rindone, Acting Director of Criminal Enforcement, Antitrust Division, United States Department of Justice.

Lisa M. Phelan, Chief, Washington Criminal I Section, Antitrust Division, United States Department of Justice.

Paul T. Gallagher, Samson Asiyanbi, James W. Attridge, Yusong Huang, Trial Attorneys, Antitrust Division, United States Department of Justice, 450 5th Street, N.W., Suite 11300, Washington, DC 20530, Tel: (202) 532-4570, Fax: (202) 514-6525, Paul.Gallagher2@usdoj.gov.
Violation: 15 U.S.C. § 1

THE GRAND JURY CHARGES:

BACKGROUND

1. The United States experienced a severe financial crisis and recession beginning in 2008. One of the industries hit hardest by the recession was the housing industry. In the years after the recession began, millions of people became delinquent on their mortgage payments, and financial institutions were forced to foreclose on millions of their homes, including in the Southern District of Florida.

2. In the State of Florida, foreclosure proceedings are required to be adjudicated through the Florida state courts. The result of these judicial foreclosure proceedings is often a Final Judgment in favor of the foreclosing financial institution for the total amount of delinquent mortgage payments and any costs or fees related to the property. Once the Court enters a Final Judgment against the homeowner, the home is scheduled for auction.

3. During a legitimate, competitive foreclosure auction, participants interested in the property compete against each other. If the bidding exceeds a reserve amount set by the foreclosing financial institution, the highest bidder wins title to the property. For foreclosure auctions conducted in Palm Beach County, the proceeds from the auction are paid to the Palm Beach County Clerk's office. Under Florida law, the County is entitled to fees related to administering the foreclosure auction. The Clerk's office deducts its fees and pays the remainder to the foreclosing financial institution, up to the Final Judgment amount. Subordinate lienholders can then file a claim to any surplus. After payment of the surplus to secondary lienholders (if any), the remaining funds are available to the homeowner.

4. In Palm Beach County, prior to January 21, 2010, foreclosure auctions were conducted by the Palm Beach County Clerk's office in-person at the Palm Beach County Courthouse. Beginning on January 21, 2010, the foreclosure auction process was changed from an in-person process to an online process. Each year since 2010, thousands of foreclosed properties in Palm Beach County have been auctioned through the online auction.

DEFENDANTS AND CO-CONSPIRATORS

5. At certain or all times during the Conspiracy Period, beginning in or around January 2012 and continuing into or around June 2015, Defendant Avi Stern ("Stern") was associated with Company A, a Florida corporation. At certain times during the Conspiracy Period, Stern participated, either directly or through his agents, in the Palm Beach County online property foreclosure auction process.

6. At certain or all times during the Conspiracy Period, Defendant Stuart Hankin ("Hankin") was an officer of Company B, a Florida corporation. At certain times during the Conspiracy Period, Hankin participated, either directly or through his agents, in the Palm Beach County online property foreclosure auction process.

7. At certain or all times during the Conspiracy Period, Defendant Christopher Graeve ("Graeve") was an officer of Company B. At certain times during the Conspiracy Period, Defendant Graeve participated, either directly or through his agents, in the Palm Beach County online property foreclosure auction process.

8. Various corporations and individuals, not made defendants in this Indictment, participated as co-conspirators in the offense charged herein and performed acts and made statements in furtherance thereof.

9. Whenever in this Indictment reference is made to any act, deed or transaction of any corporation, the allegation means that the corporation engaged in the act, deed, or transaction by or through its officers, directors, agents, employees, or other representatives while they were actively engaged in the management, direction, control, or transaction of its business or affairs.

COUNT ONE – CONSPIRACY TO RESTRAIN TRADE
(15 U.S.C. § 1)
(Stern, Hankin, and Graeve)

10. Each and every allegation contained in Paragraphs 1 through 9 of this Indictment is hereby re-alleged as if fully set forth in this Count.

THE COMBINATION AND CONSPIRACY

11. During the Conspiracy Period, beginning in or around January 2012 and continuing into or around June 2015, the exact dates being unknown to the Grand Jury, in Palm Beach County, in the Southern District of Florida, and elsewhere, Defendants, and others known and unknown to the Grand Jury, entered into and engaged in a combination and conspiracy to suppress and eliminate competition by rigging bids and allocating the market for properties sold during online property foreclosure auctions in Palm Beach County, Florida, in unreasonable restraint of interstate trade and commerce in violation of Section 1 of the Sherman Antitrust Act, 15 U.S.C. § 1.

12. The charged combination and conspiracy consisted of a continuing agreement, understanding, and concert of action among Defendants, and between Defendants and their co-conspirators, the substantial terms of which were to rig bids and allocate the market for properties sold during online property foreclosure auctions in Palm Beach County, Florida.

MEANS AND METHODS OF THE CONSPIRACY TO RESTRAIN TRADE

13. For the purpose of forming and carrying out the charged combination and conspiracy, Defendants and their co-conspirators combined and conspired to, among other things:

a. Attend meetings and engage in discussions by telephone, electronic mail, and text message regarding the market for properties sold during online property foreclosure auctions in Palm Beach County, Florida;

b. Agree during those meetings and discussions which conspirator would be permitted to win a particular property or properties presented for auction;

c. Agree during those meetings and discussions not to compete, or to stop competing, against each other;

d. Agree during those meetings and discussions to lower existing bids in order to allocate properties among each other;

e. Agree during those meetings and discussions to avoid competing with each other in certain geographic territories or neighborhoods;

f. Submit bids or refrain from bidding during the online auctions consistent with the agreements made between Defendants and their co-conspirators;

g. Purchase selected properties at public foreclosure auctions at prices they artificially suppressed; and

h. Conceal the existence of Defendants' conspiracy from:

i. financial institutions;

ii. secondary lienholders;

iii. defaulting homeowners;

iv. employees of the Palm Beach County Clerk's Office; and

v. others who relied on the integrity and competitive purpose of the auction process.

TRADE AND COMMERCE

14. During the time period covered by this Indictment, the business activities and online property foreclosure auctions on which Defendants and their co-conspirators conspired occurred within the continuous and uninterrupted flow of, and substantially affected, interstate commerce. For example:

a. A substantial number of the foreclosing financial institutions were located outside the state of Florida;

b. Out-of-state foreclosing financial institutions sent instructions regarding the foreclosures to law firms located in Florida;

c. Substantial proceeds, payments, and documentation from and relating to the sale of properties purchased by the Defendants pursuant to the conspiracy were transmitted from one state to beneficiaries located in other states;

d. Bidders for and purchasers of properties sold at the Palm Beach County foreclosure auction were located outside the state of Florida;

e. Bids were submitted via the internet on an auction platform run on servers located outside the state of Florida; and

f. A large number of the foreclosing financial institutions operated in interstate commerce and were federally insured, federally charted, and/or subject to federal regulation.

JURISDICTION AND VENUE

15. The combination and conspiracy in this Count was formed and carried out, in part, within the Southern District of Florida within the five years preceding the return of this Indictment.

ALL IN VIOLATION OF TITLE 15, UNITED STATES CODE, SECTION 1.

A TRUE BILL

____

FOREPERSON

<<signature>>

Makan Delrahim
Assistant Attorney General
Antitrust Division
United States Department of Justice

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Marvin N. Price
Acting Deputy Assistant Attorney General
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Appendix not available.

End of Document

MODEEN

2018 WL 2970990
Only the Westlaw citation is currently available.
United States Bankruptcy Court, W.D. Wisconsin.

In re: HEATHER E. MODEEN, Debtor.
GERALD J. MANION, Plaintiff,
v.
HEATHER E. MODEEN, Defendant.

Case No.: 17-11954-7

Adversary No.: 17-71

Dated: June 8, 2018

MEMORANDUM DECISION

Hon. Catherine J. Furay U.S. Bankruptcy Judge

***1** Defendant Heather Modeen ("Defendant" or "Modeen") filed a chapter 7 petition and received a discharge. Plaintiff Gerald Manion ("Plaintiff" or "Manion") filed this adversary proceeding seeking a determination that a student loan is nondischargeable.

STATEMENT OF FACTS

Defendant is in her mid-30s, has a daughter, and works full-time as an office manager. She also works a few hours a week at a second job. Pay from her primary employment is about $740 per week gross and $613 net. The second job generates about $75 per week. Her 2017 adjusted gross income—excluding an IRA distribution—was $40,997 ("AGI").

Plaintiff is the Chief Financial Officer of Manion's Wholesale Building Supplies, Inc. (the "Company"). Defendant began working for the Company in 2001. She left in 2003 but returned to the Company in 2005 and remained in its employ until 2016. After leaving the Company in 2016, Modeen worked briefly as an aide at Benedictine Heath Center. Her Schedules suggest she earned $11,766 in five months at that job. Modeen then took her current job. It pays more than the job at Benedictine, although about $5,000 less than she was earning at the Company.

In July 2014, Modeen met with a financial counselor to discuss her financial problems. Based on that meeting, she concluded that filing a bankruptcy was the most reasonable approach to addressing her situation. Concerned that Plaintiff, her boss, looked down on bankruptcy and that it could affect her job, she decided to talk to him before filing. He responded that rather than file bankruptcy, he would make loans to her to refinance her student loans and to refinance or pay other debts. The current iteration of the student loan refinance was signed on March 24, 2016 (the "Manion Loan"). The student loans were two qualified educational loans before refinancing with Plaintiff. The parties agree the refinanced loans retained their character as an educational loan. The Agreement required Defendant to make monthly payments to Plaintiff of $694.47 on the 24th of each month until September 24, 2021. It also stipulated that upon default, Plaintiff may declare the entire loan due immediately.

Modeen made payments of $760 per month to Manion until January 2017. The payments went toward the Manion Loan and the other personal loans. The outstanding balance on the Manion Loan was then $34,231.55. Manion forgave the personal loans in the amount of $20,000 and sent Modeen a 1099 for cancellation of indebtedness income in 2016. Defendant argues that her income and expenses are such that payment of the Manion Loan would be an undue hardship on her and her dependent daughter.

Defendant's daughter, age 18, lives with her. Modeen received back child support in 2017 in the total amount of $6,320.40. The daughter graduated from high school in 2017. Though she intends to return to school, she is currently unemployed and not in school. She has increased medical expenses because of a chronic illness that, at present, is controlled well with medication. Modeen anticipates receiving payments on the child support arrearage for another year in the total amount of $7,829.92.

DISCUSSION

***2** Section 523(a)(8) of the Bankruptcy Code provides the bankruptcy discharge does not discharge "an educational … loan made, insured or guaranteed by a governmental unit, or made under any program funded in whole or in part by a governmental unit or nonprofit institution." 11 U.S.C. § 523(a)(8)(A)(i). Individual debtors generally receive no discharge for "any other educational loan that is a qualified education loan, as defined in section 221(d)(1) of the Internal Revenue Code of 1986." 11 U.S.C. § 523(a)(8)(B). The Code prevents the discharge of such student loan debt "unless excepting such debt from discharge under this paragraph would impose an undue hardship on the debtor and the debtor's dependents." 11 U.S.C. § 523(a)(8).

The phrase "undue hardship" is not defined in the Code. The Seventh Circuit adopted the test for finding "undue hardship" from *Brunner v. New York State Higher Educ. Servs. Corp.*, 831 F.2d 395 (2d Cir. 1987) (per curiam). To support a finding of an undue hardship under the *Brunner* test, this Court must find:

> (1) That the debtor cannot maintain, based on current income and expenses, a "minimal" standard of living for [herself] and [her] dependents if forced to repay the loans.
>
> (2) That additional circumstances exist indicating that this state of affairs is likely to persist for a significant portion of the repayment period of the student loans; and
>
> (3) That the debtor has made good faith efforts to repay the loans.

In re Roberson, 999 F.2d 1132, 1135 (7th Cir. 1993).

The debtor has the burden of establishing each element of the test by a preponderance of the evidence. *Goulet v. Educ. Credit Mgmt. Corp.*, 284 F.3d 773, 777 (7th Cir. 2002).

1. Minimal Standard of Living

The Court must first address whether Defendant would still be able to maintain a "minimal" standard of living if she is compelled to pay the Manion Loan. This first prong "should serve as the starting point … since information regarding the debtor's current financial situation generally will be concrete and readily obtainable." *Roberson*, 999 F.2d at 1135. Put simply, the basic question is whether the Defendant's present income and expenses permit repayment. *See Nelsen v. Educ. Credit Mgmt. Corp. (In re Nelson)*, 404 B.R. 892, 894 (Bankr. E.D. Wis. 2009).

The Manion Loan Agreement provides that upon default Manion may declare the entire balance due and payable. He has done so. He says that as of January 23, 2017, the balance due was $34,231.55.

The Court finds that Defendant cannot maintain a minimal standard of living if compelled to pay the Manion Loan by its terms when it is now due in full and, as discussed below, not subject to any of the federal student loan repayment programs. Neither can Modeen maintain a minimal standard of living if compelled to resume monthly payments of $694.47. Defendant's expenses are $3,010.29 per month, not including payment on the student loan. Her net income is $3,010.29, including a child support payment that will stop within a year. She can barely cover her living expenses. While some reductions in expenses may be possible, they would not be enough to pay off the Manion Loan. It would be impossible for her to cover an additional payment in satisfaction of the Manion Loan.

2. Additional, Exceptional Circumstances

The second prong requires Plaintiff to show she is presently unable to repay the debt and that there are "additional, exceptional circumstances" making it improbable she will ever be able to pay. *Roberson*, 999 F.2d at 1136. This requirement "properly recognizes the potential continuing benefit of an education, and imputes to the meaning of 'undue hardship' a requirement that the debtor show [her] dire financial condition is likely to exist for a significant portion of the repayment period." *Id*. at 1135. Modeen must show there is a "certainty of hopelessness" in that she will not be able to fulfill her commitment at any point. *Id*. at 1136. Bankruptcy courts have interpreted this to require "additional circumstances which make it reasonably certain that the debtor's circumstances are unlikely to improve." *Nelsen*, 404 B.R. at 894-95 (*quoting Hoskins v. Educ. Credit Mgmt. Corp*. (*In re Hoskins*), 292 B.R. 883, 887 (Bankr. C.D. Ill. 2003)).

***3** In earlier cases, the Seventh Circuit set the bar of the second prong high. In *Roberson*, the court listed the factors it believed showed a debtor would lack the ability to repay. *Roberson*, 999 F.2d at 1137; *see also Goulet*, 284 F.3d at 778. Such factors included psychiatric problems, lack of usable job skills, and severely limited education. *Goulet*, 284 F.3d at 778. In *Goulet*, a convicted felon with alcohol and substance abuse problems did not establish "additional, exceptional circumstances" necessary to satisfy this prong. Instead, he was "an intelligent man" who did not lack usable job skills and could "apply himself when he desire[d]." *Id*. at 779. He had "simply failed to diligently pursue employment such that he would be able to alleviate his financial burdens." *Id*. In *Roberson*, the debtor had "a bleak forecast for the near future" as he was unemployed, had lost his driver's license after a second drunk driving conviction, and had wrist and back injuries. *Roberson*, 999 F.2d at 1137. However, those circumstances were only temporary, as his medical condition was not "insurmountable," he would be able to regain his driver's license, and neither the injuries nor the loss of license prevented him from finding employment in the future. *Id*.

More recently, the Seventh Circuit has relented on this prong. In *Krieger*, the Court of Appeals reinstated the discharge of a student loan. The debtor was a 53-year-old living in a rural area who had not held a job since 1986. *Krieger v. Educ. Credit Mgmt. Corp.*, 713 F.3d 882, 884 (7th Cir. 2013). As the *Krieger* Court put it, "[t]hat's not the sort of background employers are looking for. There is no reason to think that a brighter future is in store." *Id.*

Modeen has not shown the exceptional hopeless circumstances that would justify a finding in her favor under section 523(a)(8). She is employed and has held various jobs over the last five years, including as an office manager and as an assistant in a health center. She has marketable skills in human resources and in healthcare. She holds an Associate of Arts degree with a concentration in Accounting from the University of Phoenix. She earned a technical diploma, with honors, and certificates in gerontology in 2017 and is qualified to help provide care to aging adults. She has shown persistence in finding and obtaining employment. When it became apparent that a career change to gerontology and assistance to the aging may be personally satisfying but not as fruitful financially, she returned to more gainful employment. She also took a second job to supplement that income.

Defendant asserts her circumstances are unique because she now makes about $5,000 less per year and her rent costs have increased $120 per month. She has a new job that requires her to travel 30 miles round trip, and she needs a car to take her daughter to Minneapolis to see a health care specialist.

First, courts have criticized debtors who claim expenses for care of adult live-in children. *Logan v. N.C. State Educ. Assistance Auth. (In re Logan)*, 263 B.R. 796, 800 (Bankr. W.D. Ky. 2000) (reasoning debtor could "expect ongoing contributions to her household expenses from her children as they reach an age … where they can maintain employment"). Courts have been more sympathetic to debtors who have minor children with health issues, but that is not Modeen's situation. *See England v. United States (In re England)*, 264 B.R. 38, 52 (Bankr. D. Idaho 2001). Defendant's daughter is no longer a student or a minor, and she has medication that effectively treats her condition. It would be reasonable to expect the daughter would obtain some employment to contribute to the additional expenses of a second household member.

The rent increase and decrease in pay are simply not "exceptional" as the Seventh Circuit has defined the term. Modeen's circumstances are not exceptional even under the more relaxed standard in *Krieger*. In *Krieger*, the pro se debtor lived in a rural community, lacked internet access, and was too poor to move in search of better employment. *Krieger*, 713 F.3d at 883. Her car was more than a decade old and apparently in such bad shape it was unusable as a means of transportation. *Id*.

***4** The facts here are wholly unlike those in *Krieger*. Defendant has skills and certifications that she uses in her employment. The job market where Defendant lives may not rival that of a major city, but as shown by her continuous employment, there are certainly opportunities for people with her skill set.

Though not explicitly required by precedent, many cases where courts discharged student loans addressed a debtor who was either nearing retirement age or handicapped.[1] The emphasis in those cases is that the debtors' physical conditions permanently limited their employment options. Defendant is neither nearing retirement nor handicapped.

Modeen simply does not meet the profile of a debtor whose student loan should be discharged in full under *Brunner*. She can work full time and has articulated no circumstance that seriously limits her employability.[2] She is young, has many working years ahead of her, and her income will likely increase over time. While inflation may increase some expenses, others should be reduced either by her daughter contributing to household expenses or, at some point, living independently. In sum, there is no additional circumstance here that would justify a finding that Modeen's situation will not improve or that she will have no ability to make payment over time.

3. Good Faith Effort to Repay

The last prong of the *Brunner* test requires the court to determine whether a debtor has made a good faith effort to repay the loans. *Roberson*, 999 F.2d at 1132. The touchstone of this analysis is whether a debtor tried to "obtain employment, maximize income, and minimize expenses." *Goulet*, 284 F.3d at 779; *Roberson*, 999 F.2d at 1136. The inquiry also scrutinizes whether the debtor "willfully or negligently" caused a default, or whether the debtor's condition resulted from "factors beyond [her] reasonable control." *Roberson*, 999 F.2d at 1136.

According to her tax returns, Modeen makes between $40,000 and $42,000 per year. At the time of her petition, her monthly take-home pay, including child support, was $3,010.29. Her monthly expenses are about $3,010.29, not including payment on the Manion Loan.

Though she could reduce some of her non-essential expenses to pay the loan, Modeen has clearly made a good faith effort to repay her creditors. If she eliminated the costs for entertainment, charity, and support of her daughter, she would have an extra $285 per month. Still, none of her expenses are outrageous, especially in consideration of the fact she supports her daughter.

***5** Modeen's current employment is her best option. She began working at that job in May 2016 and at her second job in June 2017. Defendant earned a technical degree near the end of 2017 which qualifies her to work as a healthcare aide, but her potential income in that field is lower than her current income. That she sought out additional employment speaks favorably to her efforts to repay her creditors.

In summary, Modeen has shown a good faith effort to repay creditors. Her expenses are reasonable given her family circumstances. Her current employment is likely her best option, and she has made efforts to increase her income with her second job.

4. Partial Discharge

Defendant demonstrated no exceptional circumstance and has therefore failed to meet all the elements of *Brunner*. But that does not necessarily mean the student loan is completely nondischargeable. Several courts that addressed student loans under *Brunner* have taken alternate approaches.[3] Rather than holding the entire student loan nondischargeable, some courts have granted a partial discharge.[4] Those courts have acknowledged the Code does not explicitly authorize that kind of relief, but "[recognize] that an all-or-nothing approach to the dischargeability of student debt contravenes Congress' intent in granting bankruptcy courts equitable authority" to enforce the Code. *Saxman v. Educ. Credit Mgmt. Corp. (In re Saxman)*, 325 F.3d 1168, 1174 (9th Cir. 2003). Though the Seventh Circuit has not directly addressed partial discharges,[5] other courts have found the authority to discharge a portion of the loan under section 105(a) and based on a debtor's means and ability to pay.

The Sixth Circuit endorsed a partial discharge in *Tenn. Student Assistance Corp. v. Hornsby (In re Hornsby)*, 144 F.3d 433, 440 (6th Cir. 1998).[6] There, the court ruled that even if a debtor fails to meet her burden under section 523(a)(8), the debt may be partially discharged "where facts and circumstances require intervention in the financial burden on the debtor." *Id*. at 439. In doing so, the court found debtors had *not* minimized expenses in every way possible and their financial prospects would likely improve with time. *Id*. The Sixth Circuit ruled the bankruptcy court had the discretion under section 105 to grant a partial discharge even where the debtor had not proved all the elements of an undue hardship.

***6** *Hornsby* has been criticized for "seem[ing] to swallow the statutory exception to discharge mandated by Congress in the case of student loans." *See Saxman*, 325 F.3d at 1174 (*quoting East v. Educ. Credit Mgmt. Corp. (In re East)*, 270 B.R. 485, 493 (Bankr. E.D. Cal. 2001)). Taken at face value, the ruling in *Hornsby* gives courts license to sidestep the explicit language in section 523(a)(8) by discharging a student loan where a debtor has demonstrated no "undue hardship." Tempering the *Hornsby* ruling, the Ninth Circuit determined a partial discharge is appropriate "as to the portion of the debt" that meets section 523(a)(8). *In re Saxman*, 325 F.3d at 1174.

There are no clear guidelines on when a court should grant a partial discharge on student loans. In general, it should be "reserved for appropriate circumstances" when "the equities of the situation weigh distinctly in favor of the debtor." *In re England*, 264 B.R. at 52. In *England*, the court permitted a partial discharge because of the debtor's poor health and lack of insurance. *Id*. Another court granted a partial discharge where a debtor had made sincere efforts to repay the loan and had a 6-year-old child with special needs. *Grine v. Texas Guaranteed Student Loan Corp. (In re Grine)*, 254 B.R. 191, 199 (Bankr. N.D. Ohio 2000).

The Court finds the equities of this case favor the granting of a partial discharge. The Court finds the as-written terms of the student loan would impose an undue hardship. Defendant simply does not have room in her budget to pay the balance of $34,231.55 that is due in full, nor could she reasonably be expected to pay $694.47 per month. The parties agree she cannot continue to make that monthly payment. Defendant lives paycheck to paycheck and has minimal savings.

Given her age and earning potential, the Court finds Defendant could reasonably repay some portion of the loan. She is employed and has marketable experience. Her income will increase to some extent as she gains more experience. Though her daughter is still young enough to rely on her for financial help, her expenses will eventually decrease as her daughter becomes more independent. Her daughter could certainly seek some employment—even part-time—to contribute something toward expenses.

This leaves the question of how much Modeen can reasonably pay. Many cases addressing the dischargeability of student loans do so in the context of federal repayment plans.[7] Modeen's student loans would have been subject to those plans until Manion persuaded her to let him refinance the loans. Once refinanced, the loans were no longer eligible for those programs. Nor did Defendant have a right to elect into those repayment plans. In that sense, the stakes for this debtor are higher than many of the other debtors who seek to discharge student loans. If this Court held the debt entirely nondischargeable, then Modeen would be left with no recourse. She could be forced into the impossible position of needing to make an immediate payment of about $35,000 simply because Plaintiff chose to accelerate the loan. Without the availability of a repayment program, her plea to this Court may be her last chance to obtain relief from a crushing financial quagmire.

***7** While the federal repayment plans are ultimately inapplicable, they help the Court in determining how much Modeen could reasonably pay. If still federal loans, then she would be eligible for five different repayment programs. Under the Income-Based Repayment Plan ("IBR"), Defendant's monthly payment would be determined by applying her tax filing status, AGI, family size, geographical area, and estimated income growth.[8]

Though Modeen's Schedules imply she could not make payments of $200 per month, her testimony suggests otherwise. Modeen testified her daughter recently graduated from high school and intends to pursue higher education but has not yet started classes. She is unemployed, lives at home, and does not contribute to household expenses. She is afflicted with lupus but has medication for the condition and can generally lead a normal life. As noted, courts criticize debtors who claim expenses for adult live-in children in the context of student loan dischargeability. At least one has reasoned "[i]t is unreasonable to expect creditors ... to remain unpaid to any extent while the Debtor is supporting any adult children in her home." *In re Logan*, 263 B.R. at 800.[9]

Under the reasoning in *Logan*, this Court finds it is not reasonable for Modeen to delay payment on the student loan while she supports her adult daughter. It is unfortunate her daughter must contend with a serious illness, but she testified the daughter's medicine is working well. Neither party has suggested the daughter cannot work because of her condition. Even if the daughter found a minimum wage, part-time job, she could comfortably contribute at least $200 per month.[10] Once her daughter moves out, Defendant's expenses will presumably decrease.

At trial, Plaintiff testified he had calculated alternate repayment plans. He represented a 15-year repayment term at 5.5% interest would result in a $280 per month payment. That monthly payment amount is close to the repayment options that would have been available to Modeen if the federal repayment programs applied.

Under the federal repayment plans, monthly payments would be recalculated annually based on changes in her income and any remaining debt would be forgiven after 25 years.

***8** The Court finds it would not be an undue hardship on Modeen to pay back some portion of the debt on an income-based repayment basis. Payment shall be made on the following terms:

1. The interest rate shall be 5%.

2. The AGI from Modeen's 2017 tax return shall be reduced by any distribution from her Individual Retirement Account to establish the Court-adjusted AGI.

3. Modeen's Tax Filing Status shall be used. Based on the 2017 return, her status is Head of Household.

4. The term of the repayment period shall be 154 months.

5. The monthly payment shall be recalculated each year based on income, tax filing status, and family size. The first payment is due July 1, 2018, with subsequent monthly payments due on the 1st of each month adjusted and effective on July 1, 2019, and on that day every 12th month thereafter.

6. As long as Modeen's daughter is under the age of 21 and lives with Modeen as a dependent, she may be included in the computation of family size; provided, however, that if such daughter is not a full-time student by December 2018, the sum of $2,400 shall be added to Modeen's Court-adjusted AGI for the purpose of payment calculation.

Based on such calculations using the U.S. Department of Education Federal Student Aid Repayment calculator, the monthly payment amount shall be $208 commencing July 1, 2018, adjusted annually as provided herein. The Court will also order any unpaid debt on the student loan be discharged if the debt has not been repaid in full after 20 years without further order from this Court.

CONCLUSION

Modeen has failed to demonstrate an undue hardship for a full discharge under *Brunner*. Her Schedules suggest she cannot meet a minimal standard of living, but it also seems some of her expenses could reasonably be reduced. Even with a reduction in expenses, however, Defendant will not be able to make the full payment on the loan when due. Debtor is granted a partial discharge to give her the opportunity to satisfy the portion of the loan she can pay.

This decision shall constitute findings of fact and conclusions of law pursuant to Bankruptcy Rule 7052 and Rule 52 of the Federal Rules of Civil Procedure.

A separate order consistent with this decision will be entered.

BY THE COURT:

All Citations

Slip Copy, 2018 WL 2970990

Footnotes

1 *Myhre v. U.S. Dep't of Educ. (In re Myhre)*, 503 B.R. 698 (Bankr. W.D. Wis. 2013) (discharging loans for a quadriplegic debtor); *Kline v. United States (In re Kline)*, 155 B.R. 762, 764-65 (Bankr. W.D. Mo. 1993) (discharging loans of debtor who was diagnosed with depression, anxiety, and panic attacks); *Dresser v. Univ. of Maine (In re Dresser)*, 33 B.R. 63, 64-65 (Bankr. D. Me. 1983) (discharging loans of debtor with PTSD); *Ackley v. Sallie Mae Student Loans (In re Ackley)*, 463 B.R. 146, 150 (Bankr. D. Me. 2011) (discharging loans where 60-year-old had age-related health problems).

2 *See O'Hearn v. Educ. Credit Mgmt. Corp. (In re O'Hearn),* 339 F.3d 559, 566 (7th Cir. 2003)*, citing Brightful v. Pa. Higher Educ. Assistance Agency (In re Brightful)*, 267 F.3d 324 n.4 (3d Cir. 2001) (noting debtor had an obligation to pursue employment elsewhere if her opportunities at her current job were limited).

3 Yet another approach taken by the courts is a loan-by-loan procedure in which one or more student loans may be discharged, but not necessarily all. Originally, Defendant had multiple student loans but consolidated them into one through the refinance. This approach may have been applicable to the original loans. Because Defendant now only has one loan, it is no longer applicable to this case and will not be addressed any further. *See Pincus v. Graduate Loan Ctr. (In re Pincus)*, 280 B.R. 303, 312-14 (Bankr. S.D.N.Y. 2002).

4 *Educ. Credit Mgmt. Corp. v. Blair (In re Blair)*, 291 B.R. 514, 518 (B.A.P. 9th Cir. 2003) (holding that the court must preliminarily find an undue hardship before granting a partial discharge, but not reaching whether debtor must satisfy all three prongs of the *Brunner* test for a partial discharge).

5 The Seventh Circuit has, however, *deferred* student loans for a two-year period where debtor had drunk driving convictions that temporarily constrained his ability to earn an income. *See Roberson*, 999 F.2d at 1138.

6 *See also In re Saxman*, 325 F.3d at 1168 (adopting *Hornsby* but holding debtor must establish an undue hardship).

7 *Durrani v. Educ. Credit Mgmt. Corp. (In re Durrani)*, 311 B.R. 496 (Bankr. N.D. Ill. 2004); *Bard-Prinzing v. Higher Educ. Assistance Found. (In re Bard-Prinzing)*, 311 B.R. 219 (Bankr. N.D. Ill. 2004); *Larson v. United States (In re Larson)*, 426 B.R. 782 (Bankr. N.D. Ill. 2010); *Carter v. Sallie Mae (In re Carter)*, 517 B.R. 870 (Bankr. N.D. Ill. 2014); *Coatney v. United States Dep't of Educ. (In re Coatney)*, 345 B.R. 905 (Bankr. C.D. Ill. 2006).

[8] *See generally* https://studentloans.gov/myDirectLoan/repaymentEstimator.action.

[9] *See also Williams v. Educ. Credit Mgmt. Corp. (In re Williams),* 301 B.R. 62, 73 (Bankr. N.D. Cal. 2003) (finding that adult son's health care is not an expense that can be included in minimal standard of living consideration); *Educ. Credit Mgmt. Corp. v. Buchanan,* 276 B.R. 744, 752 (N.D. W. Va. 2002) ("If given the choice between giving money to their creditors or their legally independent children, undoubtably most debtors would choose their children. Were this allowed, few debtors would be adjudged capable of repaying their debts."*); but see Grove v. Educ. Credit Mgmt. Corp. (In re Grove)*, 323 B.R. 216, 229 n.5 (Bankr. N.D. Ohio 2005) ("[T]he U.S. Department of Education generally expects parents to contribute to the cost of college education for their adult children between the ages of 18 and 24 .... For example, to be deemed 'independent' a student must generally be married, over twenty-four, orphaned, have dependents of his or her own, or be enrolled in a masters or doctorate program.").

[10] Minimum wage in Wisconsin is currently $7.25. If her daughter worked 20 hours per week, her bi-weekly pay would be about $266.

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DANIEL

891 F.3d 762
United States Court of Appeals, Ninth Circuit.

Stephanie DANIEL, on behalf of herself and all others similarly situated, Plaintiff-Appellant,
v.
NATIONAL PARK SERVICE; Does, 1–10, Defendants-Appellees.

No. 16-35689

Argued and Submitted December 5, 2017—Seattle, Washington

Filed May 30, 2018

Synopsis
Background: Patron brought putative class action against the National Park Service, alleging that Service violated the Fair Credit Reporting Act by failing to redact debit card expiration date from patron's purchase receipt for entrance pass to national park. The United States District Court for the District of Montana, Susan P. Watters, District Judge, 2016 WL 4401369, granted Service's motion to dismiss for failure to state a claim. Patron appealed.

Holdings: The Court of Appeals, McKeown, Circuit Judge, held that:

[1] patron alleged a concrete, particularized injury of identity theft and fraudulent charges sufficient to establish Article III standing; but

[2] identify theft and fraudulent charges on patron's debit card were not fairly traceable to printing of receipt showing debit card's expiration date; and

[3] FCRA did not clearly waive sovereign immunity.

Affirmed.

West Headnotes (21)

[1] **Federal Courts**Standing
Federal Courts Governments and Political Subdivisions

Both Article III standing and sovereign immunity are threshold jurisdictional issues that appellate court reviews de novo. U.S.C.A. Const. Art. 3, § 2, cl.1.

Cases that cite this headnote

[2] **United States**Immunity in General

A suit dismissed on sovereign immunity grounds cannot be salvaged.

Cases that cite this headnote

[3] **Federal Civil Procedure**In general; injury or interest
Federal Civil Procedure Causation; redressability

To meet the constitutional threshold of Article III standing, a plaintiff must allege that she (1) suffered an injury in fact, (2) that is fairly traceable to the challenged conduct, and (3) that is likely to be redressed by a favorable judicial decision. U.S.C.A. Const. Art. 3, § 2, cl.1.

Cases that cite this headnote

[4] **Consumer Credit**Actions for Violations

National park patron alleged a concrete, particularized injury of identity theft and fraudulent charges sufficient to establish Article III standing to bring claim against National Park Service for violation of the Fair Credit Reporting Act (FCRA), by alleging that Service failed to redact debit card expiration date from patron's purchase receipt for entrance pass to national park, that patron's debit card was used fraudulently after transaction, and that patron suffered damages from stolen identity. U.S.C.A. Const. Art. 3, § 2, cl.1; Consumer Credit Protection Act § 605, 15 U.S.C.A. § 1681c(g).

Cases that cite this headnote

[5] **Consumer Credit**Actions for Violations

At the pleading stage, consumer was not required to prove proximate causation to establish Article III standing to bring claim for violation of the Fair Credit Reporting Act (FCRA) by National Park Service based on Service's failure to redact debit card expiration date from patron's purchase receipt for entrance pass to national park. U.S.C.A. Const. Art. 3, § 2, cl.1; Consumer Credit Protection Act § 605, 15 U.S.C.A. § 1681c(g).

Cases that cite this headnote

[6] **Consumer Credit**Actions for Violations

To establish Article III standing to bring a claim for violation of section of the Fair Credit Reporting Act (FCRA) governing truncation of credit card and debit card numbers, consumer bears the burden of demonstrating that her injury-in-fact is fairly traceable to the challenged action. U.S.C.A. Const. Art. 3, § 2, cl.1; Consumer Credit Protection Act § 605, 15 U.S.C.A. § 1681c(g).

Cases that cite this headnote

[7] **Consumer Credit**Actions for Violations

Identify theft of national park patron and fraudulent charges on patron's debit card were not fairly traceable to National Park Service's printing of receipt for entrance pass to national park showing expiration date of that debit card, and thus patron failed to adequately allege Article III standing to bring Fair Credit Reporting Act (FCRA) claim against Service based on Service's failure to redact debit card expiration date from patron's purchase receipt, absent allegations that another copy of receipt existed, that receipt was lost or stolen, or that another person apart from patron's lawyers viewed receipt. U.S.C.A. Const. Art. 3, § 2, cl.1; Consumer Credit Protection Act § 605, 15 U.S.C.A. § 1681c(g).

Cases that cite this headnote

[8] **Federal Civil Procedure**In general; injury or interest
Federal Civil Procedure Causation; redressability

A plaintiff may not rely on a bare legal conclusion to assert injury-in-fact required for standing, or engage in an ingenious academic exercise in the conceivable to explain how defendants' actions caused his injury.

Cases that cite this headnote

[9] **Federal Civil Procedure**In general; injury or interest
Federal Civil Procedure Causation; redressability

The causation and redressability requirements are relaxed in a standing analysis where a plaintiff's claims rest on a procedural injury.

Cases that cite this headnote

[10] **United States**Necessity of waiver or consent
United States Mode and sufficiency of waiver or consent

Sovereign immunity shields the United States from suit absent a consent to be sued that is unequivocally expressed in the text of a relevant statute.

Cases that cite this headnote

[11] **United States**Mode and sufficiency of waiver or consent

To maintain a suit against the government for money damages, the waiver of sovereign immunity must extend unambiguously to such monetary claims, thus foreclosing an implied waiver.

Cases that cite this headnote

[12] **United States**Mode and sufficiency of waiver or consent

The clear textual waiver rule ensures that Congress has specifically considered sovereign immunity and has intentionally legislated on the matter.

Cases that cite this headnote

[13] **United States**Mode and sufficiency of waiver or consent

The clear textual waiver rule ensures Congress does not, by broad or general language, legislate on a sensitive topic inadvertently or without due deliberation.

Cases that cite this headnote

[14] **United States**Construction of waiver or consent in general

Any ambiguities in the statutory language are to be construed in favor of sovereign immunity.

Cases that cite this headnote

[15] **Statutes** Statute as a Whole; Relation of Parts to Whole and to One Another

The court's duty is to construe statutes, not isolated provisions.

Cases that cite this headnote

[16] **United States** Particular Claims and Actions

Appellate court would look to the provisions of the whole law to determine whether the Fair Credit Reporting Act's (FCRA) "any person" language unambiguously applied to the federal government to clearly waive immunity for consumer's action, alleging that National Park Service's failure to redact debit card expiration date from patron's purchase receipt for entrance to national park violated FCRA's enforcement provisions. Consumer Credit Protection Act § 603, 15 U.S.C.A. § 1681a(b).

Cases that cite this headnote

[17] **United States** Particular Claims and Actions

Fair Credit Reporting Act (FCRA) did not clearly waive sovereign immunity for patron's suit against governmental agency, the National Park Service, alleging that failure to redact debit card expiration date from purchase receipt for national park entrance pass violated FCRA's enforcement provisions; ascribing personhood to United States would have licensed potential punitive damages against United States, conflicted with clear waiver of sovereign immunity elsewhere in statute, and led to implausible results, including subjecting United States to criminal penalties and authorizing Federal Trade Commission and state governments to launch enforcement actions against United States, and legislative history demonstrated that Congress never considered extending FCRA's enforcement provisions to United States. Consumer Credit Protection Act §§ 605, 626, 15 U.S.C.A. §§ 1681c(g), 1681u(j).

Cases that cite this headnote

[18] **Municipal Corporations** Judgment
United States Punitive damages

There is a presumption against imposition of punitive damages on governmental entities.

Cases that cite this headnote

[19] **United States** Mode and sufficiency of waiver or consent

Congress need not use magic words to waive sovereign immunity.

Cases that cite this headnote

[20] **Statutes** Similarity or difference
Statutes Other Statutes

Identical language may convey varying content when used in different statutes, sometimes even in different provisions of the same statute.

Cases that cite this headnote

[21] **United States** Power to waive immunity or consent to suit

Congress is free to waive the federal government's sovereign immunity against liability without waiving its immunity from monetary damages awards.

Cases that cite this headnote

***764** Appeal from the United States District Court for the District of Montana, Susan P. Watters, District Judge, Presiding, D.C. No. 1:16-cv-00018-SPW

Attorneys and Law Firms

Timothy M. Bechtold (argued), Bechtold Law Firm PLLC, Missoula, Montana, for Plaintiff-Appellant.

Mark B. Stern (argued) and Henry C. Whitaker, Appellate Staff; Michael W. Cotter, United States Attorney; Chad A. Readler, Acting Assistant Attorney General; Civil Division, United States Department of Justice, Washington, D.C.; for Defendant-Appellee.

Before: Michael Daly Hawkins, M. Margaret McKeown, and Morgan Christen, Circuit Judges.

OPINION

McKEOWN, Circuit Judge:

***765** This appeal is one of many in which plaintiffs seek redress for violation of a federal law that requires redaction of certain credit and debit card information on printed receipts. Stephanie Daniel alleges that identity thieves made fraudulent charges on her debit card at some unspecified time after she visited Yellowstone National Park. Daniel sued the National Park Service for issuing a receipt showing her debit card's expiration date, a violation of the Fair Credit Reporting Act ("FCRA"). 15 U.S.C. § 1681c(g).

We affirm the district court's dismissal of Daniel's suit. As an initial matter, Daniel lacks standing because her complaint makes only conclusory allegations that her stolen identity was traceable to the Park Service's alleged FCRA violation. Nonetheless, giving Daniel leave to amend the complaint would be futile because the FCRA does not waive the federal government's sovereign immunity from Daniel's suit.

Background

When Daniel purchased an entrance pass to Yellowstone National Park, the National Park Service (the "Park Service") printed a receipt bearing her full debit card expiration date. According to Daniel, the Park Service violated the FCRA's prohibition that "no *person* that accepts credit cards or debit cards for the transaction of business shall print more than the last 5 digits of the card number *or the expiration date* upon any receipt provided to the cardholder at the point of the sale or transaction." 15 U.S.C. § 1681c(g) (emphases added). The receipt otherwise complied with the FCRA's card-number redaction requirements—it did not print more than the last five digits of the debit card number.

****2** Daniel sued the Park Service, on behalf of herself and a putative class, under one of the FCRA's enforcement provisions: "Any person who willfully fails to comply with [the FCRA] with respect to any consumer is liable to that consumer" for statutory damages of between $100 and $1,000 per violation or "any actual damages sustained by the consumer," costs and attorneys' fees, and potential punitive damages. *Id.* § 1681n. Daniel claimed that after the Yellowstone transaction, her debit card was used fraudulently and she suffered damages from her stolen identity. She also alleged that the fraudulent use of her debit card was caused in part by the inclusion of the card's expiration date on her Yellowstone receipt.

The district court granted the Park Service's motion to dismiss on the grounds that the FCRA does not waive the U.S. government's sovereign immunity. The court concluded that "including the United States as a 'person' every time the term is used in the FCRA would lead to inconsistent usage and potentially absurd results." Accordingly, Congress did not "speak unequivocally" as is required to waive sovereign immunity.[1]

Analysis

[1][2]Both Article III standing and sovereign immunity are threshold jurisdictional ***766** issues that we review de novo. *See Raines v. Byrd*, 521 U.S. 811, 818, 117 S.Ct. 2312, 138 L.Ed.2d 849 (1997); *FDIC v. Meyer*, 510 U.S. 471, 475, 114 S.Ct. 996, 127 L.Ed.2d 308 (1994). In this instance, we analyze both issues because dismissal of the case on standing grounds leaves open whether Daniel could amend her complaint to satisfy standing requirements. That route is foreclosed, however, because a suit dismissed on sovereign immunity grounds cannot be salvaged. *See United States v. Mitchell*, 463 U.S. 206, 212, 103 S.Ct. 2961, 77 L.Ed.2d 580 (1983) ("It is axiomatic that the United States may not be sued without its consent and that the existence of consent is a prerequisite for jurisdiction."). Daniel's complaint fails on both fronts.

I. STANDING

[3]To meet the constitutional threshold of Article III standing, Daniel must allege that she "(1) suffered an injury in fact, (2) that is fairly traceable to the challenged conduct of [the Park Service], and (3) that is likely to be redressed by a favorable judicial decision." *Spokeo, Inc. v. Robins*, ––– U.S. ––––, 136 S.Ct. 1540, 1547, 194 L.Ed.2d 635 (2016). Although Daniel alleged a sufficient injury of identity theft, she failed to allege that her injury was "fairly traceable" to the Park Service's issuance of the receipt. Without this link, Daniel's suit must be dismissed.

A. DANIEL ALLEGED A CONCRETE INJURY OF IDENTITY THEFT

We recently considered whether "receiving an overly revealing credit card receipt—unseen by others and unused by identity thieves—[is] a sufficient injury to confer Article III standing." *See Bassett v. ABM Parking Servs., Inc.*, 883 F.3d 776, 777 (9th Cir. 2018). Bassett's theory of injury—an "exposure" to identity theft "caused by [the issuer's] printing of his credit card expiration date on a receipt that he alone viewed"—did not "have 'a close relationship to a harm that has traditionally been regarded as providing a basis for a lawsuit in English or American courts.' " *Id.* (quoting *Spokeo*, 136 S.Ct. at 1549). Nor did Congress "elevat[e] to the status of legally cognizable injuries concrete, *de facto* injuries that were previously inadequate in law." *Id.* at 781–82 (quoting *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 578, 112 S.Ct. 2130, 119 L.Ed.2d 351 (1992)). It was no stretch to conclude that a receipt showing the credit card expiration date, by itself, was not a concrete injury. *Id.* at 780.

[4]In contrast to Bassett, Daniel alleged a concrete, particularized injury by claiming that after the Yellowstone transaction, her debit card was used fraudulently and she suffered damages from her stolen identity. Identity theft and fraudulent charges are concrete harms particularized to Daniel and establish a sufficient injury at the pleading stage. *See generally Spokeo*, 136 S.Ct. at 1548–50; *In re Zappos.com, Inc.*, 888 F.3d 1020, 1028 (9th Cir. 2018) (holding that specific allegations of hackers accessing a plaintiff's personal information that "could be used to help commit identity fraud or identity theft" are a sufficient injury).

B. DANIEL'S IDENTITY THEFT IS NOT FAIRLY TRACEABLE TO THE PARK SERVICE'S RECEIPT

****3**[5][6]The trickier question is whether the fraudulent charges on Daniel's debit card and her stolen identity are "fairly traceable" to the Park Service's printing of a receipt showing the expiration date of that debit card. At the pleading stage, Daniel does not need to prove proximate causation. *See* ***767***Lexmark Int'l, Inc. v. Static Control Components, Inc.*, ––– U.S. ––––, 134 S.Ct. 1377, 1391 n.6, 188 L.Ed.2d 392 (2014). But she still bears the burden of "demonstrating that her injury-in-fact is … fairly traceable to the challenged action"—here, the Park Service's issuance of the receipt. *Davidson v. Kimberly-Clark Corp.*, 889 F.3d 956, 967 (9th Cir. 2018) (citing *Monsanto Co. v. Geertson Seed Farms*, 561 U.S. 139, 149, 130 S.Ct. 2743, 177 L.Ed.2d 461 (2010)). Daniel's threadbare allegations fall short of demonstrating that link.

[7]Daniel's complaint contains only two generic statements that attempt to draw a connection between the receipt and her later identity theft. She alleged: "After this debit card transaction, Plaintiff Daniel's personal debit card was used fraudulently and she suffered damages from the stolen identity." She went on to claim: "Based on information and belief, the fraudulent use of Plaintiff Daniel's debit card was caused in part by the inclusion of the expiration date of her debit card on the receipt of her purchase from Defendant National Park Service."

[8]The latter statement is a legal conclusion, and is therefore not entitled to an assumption of truth at the pleading stage. *See Ashcroft v. Iqbal*, 556 U.S. 662, 678–80, 129 S.Ct. 1937, 173 L.Ed.2d 868 (2009). The former statement presents no specific factual allegations plausibly tying the Park Service receipt to her identity theft. These naked assertions fail our edict that a plaintiff may not "rely on a bare legal conclusion to assert injury-in-fact, or engage in an ingenious academic exercise in the conceivable to explain

how defendants' actions caused his injury." *Maya v. Centex Corp.*, 658 F.3d 1060, 1068 (9th Cir. 2011) (internal quotation marks and footnotes omitted).

Like Bassett, Daniel "did not allege that another copy of the receipt existed, that h[er] receipt was lost or stolen, ... or even that another person apart from h[er] lawyers viewed the receipt." *Bassett*, 883 F.3d at 783.[2] Merely asserting that a theft occurred at an unspecified time "after" the debit card transaction—absent any other details—does not connect the dots. Even crediting that temporal allegation as true, as we must at this stage, Daniel alleged no link between the receipt and the identity theft. *See Syed v. M-I, LLC*, 853 F.3d 492, 499 n.4 (9th Cir. 2017); *Maya*, 658 F.3d at 1068–73.

We are left with an allegation of a "bare procedural violation" of the FCRA and a generic allegation of later harm that is "divorced from" that violation. *See Spokeo*, 136 S.Ct. at 1549; *Bassett*, 883 F.3d at 781, 783. Because the "fairly traceable" leg of standing is no less essential to the "irreducible constitutional minimum" of standing than the injury leg, Daniel failed to adequately allege standing. *Spokeo*, 136 S.Ct. at 1547 (quoting *Lujan*, 504 U.S. at 560, 112 S.Ct. 2130).

[9]Our conclusion does not alter the longstanding principle that "the causation and redressability requirements are relaxed" in standing analysis where a plaintiff's claims "rest on a procedural injury." *Ctr. for Biological Diversity v. Mattis*, 868 F.3d 803, 817 (9th Cir. 2017) (quoting *California ex rel. Imperial Cty. Air Pollution Control Dist. v. U.S. Dep't of the Interior*, 767 F.3d 781, 790 (9th Cir. 2014)). Our usual rule rests on the assumption that by "providing a cause of action" for violations of a statute, "Congress has recognized the harm such violations cause, thereby articulating a 'chain[ ] of causation that will give ***768** rise to a case or controversy.' " *Syed*, 853 F.3d at 499 (quoting *Spokeo*, 136 S.Ct. at 1549). Such an assumption is unwarranted under these unique circumstances.

****4** The FCRA presents the exceedingly rare case where Congress created a cause of action for violations of a statute, but also concluded that a chain of causation does *not* cause harm. The FCRA prohibits any "person" from printing a receipt with a card's expiration date, and holds liable "[a]ny person who willfully fails to comply with" that requirement. 15 U.S.C. §§ 1681c(g), 1681n. On the surface, the law is "an effort to combat identity theft." *Bateman v. Am. Multi-Cinema, Inc.*, 623 F.3d 708, 717 (9th Cir. 2010).

Yet after passing the expiration-date requirement, Congress enacted the Credit and Debit Card Receipt Clarification Act, Pub. L. No. 110-241, 122 Stat. 1565 (2008) (the "Clarification Act"). That statute includes express congressional findings that "[e]xperts in the field agree that proper truncation of the card number, by itself as required by the [FCRA], regardless of the inclusion of the expiration date, *prevents* a potential fraudster from perpetrating identity theft or credit card fraud." 122 Stat. at 1565 (emphasis added). Accordingly, the Clarification Act set a temporary safe harbor for merchants: "any person who printed an expiration date on any receipt ... between December 4, 2004, and [June 3, 2008]," but otherwise complied with the card number truncation requirements, did not willfully violate the FCRA. *Id.* at 1566. The Clarification Act left the FCRA untouched for receipts printed after June 3, 2008, like Daniel's. *Id.*

The congressional ambivalence expressed in the statutory prohibition and the Clarification Act produces a peculiar outcome. On the one hand, we have a cause of action to remedy statutory violations that was intended to "combat identity theft," and we have vague allegations of "identity theft." On the other hand, we have an express congressional finding that receipts like Daniel's "prevent" identity theft and credit card fraud, they do not cause injury. "On balance, congressional judgment weighs against" standing in this case, just as in *Bassett*. 883 F.3d at 782.

The result here does not foreclose future plaintiffs from adequately alleging standing for FCRA violations, even those involving expiration dates on receipts. But such plaintiffs shoulder the burden of meeting each of the elements for standing, including the "fairly traceable" requirements.

In the ordinary appeal, we might consider whether amendment of the complaint could cure the defects in the standing allegations. *E.g.*, *Maya*, 658 F.3d at 1072. However, we do not reach that question because Daniel's suit is also barred by sovereign immunity. Any amendment would be futile. *See Mitchell*, 463 U.S. at 212, 103 S.Ct. 2961.

II. SOVEREIGN IMMUNITY

[10][11]Sovereign immunity shields the United States from suit "absent a consent to be sued that is 'unequivocally expressed' " in the text of a relevant statute. *United States v. Bormes*, 568 U.S. 6, 9–10, 133 S.Ct. 12, 184 L.Ed.2d 317 (2012) (quoting *United States v. Nordic Village, Inc.*, 503 U.S. 30, 33–34, 112 S.Ct. 1011, 117 L.Ed.2d 181 (1992)). To maintain a suit against the government for money damages, "the waiver of sovereign immunity must extend unambiguously to such monetary claims," thus foreclosing an implied waiver. *Lane v. Pena*, 518 U.S. 187, 192, 116 S.Ct. 2092, 135 L.Ed.2d 486 (1996).

[12][13][14]The clear textual waiver rule "ensures that Congress has specifically considered … sovereign immunity and has intentionally legislated on the matter." ***769***Sossamon v. Texas*, 563 U.S. 277, 290, 131 S.Ct. 1651, 179 L.Ed.2d 700 (2011).[3] It also "ensure[s] Congress does not, by broad or general language, legislate on a sensitive topic inadvertently or without due deliberation." *Id.* at 291, 131 S.Ct. 1651. Key here, "*[a]ny* ambiguities in the statutory language are to be construed in favor of immunity." *FAA v. Cooper*, 566 U.S. 284, 290, 132 S.Ct. 1441, 182 L.Ed.2d 497 (2012) (emphasis added).

A. THE FCRA DOES NOT CLEARLY WAIVE IMMUNITY FOR DANIEL'S SUIT

****5**[15][16]We begin with the principle that our duty is "to construe statutes, not isolated provisions." *King v. Burwell*, ––– U.S. ––––, 135 S.Ct. 2480, 2489, 192 L.Ed.2d 483 (2015). We thus "look to the provisions of the whole law" to determine whether the FCRA's "any person" language unambiguously applies to the federal government. *Star Athletica, L.L.C. v. Varsity Brands, Inc.*, ––– U.S. ––––, 137 S.Ct. 1002, 1010, 197 L.Ed.2d 354 (2017).

[17]The FCRA broadly defines a "person" as "any individual, partnership, corporation, trust, estate, cooperative, association, *government or governmental subdivision or agency*, or other entity." 15 U.S.C. § 1681a(b) (emphasis added). The National Park Service is an agency of the United States. Hence, the sovereign immunity question boils down to whether the inclusion of "governmental … agency" in the FCRA's definition of "person" constitutes an unequivocal waiver of the federal government's immunity from money damages and subjects the United States to the various provisions directed at "any person" who violates the law. Construing the FCRA as a whole—including the different contexts in which "person" is used, and the inclusion of a clear waiver of sovereign immunity in an unrelated provision—we view the statute as ambiguous with respect to whether Congress waived immunity for Daniel's suit.

1. The Many Appearances of "Person" in the FCRA

The word "person" appears throughout the FCRA, as amended by the Fair and Accurate Credit Transactions Act ("FACTA").[4] The statutory proscription at issue establishes that "no *person* that accepts credit cards or debit cards for the transaction of business shall print … the expiration date upon any receipt provided to the cardholder at the point of the sale or transaction." 15 U.S.C. § 1681c(g) (emphasis added).

The FCRA also contains a number of enforcement provisions directed at "any person" who violates the law. Daniel invoked a citizen suit provision that "[a]ny *person* who willfully fails to comply with [the FCRA] with respect to any consumer is liable to that consumer" for statutory damages of between $100 and $1,000 per violation or "any actual damages sustained by the consumer," costs and attorneys' fees, and potential punitive damages. *Id.*§ 1681n. Similarly, "[a]ny *person* who is negligent in failing to comply with [the FCRA] with respect to any consumer is liable to that consumer" for "any actual damages," costs and attorneys' fees. *Id.* § 1681***o***. "Any *person* who knowingly and willfully obtains information on a consumer from a consumer reporting agency under false pretenses shall be fined …, imprisoned ***770** for not more than 2 years, or both." *Id.* § 1681q. And, "any *person*" who violates the FCRA is subject to enforcement actions by the Federal Trade Commission, the Consumer Financial Protection Bureau, and state governments. *Id.* § 1681s (all emphases added).

2. Reading "the United States" Into Every Iteration of "Person" Leads to Implausible Results

Distilling a clear waiver of sovereign immunity in the FCRA would require us to treat "the United States" as a "person" in each provision. Substituting the sovereign for each of the FCRA's iterations of "person" leads to implausible results, however, and underscores that Congress did not intend for the law's enforcement provisions to apply against the federal government. Notwithstanding the FCRA's broad statutory definition, we note that in other contexts, courts have been "reluctant to read 'person' to mean the sovereign where, as here, such a reading is decidedly awkward." *Int'l Primate Prot. League v. Adm'rs of Tulane Educ. Fund*, 500 U.S. 72, 83, 111 S.Ct. 1700, 114 L.Ed.2d 134 (1991).

****6** Most importantly, treating the United States as a "person" across the FCRA's enforcement provisions would subject the United States to criminal penalties. Because "[a]ny person who knowingly and willfully obtains information on a consumer from a consumer reporting agency under false pretenses shall be fined …, imprisoned for not more than 2 years, or both," such an interpretation would subject the sovereign to incarceration. 15 U.S.C. § 1681q. As the Supreme Court observed in construing the use of "person" in the Sherman Antitrust Act:

> The connotation of a term in one portion of an Act may often be clarified by reference to its use in others. The word "person" is used in several sections other than [this one]. In [the other sections], the phrase designating

> those liable criminally is "every person who shall" etc. In each instance it is obvious that … the term "person" … cannot embrace the United States.

United States v. Cooper Corp., 312 U.S. 600, 606–07, 61 S.Ct. 742, 85 L.Ed. 1071 (1941); *see also U.S. Postal Serv. v. Flamingo Indus. (USA) Ltd.*, 540 U.S. 736, 744–45, 124 S.Ct. 1321, 158 L.Ed.2d 19 (2004) (reinforcing that the United States is not a "person" in the Sherman Act because "if the definition of 'person' included the United States, then the Government would be exposed to liability as an antitrust defendant, a result Congress could not have intended").

It may not be "outlandish" for Congress to subject *federal employees* to criminal prosecution. *See Bormes v. United States*, 759 F.3d 793, 796 (7th Cir. 2014). But the statutory definition would read "the United States" into the FCRA's enforcement provisions, not "federal employees." We have recognized the difference between imposing criminal penalties on individuals and government agencies; the latter is "patently absurd." *Al-Haramain Islamic Found., Inc. v. Obama*, 705 F.3d 845, 854 (9th Cir. 2012) (quoting *United States v. Singleton*, 165 F.3d 1297, 1299–1300 (10th Cir. 1999)). Because authorizing criminal penalties against governments rather than individuals would be "unprecedented," it is highly unlikely that Congress intended to do so obliquely with a broad definition of "person." *Id.*

Ascribing personhood to the federal government also would authorize the Federal Trade Commission, the Consumer Financial Protection Bureau, and state governments to launch enforcement actions against the United States for violations of the FCRA. *See*15 U.S.C. §§ 1681s(a)(2)(A), 1681s(c)(1)(B). Since ***771** Daniel does not identify any other federal statute that applies such an enforcement scheme against the United States, we doubt that Congress meant to build a novel enforcement regime without doing so explicitly.[5] The spectre of the Federal Trade Commission suing the United States, aka itself, to "recover a civil penalty" *from itself* makes little sense. *See id.* § 1681s.

****7** Finally, regarding the United States as a "person" would license substantial potential punitive damages against the federal government when Congress rarely does so. *See*15 U.S.C. § 1681n (levying potential punitive damages on "any person" who willfully violates the Act). In waiving the sovereign immunity of the United States for certain tortious acts, the Federal Tort Claims Act prohibits assessment of punitive damages against the United States. *See*28 U.S.C. § 2674. Hence, a finding of waiver of sovereign immunity to authorize Daniel's suit would require us to believe that Congress chose to prohibit punitive damages against the United States for tortiously killing people, *see id.*, but allowed punitive damages on the government for printing overly revealing debit card receipts.

[18]There is a "presumption against imposition of punitive damages on governmental entities." *Vt. Agency of Nat. Res. v. U.S. ex rel. Stevens*, 529 U.S. 765, 785, 120 S.Ct. 1858, 146 L.Ed.2d 836 (2000). Given the presumption, Congress must be explicit in licensing punitive damages against the sovereign, as it was in § 1681u(j), discussed below. The FCRA's assessment of potential punitive damages against "any person" who "willfully fails to comply with" the law is not so lucid. 15 U.S.C. § 1681n.

3. Section 1681u(j)'s Explicit Waiver of Sovereign Immunity

Equating "the United States" with a "person" in multiple sections of the FCRA also conflicts with a very clear waiver of sovereign immunity elsewhere in the statute. In § 1681u(j), the FCRA provides that "[a]ny agency or department of the United States obtaining or disclosing any consumer reports, records, or information contained therein in violation of this section is liable to the consumer" for statutory and actual damages, and, "if the violation is found to have been willful or intentional, such punitive damages as a court may allow."[6]15 U.S.C. § 1681u(j). As the district ***772** court observed, "[t]he fact that Congress explicitly named the United States in the remedial provisions found at § 1681u(j) but not in the remedial provisions found at §§ 1681n and 1681***o*** demonstrates the equivocal nature of any purported waiver of sovereign immunity" in the latter sections. Congress enacted the explicit waiver of sovereign immunity in § 1681u(j) less than one year before Congress expanded liability to "person[s]" under the FCRA. *See* Intelligence Authorization Act for Fiscal Year 1996, Pub. L. No. 104-93, tit. VI, § 601, 109 Stat. 976–77. Because Congress knew how to explicitly waive sovereign immunity in the FCRA, it could have used that same language when enacting subsequent enforcement provisions. That Congress subjected "person[s]" to liability in those later amendments—not the United States itself or any of its departments or agencies—is telling.

Of course, § 1681u concerns disclosures of information by the Federal Bureau of Investigation and other federal agencies involved in counterintelligence investigations. While the section's limited focus on federal agencies might explain the difference in statutory language, § 1681u clouds whether the remedial provisions at §§ 1681***o*** and 1681n extend "unambiguously" to monetary claims against the United States. *See Ordonez v. United States*, 680 F.3d 1135, 1138 (9th Cir. 2012) (quoting *Lane*, 518 U.S. at 192, 116 S.Ct. 2092). We view the comparison to § 1681u as particularly instructive because "it is useful to benchmark the statutory language against other explicit waivers of sovereign immunity" when determining whether an unequivocal waiver of sovereign immunity exists. *Al-Haramain*, 705 F.3d at 851.

4. The FCRA's Ambiguity Compared with Clear Waivers of Sovereign Immunity

****8[19]**Further to that point, other citizen suit provisions that waive sovereign immunity do so much more explicitly. *See, e.g.*, 33 U.S.C. § 1365 (the "Clean Water Act") ("any citizen may commence a civil action on his own behalf … against any person (including (i) the United States, and (ii) any other governmental instrumentality or agency …)"); 42 U.S.C. § 6972 (RCRA) ("any person may commence a civil action on his own behalf … against any person, including the United States and any other governmental instrumentality or agency, …").[7] Although Congress need not use "magic words" to waive sovereign immunity, *see Cooper*, 566 U.S. at 290, 132 S.Ct. 1441, most other waivers of sovereign immunity specifically mention the "United States." *See* ***773***Al-Haramain*, 705 F.3d at 851 (collecting examples of waivers). As we have stated, "contrasted against other provisions deemed sufficient to invoke waiver, the lack of an explicit waiver … is stark, permitting suit only against a 'person,' without listing the 'United States.' " *Id.* at 852.

5. Daniel's Interpretation of "Person" Overreads the Statute

Glossing over the many statutory indicators to the contrary, Daniel seeks to identify a waiver by focusing exclusively on the FCRA's definition of "person." Because the Park Service is a "governmental … agency"—her theory goes—the Park Service must be a "person" that is liable to Daniel for statutory damages or "any actual damages," punitive damages, costs and attorneys' fees. The Seventh Circuit embraced this theory in *Bormes v. United States*, holding that the definition alone marks "the end of the inquiry." 759 F.3d 793, 795 (2014).

We are not convinced by the Seventh Circuit's reasoning.[8] Importantly, the United States conceded in *Bormes* that it is a "person" for the purpose of the FCRA's substantive requirements; the government challenged only that the FCRA authorizes money damages against it. *Id.* The court seized on that concession, reasoning that "if the United States is a 'person' … for the purpose of duties, how can it not be one for the purpose of remedies? Nothing in the FCRA allows the slightest basis for a distinction." *Id.*

****9[20][21]**Yet the Seventh Circuit's logic can just as easily be flipped around.[9] If the United States cannot be a "person" under the criminal provisions of the FCRA, why must the United States unequivocally be a "person" for the purpose of the other enforcement provisions? *See United States v. Nosal*, 676 F.3d 854, 857–59 (9th Cir. 2012) (en banc) (observing that "identical words … within the same statute should normally be given the same meaning" and narrowly construing a term because a broader construction would substantially "expand the scope of criminal liability"). To use the Seventh Circuit's words, "[n]othing in the FCRA allows the slightest basis for a distinction." *Bormes*, 759 F.3d at 795. That is particularly true when the remedies section also subjects "persons" to punitive damages, and the United States is rarely prone to sweeping punitive liability. *See*15 U.S.C. § 1681n. The court in *Bormes* did ***774** not address this important anomaly. Nor did the court consider the clear waiver of sovereign immunity at § 1681u(j) or the unparalleled enforcement regime created by its decision.

Even more curious, the Seventh Circuit has since questioned its own reasoning in *Bormes*. Notably, the court refused to expand its holding to effect a waiver of tribal sovereign immunity in the FCRA. *See Meyers v. Oneida Tribe of Indians of Wis.*, 836 F.3d 818 (7th Cir. 2016), *cert. denied*, ––– U.S. ––––, 137 S.Ct. 1331, 197 L.Ed.2d 518 (2017). The court emphasized that in *Bormes*, "the government conceded that it was a 'person' for purposes of the Act so the court had no reason to engage in a full analysis of the scope of the term 'any government.' " *Id.* at 826. By contrast, the tribal government made no such concession. *Id.* Finally grappling with the statutory term, the court concluded that "any government" is equivocal as to whether it includes "Indian tribes" even though Indian tribes are governments:

> The district court did not dismiss [Meyers's] claim because it concluded that Indian tribes are not governments. It dismissed his claim because it could not find a clear, unequivocal statement in FACTA that Congress meant to abrogate the sovereign immunity of Indian Tribes. Meyers has lost sight of the real question in this sovereign immunity case—whether an Indian tribe can claim immunity from suit. The answer to this question must be "yes" unless Congress has told us in no uncertain terms that it is "no." Any ambiguity must be resolved in favor of immunity. Abrogation of tribal sovereign immunity may not be implied. Of course Meyers wants us to focus on whether the Oneida Tribe is a government so that we might shoehorn it into FACTA's statement that defines liable parties to include "any government." But when it comes to sovereign immunity, shoehorning is precisely what we cannot do. Congress'[s] words must fit like a glove in their unequivocality. It must be said with "perfect confidence" that Congress intended to abrogate sovereign immunity and "imperfect confidence will not suffice." Congress has demonstrated that it knows how to unequivocally abrogate immunity for Indian Tribes. It did not do so in FACTA.

Id. at 826–27 (internal citations omitted).

The same logic in *Meyers* applies with respect to the United States. The "real question" in this sovereign immunity appeal is not whether the United States is a government; it is whether Congress explicitly waived sovereign immunity or the United States can claim immunity from suit. Having considered the structure of the FCRA as a whole, we cannot say with "perfect confidence" that Congress meant to abrogate the federal government's sovereign immunity. And because "[a]ny ambiguities in the statutory language are to be construed in favor of immunity," Daniel's suit was properly dismissed. *See Cooper*, 566 U.S. at 290, 132 S.Ct. 1441.[10]

B. THE LEGISLATIVE HISTORY OF THE FCRA IS CONSISTENT WITH OUR INTERPRETATION

****10** During passage of the FCRA and every amendment, Congress never considered subjecting the federal government to liability in suits like the one filed by Daniel. ***775** Thus, the legislative history "confirms what we have concluded from the text alone." *Mohamad v. Palestinian Auth.*, 566 U.S. 449, 460, 132 S.Ct. 1702, 182 L.Ed.2d 720 (2012); *see Al-Haramain*, 705 F.3d at 852 (considering legislative history to buttress a textual conclusion that a statute does not waive sovereign immunity).

In 1970, Congress passed the Fair Credit Reporting Act, Pub. L. No. 91-508, tit. II, 84 Stat. 1127 (the "original FCRA"). The original FCRA included the definition of "person" that remains today. § 603, 84 Stat. at 1128. The law did not impose civil liability on "any person" for noncompliance with the FCRA; rather, civil suits for "any actual damages," punitive damages, costs and attorneys' fees were authorized against "[a]ny consumer reporting agency or user of information" who willfully violated the Act. § 616, 84 Stat. at 1134; *see also* § 617, 84 Stat. at 1134 (imposing civil liability on "[a]ny consumer reporting agency or user of information" who negligently violated the Act).

The original FCRA did, however, impose criminal fines or imprisonment on "[a]ny person who knowingly and willingly obtains information on a consumer from a consumer reporting agency under false pretenses." § 619, 84 Stat. at 1134. It would be "patently absurd" to divine that Congress intended to waive sovereign immunity for the sole purpose of imposing criminal sanctions on the United States in the original FCRA. *See Al-Haramain*, 705 F.3d at 854.

Fast forward to 1996, the Consumer Credit Reporting Reform Act, Pub. L. No. 104-208, §§ 2401–52, 110 Stat. 3009-426–62 (the "1996 Act"), expanded the scope of the FCRA's civil damages provisions in four ways relevant to this appeal. The 1996 Act replaced the "any consumer reporting agency" language in the original FCRA with "*[a]ny person* who fails to comply with any provision of this title with respect to any other person shall be liable ..." § 2412, 110 Stat. at 3009-446 (codified at 15 U.S.C. §§ 1681n, 1681***o***) (emphasis added). It added statutory damages of between $100 and $1,000 as an alternative to "any actual damages" for each willful violation of the FCRA. *Id.* (codified at 15 U.S.C. § 1681n). It authorized the Federal Trade Commission to bring civil actions to recover penalties from "any person" who violates the FCRA. § 2416, 110 Stat. at 3009-450 (codified at 15 U.S.C. § 1681s).[11] And, it authorized states to seek damages from "any person" who violates the FCRA under certain circumstances. § 2417, 110 Stat. at 3009-451 (codified at 15 U.S.C. § 1681s).

Despite the 1996 Act's levy of substantial potential liability on "person[s]," Congress never once mentioned exposing the federal fisc to the same liability. *See, e.g.*, H.R. Rep. No. 103-486, at 49 (1994) (the enforcement provisions target "banks" and "retailers").[12] To the contrary, Congressional Budget Office analyses of prior versions of the 1996 Act—which also imposed civil liability on "person[s]"—did not anticipate ***776** any costs from defending the federal government against private suits. *See id.* at 62–63; S. Rep. No. 103-209, at 32–34 (1994); H.R. Rep. No. 102-692, at 45–46 (1992). The lack of any reference to potential federal liability is particularly glaring given the federal government's role as the nation's largest employer, lender, and creditor, and its corresponding vulnerability to suit under the new FCRA provisions.

****11** In 2003, Congress enacted FACTA, Pub. L. No. 108-159, 117 Stat. 1952, which added various prohibitions to the FCRA including the expiration date requirement at issue here. *See* § 113, 117 Stat. at 1959–60 (codified at 15 U.S.C. § 1681c(g)). FACTA did not amend the FCRA's statutory definition of "person" or its provisions related to civil suits, damages, and federal and state enforcement of the law.

Like the 1996 Act, FACTA's legislative history establishes that the receipt prohibitions were directed toward "businesses" or "merchants" that accept credit and debit cards, not the federal government. *See*S. Rep. No. 108-166, at 12 (2003). In fact, the Congressional Budget Office report on FACTA refers to the receipt requirements as a "private-sector mandate" without reference to any cost to the U.S. government. *Id.* at 28–30.

Taken together, the legislative history demonstrates that Congress never considered extending the enforcement provisions of the FCRA to the federal government. Rather than "specifically consider" sovereign immunity in crafting the enforcement provisions, Congress "legislate[d] on a sensitive topic inadvertently or without due deliberation" when it used "person." *Sossamon*, 563 U.S. at 290–91, 131 S.Ct. 1651. The explicit waiver rule exists to prevent such inadvertent drafting from exposing the United States to liability. *Id*.

Daniel's suit fails because the Park Service is immune from suit. No amendment of the complaint could remedy the absence of a clear waiver of sovereign immunity in the FCRA.

AFFIRMED.

All Citations

891 F.3d 762, 2018 WL 2424494, 18 Cal. Daily Op. Serv. 5230, 2018 Daily Journal D.A.R. 5033

Footnotes

1 The district court did not address the second issue raised in the Park Service's motion—whether Daniel pled sufficient facts to maintain an action under the FCRA.

2 Daniel alleged that the Park Service printed a merchant copy of the receipt. But since the merchant copy did not contain the card's expiration date, such a receipt does not make Daniel's stolen identity any more "traceable" to the Park Service's violation of the FCRA.

3 Although *Sossamon* concerns state sovereign immunity, the Court acknowledged that it was applying federal sovereign immunity principles. 563 U.S. at 285 n.4, 131 S.Ct. 1651.

4 We use "FCRA" where "FCRA" or "FACTA" could be used interchangeably.

5 The closest analog we found—and not just because the statute bears a similar acronym—is the Resource Conservation and Recovery Act ("RCRA"), 42 U.S.C. § 6901 *et seq*. Like the FCRA, RCRA provides for broad remedies against "any person" who violates the Act, authorizes citizen suits against "any person" who violates the Act, and deputizes the Environmental Protection Agency ("EPA") to enforce compliance orders against "any person" who violates the Act. *Id.* §§ 6928, 6972.
The similarities end there. Although RCRA's statutory definition of "person" explicitly *includes* "the United States," *id.* § 6903(15), RCRA also contains a separate section specifically directed at violations of the Act by the federal government and provides a clarion waiver of sovereign immunity. *See id.* § 6961(a) ("Each department, agency, and instrumentality of ... the Federal Government ... shall be subject to ... such sanctions as may be imposed by a court to enforce such relief ... in the same manner, and to the same extent, as any person is subject to such requirements .... The United States hereby expressly waives any immunity otherwise applicable to the United States ....). Even as RCRA authorizes EPA enforcement actions against other federal agencies, it establishes a more collaborative procedure that recognizes the unique posture of one agency punishing another for violations of federal law: the EPA and the violating agency must "confer" before an enforcement order becomes final. *Id.* § 6961(b).

6 Assessment of punitive damages in this section cuts both ways. It demonstrates that Congress was willing to impose punitive damages on the United States in the FCRA. At the same time, it shows that when Congress intends to impose this rare liability on the United States, Congress does so explicitly.

7 The definition of "person" in the Clean Water Act more clearly excludes the United States than does the definition in the FCRA. *See*33 U.S.C. § 1362(5) ("The term 'person' means an individual, corporation, partnership, association, State, municipality, commission, or political subdivision of a State, or any interstate body."). The definition in RCRA, however, *expressly includes the United States*. *See*42 U.S.C. § 6903(15) ("The term 'person' means an individual, trust, firm, joint stock company, corporation (including a government corporation), partnership, association, State, municipality, commission, political subdivision of a State, or any interstate body *and shall include each department, agency, and instrumentality of the United States*." (emphasis added)). RCRA's definition of "person" and its explicit waiver of the United States government's sovereign immunity suggest that Congress did not waive sovereign immunity in the FCRA. And if the comparison between the provisions of RCRA and the Clean Water Act and those of the FCRA muddies the water, it simply underscores that Congress knows how to expressly waive immunity when it wants to do so.

8 The Seventh Circuit traveled a long and twisted path in reaching its conclusion. A panel of the court first held that the United States is subject to suits like this one because of the sovereign immunity waiver contained in the Tucker Act, 28 U.S.C. § 1346. *See Talley v. U.S. Dep't of Agric.*, 595 F.3d 754, 759 (7th Cir. 2010). The court then granted rehearing en banc, vacated the panel opinion, and affirmed the district court's dismissal on sovereign immunity grounds by an equally divided court. *See*No. 09-2123, 2010 WL 5887796 (7th Cir. Oct. 1, 2010). Soon after, another decision endorsing the Tucker Act theory worked its way to the Supreme Court by way of the U.S. Court of Appeals for the Federal Circuit, which hears Tucker Act appeals. *United States v. Bormes*, 568 U.S. 6, 133 S.Ct. 12, 184 L.Ed.2d 317 (2012). The Supreme Court unanimously rejected the Tucker Act theory and remanded *Bormes* to the Seventh Circuit—because the Federal Circuit no longer had jurisdiction—to consider whether the remedial provisions of the FCRA contain an unequivocal waiver of sovereign immunity. *Id.* at 20, 133 S.Ct. 12.

9 We observe that "identical language may convey varying content when used in different statutes, sometimes even in different provisions of the same statute." *See Yates v. United States*, ––– U.S. ––––, 135 S.Ct. 1074, 1082, 191 L.Ed.2d 64 (2015) (collecting cases). What is more, "Congress is free to waive the Federal Government's sovereign immunity against liability without waiving its immunity from monetary damages awards." *Lane*, 518 U.S. at 196, 116 S.Ct. 2092.

10 We cannot "expand [the FCRA's] abrogation of immunity" beyond that which is unequivocally expressed. *Michigan v. Bay Mills Indian Cmty.*, ––– U.S. ––––, 134 S.Ct. 2024, 2034, 188 L.Ed.2d 1071 (2014). Under our reading, the FCRA authorizes money damages against the government only where the "United States" is explicitly referenced in § 1681u(j).

11 The Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010, Pub. L. No. 111-203, 124 Stat. 1376, shared authority to initiate such civil actions with the Consumer Financial Protection Bureau. *See* § 1088(a)(10), 124 Stat. at 2090 (codified at 15 U.S.C. § 1681s(b)(1)(H)).

12 The Seventh Circuit considered the absence of legislative history about waiving sovereign immunity in the 1996 Act "unsurprising" because Congress already had waived sovereign immunity in the original FCRA. *Bormes*, 759 F.3d at 795. The infirmity of this reasoning is that the original FCRA subjected "person[s]" to *only* criminal liability, which Congress never would have thought applied to the United States.

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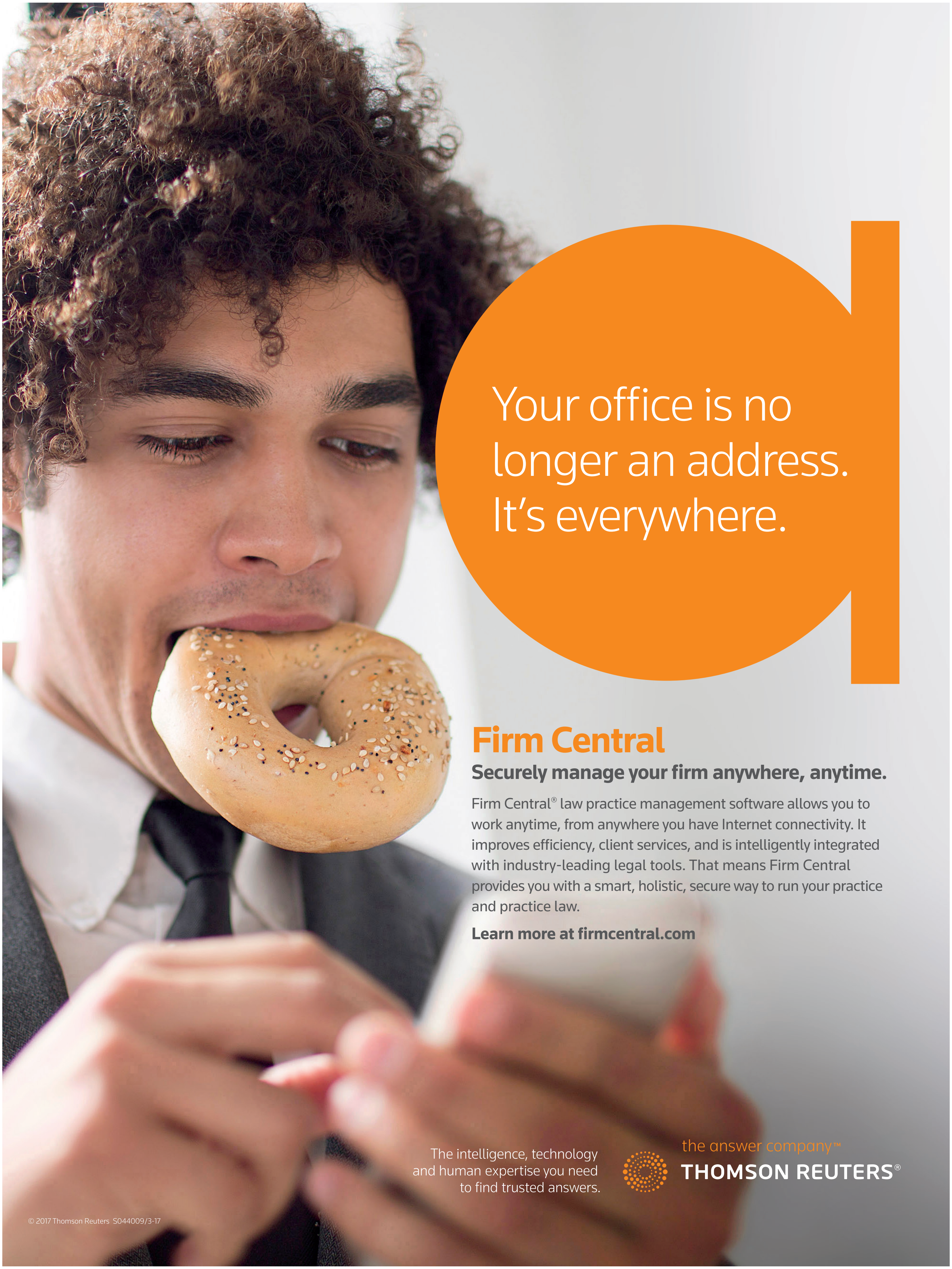
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