

Banking and Finance Law Daily Wrap Up, CREDIT, DEBIT AND GIFT CARDS—U.S.: 6-year limitations period accrues when APA plaintiff is injured, (Jul. 1, 2024)

Banking and Finance Law Daily Wrap Up

By [John M. Pachkowski, J.D.](#)

An APA claim does not accrue for purposes of 28 U.S.C. § 2401(a)'s 6-year statute of limitations until the plaintiff is injured by final agency action.

In a 6-3 opinion, written by Associate Justice Amy Coney Barrett, the U.S. Supreme Court has ruled that when a plaintiff pursues a “facial” challenge to an agency rule under the Administrative Procedure Act (APA), the 6-year statute of limitations found at 28 U.S.C § 2401(a) does not begin to run until the plaintiff is injured ([Corner Post, Inc. v. Board of Governors of the Federal Reserve System](#), No. 22-1008 (July 1, 2024)).

This case arose from a challenge by Corner Post, Inc., a convenience store and truck stop in North Dakota, and two retail associations—the North Dakota Petroleum Marketers Association and the North Dakota Retail Association—to the Dodd-Frank Act's Durbin Amendment that authorized the Federal Reserve Board to regulate interchange fees that an issuer may receive or charge in regard to electronic debit transactions. The Fed issued Regulation II in 2011, setting a maximum interchange fee of 21 cents per transaction and an ad valorem allowance of 0.05 percent of the transaction to account for fraud loss. Corner Post was incorporated on June 26, 2017, but did not open for business until March 2018; and had accepted debit cards for payments since it first opened its doors for business. The challenge was initially filed in federal court by the two retail associations and Corner Post was added as a plaintiff after the government invoking Section 2401(a)'s 6-year statute of limitations.

Corner Post and the retail associations had claimed that the interchange and processing fees paid by merchants in debit card transactions were arbitrary and capricious, contrary to the APA, and in violation of the Durbin Amendment. The Eighth Circuit Court of Appeals found that when plaintiffs bring a facial challenge to a final agency action, the right of action accrues, and the limitation period begins to run, upon publication of the regulation, in this case 2011. Therefore, the merchants' challenge to Regulation II was untimely under Section 2401(a). The holding by the Eighth Circuit was in agreement with five other Circuit Courts of Appeals; while the Sixth Circuit Court of Appeals has held that a claim first accrues when the rule causes a plaintiff to suffer legal wrong or be adversely affected or aggrieved.

In reaching its conclusion, the Court examined two provisions of the APA—5 U.S.C. §§ 702 and 704, as well as Section 2401(a). Section 702 of the APA allows a person injured by agency action to obtain judicial review by suing the United States or one of its agencies, officers, or employees, while Section 704 which limits judicial review only for “final agency action.”

The Court noted that in 1948, when Section 2401(a) was enacted, to the present, “accrue” has had a well-settled meaning; and that definition has appeared “in dictionaries from the 19th century up until today.” The Court added that Congress knew how to depart from the traditional rule to create a limitations period that begins with the defendant's action instead of the plaintiff's injury.

Statute of repose. The Court rejected the Fed's position that Section 2401(a) was a defendant-protective statute of repose that begins to run when agency action becomes final. The Court further dismissed the Fed's call for a special administrative-law rule into Section 2401(a) that would create a defendant-focused rule for agency suits while retaining the traditional challenger-specific accrual rule for other suits against the United States. By rejecting this

position, the Court noted that it would be giving the same statutory text different meanings in different contexts, even though those words had a single, well-settled meaning when Congress enacted Section 2401(a).

Meaningful relief. In a concurring opinion, Associate Justice Brett M. Kavanaugh addressed “a crucial additional point” in that Corner Post can obtain relief in this case only because the APA authorizes vacatur of agency rules. Citing Court precedent, he noted that “Vacatur is therefore essential to fulfill the ‘basic presumption of judicial review’ for parties who have been ‘adversely affected or aggrieved’ by federal agency action.” Justice Kavanaugh further observed that the absence of vacatur would also create an asymmetry;” and “[e]liminating vacatur as a remedy would terminate entire classes of administrative litigation that have traditionally been brought by unregulated parties.”

“Profoundly destabilizing.” In a 24-page dissent, joined by Associate Justices Sonia Sotomayor and Elena Kagan, Associate Justice Ketanji Brown Jackson stated, “Today, the majority throws that caution to the wind and engages in the same kind of misguided reasoning about statutory limitations periods that we have previously admonished.” She added, “The flawed reasoning and far-reaching results of the Court’s ruling in this case are staggering.” Jackson further rebuked the Court’s majority opinion noting “The Court’s baseless conclusion means that there is effectively no longer any limitations period for lawsuits that challenge agency regulations on their face. Allowing every new commercial entity to bring fresh facial challenges to long-existing regulations is profoundly destabilizing for both Government and businesses. It also allows well-heeled litigants to game the system by creating new entities or finding new plaintiffs whenever they blow past the statutory deadline.”

Industry reaction. The National Retail Federation welcomed the Court’s ruling. “There are multiple reasons why the statute of limitations has not expired in this case,” NRF Chief Administrative Officer and General Counsel Stephanie Martz [said](#). “The bottom line is that a small business harmed by a faulty regulation should not be denied its day in court based on a technicality, especially one that has been in dispute. The Federal Reserve set the cap far higher than intended by Congress and merchants like Corner Post have paid millions of dollars too much as a result, in turn driving up prices for their customers. That harm is ongoing and hasn’t been changed by the passage of time. The Supreme Court has made the right decision by allowing this lawsuit to be decided on its merits.”

Commenting on the decision, Devin Watkins, an Attorney with the Competitive Enterprise Institute, [stated](#) the Court “has finally ended the Catch-22 at the center of the default statutes of limitations in federal law. For too long, the government prevented people from challenging its actions if no one had been harmed yet—and then, when the harm occurred, the government argued that it was too late to make such a challenge.”

The case is [No. 22-448](#).

Judge: Barrett, J.

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Companies: Competitive Enterprise Institute; Corner Post, Inc.; National Retail Federation

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