

## **Banking and Finance Law Daily Wrap Up, CREDIT, DEBIT AND GIFT CARDS—5th Cir.: Fifth Circuit again keeps case challenging CFPB's CARD Act rule in Texas, (Jun. 20, 2024)**

Banking and Finance Law Daily Wrap Up

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By Justin Marcus Smith, J.D.

The Fifth Circuit emphasized, in two separate passages, that it wants federal district courts to stay their venue-transfer orders for a short time so opposing parties have time to seek review on a less “harried” basis.

The United States District Court for the Northern District of Texas clearly abused its discretion when it transferred litigation seeking vacatur of the Consumer Financial Protection Bureau’s credit card late-fee final rule to the United States District Court for the District of Columbia, held the U.S. Court of Appeals for the Fifth Circuit. The Fifth Circuit found the transferring district court should not have considered the convenience of CFPB counsel or determined that D.C. residents had a localized interest in this matter. The Fifth Circuit distinguished that the “good cause” standard applicable to 28 U.S.C. § 1404(a) required CFPB to “clearly” demonstrate that the District of Columbia venue was the “clearly more convenient” one. The federal appellate court concluded that controlling venue and transfer rules precluded sending the case to Washington, D.C. Accordingly, the Fifth Circuit dissolved its administrative stay of the Northern District of Texas transfer order, granted the plaintiff business and banking organizations’ petition for a writ of mandamus, and directed the district court to vacate its prior May 28, 2024, transfer order ([In re Chamber of Commerce v. CFPB](#), No. 24-10463 (5th Cir. June 18, 2024)).

**Background.** On March 7 of this year, various business and banking groups, including the United States Chamber of Commerce and Fort Worth Chamber of Commerce, sought *vacatur* of a new CFPB final rule reducing credit card late fees in implementation of the Credit Card Accountability Responsibility and Disclosure Act (CARD Act) of 2009. The associations claimed the final rule is unlawful, upends more than a decade of regulations, violates the Appropriations Clause, and violates a basic legal concept that consequences attach for borrowers’ failure to pay an obligation (see [Banking and Finance Law Daily](#), Mar. 8, 2024). The final rule was originally set to take effect on May 14, but the plaintiffs secured a preliminary injunction.

As the United States Court of Appeals for the Fifth Circuit noted, this case has already acquired a “byzantine” procedural history. Previously, the Fifth Circuit had vacated the lower court’s first of two attempts to transfer venue to the District of Columbia. The Fifth Circuit kept the case in the federal district court in Northern Texas, determining that the Texas federal district court had lacked the necessary jurisdiction to make any transfer (see [Banking and Finance Law Daily](#), May 7, 2024).

Shortly after, the CFPB renewed its transfer motion. Considering the private and public interest factors involved, the federal district court in Northern Texas granted the CFPB’s transfer request and again ordered the case transferred to the District of Columbia’s federal district court (see [Banking and Finance Law Daily](#), May 29, 2024). However, the plaintiff associations petitioned for a writ of mandamus and requested a stay. The Fifth Circuit, in a one-sentence, unpublished order, again halted any transfer of the case to the District of Columbia, stating that the lower court’s May 29, 2024, order was “administratively STAYED until 5:00 p.m. on Tuesday, June 18, 2024” (see [Banking and Finance Law Daily](#), May 31, 2024).

**June 18 disposition.** On the ordered day, June 18, 2024, the Fifth Circuit adjudicated that the district court abused its discretion by misapplying the controlling 28 U.S.C. § 1414(a) standard for transferring cases and corresponding Fifth Circuit precedent in applying that standard. The Fifth Circuit accordingly dissolved its earlier administrative stay, granted the United States Chamber of Commerce petition for a writ of mandamus, and directed the Northern District of Texas district court to vacate its most recent transfer order.

**Recent exhortation.** In explaining the three outcomes, the Fifth Circuit appeared to express, first, some dismay that the district court had diverged from its “recent exhortation” in another matter that “district courts should stay their venue-transfer orders for a short period to allow for appellate review[.]” This divergence is what prompted the Fifth Circuit to administratively stay the district court transfer order “pending our more considered view of the [United States Chamber of Commerce] mandamus petition.”

**Forum shopping.** Next, the Fifth Circuit explained that a plaintiffs’ choice of venue should be given some deference “so long as plaintiffs meet certain requirements.” This means a “certain amount of forum shopping” is permissible.

In this matter, the Fifth Circuit noted that § 1404(a) differs from *forum non conveniens* in two key respects: (1) a transfer remedy; and (2) a different standard for transfer requiring a lesser showing of inconvenience. However, although the showing of inconvenience is lesser, the bar for “good cause” is much higher. “Good cause” actually requires the party moving for transfer to “clearly” demonstrate that its chosen venue is more convenient. The marginal gain in convenience is to be “significant.” Evidence provided should make that plainly obvious that the marginal gain will “actually materialize in the transferee venue.” (Emphasis omitted).

**Private interest.** Turning to the private-interest and public-interest factors, the Fifth Circuit said it disagreed with the emphasis the district court placed on counsel location. The Fifth Circuit said it had already held, in yet another matter, that there is no basis to consider the location of counsel as a standalone factor under § 1404(a). Courts should not lose sight of the convenience of parties. The location of counsel was not a practical problem that would affect the convenience of the parties in this case.

The Fifth Circuit said it had also previously held, in the context of a different statute, that courts should not consider the location of an agency’s attorneys. Congress, if it wanted to, could easily “enshrine” the federal district court for the District of Columbia as the venue for Administrative Procedure Act challenges, but it has yet to do so. Court familiarity with this case also did not create judicial efficiency in favor of transfer. The district court did not address its familiarity. Time was also generally not of the essence under § 1404(a).

**Public interest.** The Fifth Circuit held the district court’s analysis—concluding that localized-interests favored transfer—clashed head on with another recent decision that provided “significant guidance” on how to analyze local interests. The Fifth Circuit opined the local-interest inquiry should be concerned with the interest of non-party citizens in adjudicating the case. The instant plaintiffs sought nationwide injunction of the final rule; therefore, this case was not one where Fort Worth citizens have a lesser stake in the litigation than D.C. citizens. This was not a localized case at all. The interests were “completely diffuse” and thus neutral.

Turning to the public interest in administration of the case, the Fifth Circuit found the district court did not clearly abuse its discretion by considering its own congested docket; however, the Fifth Circuit deprecated the parties’ assertions that timeliness was essential in this matter. The Fifth Circuit concluded the need for speed was no longer present because the plaintiffs secured a preliminary injunction.

Turning again to court familiarity with the case, the Fifth Circuit noted again that § 1404(a) set no time limit, hence court familiarity “does not have a strong effect on how any factor should be weighed.”

Last, the Northern District of Texas district court’s consideration of court congestion was speculative, ignored the plaintiff’s role as “master of the complaint,” and the Fifth Circuit noted it has repeatedly held that congestion cannot justify transfer. Accordingly, the CFPB did not satisfy the good-cause standard for transfer.

**Mandamus.** The court found the United States Chamber of Commerce met each requirement for mandamus. The court again urged the district courts to stay their venue-transfer orders for a short time so opposing parties have time to seek review on a less harried basis. The Fifth Circuit said doing so here would have avoided expedited consideration of mandamus. In sum, controlling venue and transfer rules precluded sending the case to Washington, D.C.

The case is [No. 24-10463](#).

Judge: Willett, D.

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Companies: American Bankers Association; Chamber of Commerce of the United States of America; Consumer Bankers Association; Fort Worth Chamber of Commerce; Longview Chamber of Commerce; Texas Association of Business

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