

Banking and Finance Law Daily Wrap Up, UNFAIR DECEPTIVE ABUSIVE ACTS OR PRACTICES—Consumer groups support CFPB in battle over Supervision and Examination Manual, (Aug. 23, 2024)

Banking and Finance Law Daily Wrap Up

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By Joe Cox, J.D.

This appeal centers around a suit filed by banking organizations to enjoin the applicability of the CFPB's Supervision and Examination Manual in regulating unfair discriminatory acts or practices.

A group of consumer and minority organizations have filed an [amicus curiae brief](#) with the U.S. Court of Appeals for the Fifth Circuit in *Chamber of Commerce of United States of America v. CFPB*, No. 23-40650) in support of the Consumer Financial Protection Bureau in an appeal from the summary judgment granted by the U.S. District Court for the Eastern District of Texas to a group of banking organizations. That judgment stemmed from a suit to enjoin the CFPB from using its 2022 Supervision and Examination Manual update to pursue and prevent unfair discriminatory acts or practices under the Dodd-Frank Act. The brief filed by the organizations centers mostly around proving the continued presence of discrimination and unfair acts and practices in the financial services industry.

History of the Suit. As noted, this suit began when a group of banking and commercial entities, with the Chamber of Commerce of the United States the foremost named party, filed suit in a Texas District Court. The suit sought relief from the CFPB's March 2022 update to the "unfair, deceptive, or abusive acts and practices (UDAAP)" portion of the Bureau's "Supervision and Examination Manual," which directed examiners to use their UDAAP authority to "access companies' data, algorithms, operations, premises, and personnel for evidence of 'discrimination,' including "disproportionately adverse impacts on a discriminatory basis, or evidence of insufficient internal monitoring for those outcomes." The trial court ultimately held that the CFPB's adoption of that approach in the agency's March 2022 update of the manual "is beyond the agency's constitutional authority based on an Appropriations Clause violation and beyond the agency's statutory authority to regulate 'unfair' acts or practices under the Dodd-Frank Act" and accordingly granted summary judgment. (See [Banking and Finance Law Daily story](#), Sept. 11, 2023).

Recent Appeal. The CFPB has appealed that summary judgment, arguing that the trial court erred in its ruling. The Bureau urges reversal on grounds that: 1) the plaintiff organizations lacked standing, 2) the CFPB acted within its authority and that its funding statute is constitutional, and 3) the relief granted in the summary judgment was overly broad.

The constitutional issue is particularly germane. At the time of the district court's ruling, the Fifth Circuit had held the funding clause of the CFPB to be unconstitutional as a violation of the Appropriations Clause. The CFPB points out that the Supreme Court rejected that argument in *Cnty. Fin. Servs. Ass'n of Am., Ltd. v. CFPB*.

On the issue of authority, the CFPB argued that the Consumer Financial Protection Act gave it authority to treat discrimination as inherently unfair, and that the District Court had erred by attempting to invoke the "major questions" doctrine to forestall action by the CFPB.

The standing question has continued throughout, as the CFPB posits that only one of the named plaintiffs resides in the district of Texas where the suit was filed, and that plaintiff does not have standing as an injured party.

The Constitutional Accountability Center filed a recent amicus brief of its own in support of the CFPB's appeal. That brief argued that the update to the manual was merely a "routine" exercise of the CFPB's core powers. The central thrust of the CAC's brief was that applying the application of the major questions doctrine to deny

the CFPB's authority was going against the clear meaning of the Dodd-Frank Act and the authority granted by congress. (See [Banking and Finance Law Daily](#), Aug. 15, 2024).

The New Brief. The new amicus brief was filed by Rise Economy, National Community Reinvestment Coalition, National Association for Latino Community Asset Builders, Center for Responsible Lending, Texas Appleseed, National Consumer Law Center, and American for Financial Reform Education Fund. The brief was provided "to underscore the substantial evidence of discriminatory practices in the consumer finance industry and to explain how such discrimination may be 'unfair' under the relevant statutory definition."

In the first section, the organizations thoroughly document that people of color have inadequate access to financial services, often in the form of "banking and credit deserts." Additionally, the brief documents how consumers can be discriminated against in attempting to open a bank account. The brief then discusses evidence that people of color receive discriminatory consumer and mortgage loan terms, if they can obtain such mortgages at all. Finally, the persistence of discrimination in small business lending is then discussed and documented. All of these trends, posits the brief, are even more damaging given the potential for discrimination in the increasing empowerment of FinTech firms, which employ algorithms that can exacerbate existing biases.

In the remainder of the brief, the organizations explain how the purview of the Dodd-Frank Act renders these patterns of discrimination as unfair. Accordingly, the brief argues that such discrimination may be combatted by the CFPB under the CFPB.

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Companies: Americans for Financial Reform Education Fund; Center for Responsible Lending; National Association for Latino Community Asset Builders; National Community Reinvestment Coalition; National Consumer Law Center; RISE Economy; Texas Appleseed

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