

Banking and Finance Law Daily Wrap Up, CREDIT, DEBIT AND GIFT CARDS—CFPB moves to dissolve preliminary injunction in CARD Act lawsuit, (Jul. 9, 2024)

Banking and Finance Law Daily Wrap Up

[Click to open document in a browser](#)

By Sherri M. Schroeder, J.D.

The Bureau believes the court should dissolve the preliminary injunction and lift the stay of the Bureau's Late-Fee Rule because the court's earlier analysis rested entirely on a Fifth Circuit holding that has been reversed by the Supreme Court.

In the latest skirmish in the battle waged by various business groups, banking groups, and Chambers of Commerce (the Chambers) against the Consumer Financial Protection Bureau (CFPB) and its Director (the Bureau) regarding a new CFPB final rule reducing credit card late fees in implementation of the Credit Card Accountability Responsibility Act (CARD Act) of 2009, the Bureau has made a [motion](#) to dissolve the preliminary injunction and stay that was previously granted in May of 2024 by the U.S. District Court for the Northern District of Texas. The Bureau is arguing that the U.S. Supreme Court's decision in *CFPB v. Cmty. Fin. Servs. Ass'n of Am., Ltd.*, 601 U.S. 416, 435 (U.S. 2024) (*CFSA*) is "a substantial change in the law that justifies dissolving the preliminary injunction, which now rests entirely on overruled precedent." Although the Chambers offered several statutory challenges as alternative grounds for relief in their preliminary injunction motion, the CFPB argues that the Chambers have not established a likelihood of success on any of them and that the public interest does not support continuing the stay. In addition, the Bureau fired another volley of shots with its Notice of Supplemental Authority, filed in support of their motion to dismiss or transfer under 28 U.S.C. § 1406, based on Justice Thomas' recent concurring opinion about associational standing (*Chamber of Commerce of the United States v. CFPB*, No. 4:24-cv-213-P (N.D. Tex. July 8, 2024)).

Background. After the CFPB issued a final rule in March 2024 implementing the CARD Act and reducing the credit card late-fee safe harbor from \$30 to \$8, no longer adjusting the amount for inflation, and reducing the cap on late fees to 25 percent of the missed minimum payment, the Chambers filed suit to vacate the final rule. A preliminary injunction was granted to stay the rule in May 2024 (see [Banking and Finance Law Daily](#), May 13, 2024). The court based its determination that the Chambers were likely to succeed on the merits entirely on their constitutional challenge, which at the time was governed by the Fifth Circuit's precedent in *Community Financial Services Ass'n of America, Ltd. v. CFPB*, 51 F.4th 616, 638 (5th Cir. 2022), which held that the Bureau's statutory funding mechanism was unconstitutional. After various back-and-forth motions were filed concerning transfer of the case from the U.S. District Court for the Northern District of Texas to the U.S. District Court for the District of Columbia (see [Banking and Finance Law Daily](#), [May 29, 2024](#), and [June 20, 2024](#)), the Fifth Circuit ultimately decided that controlling venue and transfer rules precluded sending the case to the D.C. court. In the meantime, the U.S. Supreme Court issued its decision in *CFSA*. This decision reversed the Fifth Circuit's decision and determined that the Bureau's funding mechanism satisfied the Appropriations Clause.

Argument. In its supporting brief, the Bureau [argues](#) that the Supreme Court's decision in *CFSA* "fatally undermines" the justification for the preliminary injunction granted in May 2024. That ruling was made just six days after the lower court entered its ruling, which granted the preliminary injunction because the Chambers were likely to succeed on their claim that the CFPB's final rule was promulgated with funds illegally and unconstitutionally drawn in violation of the Appropriations Clause. The Bureau argues that this Supreme Court decision means that the Chambers are no longer able to show a likelihood of success on the merits on their constitutional claim.

The Bureau also argues that the Chambers have not established a likelihood of success on the merits on any of the other claims raised in their preliminary injunction motion, meaning that there is no justification for continuing the stay on the Late-Fee Rule. These alternative arguments include that the Late-Fee Rule rests on an unlawful interpretation of the CARD Act and that the rule's effective date violates the Truth in Lending Act (TILA). The Bureau first argues that the Late Fee Rule's approach to the penalty fee safe harbor is consistent with the CARD Act. Although the Chambers argue that the Late Fee Rule does not allow them to charge a penalty fee that is reasonable and proportional to customers' late payments, the Bureau argues that the CARD Act expressly allows them to charge such a fee.

The Bureau also argues that the Chambers' argument improperly narrows the definition of "costs" as used in the statute. Here, the Bureau argues that "because only a small fraction of accounts that incur late fees are ultimately written off, incorporating post-charge-off costs into the late fee calculation would improperly require the majority of consumers who pay late to compensate issuers for losses that have nothing to do with the conduct they engaged in." Although the Chambers may disagree with that determination, notes the Bureau in its motion, "this analysis of what constitutes an appropriate 'cost' is required by the statutory text and is necessary to ensure that consumers are only charged a late fee that is reasonable and proportional to their actual violations."

As to the Chambers' alternate argument that the Late Fee Rule's effective date violates a TILA section, "requiring any disclosure which differs from the disclosures previously required... shall have an effective date of that October 1 which follows by at least six months the date of promulgation," the Bureau argues that the Late Fee Rule is not a rule requiring any different disclosure within the meaning of that provision. According to the Bureau, the statute's disclosure requirements remain unchanged, although the Late-Fee Rule may require larger issuers to change the amount they charge if their current fees are no longer justifiable, which will require disclosure of that new amount. However, argues the Bureau, credit card companies have quickly changed the numerical amount of late fees on an annual basis, which undermines the Chambers' argument that the effective date here imposes an unreasonable burden under TILA. At most, argues the Bureau, this claim would entitle the Chambers to a temporary delay of the effective date until October 1.

Finally, the Bureau argues that the court should reconsider its determination that the balance of the equities and public interest support a preliminary injunction. The Bureau argues that a preliminary injunction would burden the Bureau "and the working Americans it seeks to protect—who currently pay billions of dollars in unjustifiably high late fees annually, making it more difficult for them to pay for necessities like food and medicine and, indeed, pay their credit card bills." Those burdens, argue the Bureau, significantly outweigh the harm to the Chambers' larger card issuer members who would lose only a relatively small portion of their revenue.

Supplemental authority. Also of note is the Bureau's Notice of Supplemental Authority [filed](#) to support their motion to dismiss or transfer under 28 U.S.C. § 1406. In that motion, the Bureau contended that venue is improper in the Northern District of Texas because the Fort Worth Chamber of Commerce, which is the "primary hook for venue" in the case according to the Bureau, lacks associational standing to bring the suit.

On June 13, 2024, Supreme Court Justice Clarence Thomas issued a concurring opinion about associational standing in *FDA v. Alliance for Hippocratic Medicine*. According to the Bureau, the concurrence raises "serious" concerns about associational standing, including whether it "can be squared with Article III's" limitations on judicial power, and "underscores why the Court should not allow Plaintiffs here to dramatically expand associational standing, beyond even what's allowed by the precedent Justice Thomas criticized in his concurrence." The Bureau argues that although the Fort Worth Chamber's stated purpose is to build "a thriving business climate in the Fort Worth region," the interests it seeks to protect in the litigation at hand are the interests of large card issuers to charge higher late fees. Because no such card issuer is based in or near Fort Worth, protecting out-of-state-issuers' interests cannot be "germane" to the Fort Worth Chamber's mission for Article III purposes.

Attorneys: Jennifer B. Dickey, U.S. Chamber Litigation Center, and Michael Murray (Paul Hastings LLP) for Chamber of Commerce of the United States of America, Fort Worth Chamber of Commerce, Longview Chamber

of Commerce, American Bankers Association, Consumer Bankers Association and Texas Association of Business. Stephanie Garlock for the Consumer Financial Protection Bureau and Rohit Chopra.

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

MainStory: TopStory BankingOperations CFPB ConsumerCredit CreditDebitGiftCards FederalReserveSystem
LouisianaNews MississippiNews TexasNews TruthInLending