# Consumer Finance Monitor (Season 7, Episode 31): Universal Injunctions, Associational Standing, and Forum Shopping – Their Effects on Legal Challenges to Regulations

Speakers: Alan Kaplinsky and Alan Trammell

Alan Kaplinsky:

Welcome to the award-winning Consumer Finance Monitor podcast where we explore important new developments in the world of consumer financial services and what they mean for your business, your customers, and the industry. This is a weekly show brought to you by the Consumer Financial Services Group at the Ballard Spahr law firm, and I'm your host, Alan Kaplinsky, the former practice group leader for 25 years, and now the senior counsel of the Consumer Financial Services Group at Ballard Spahr. And I'm delighted to be moderating today's program.

For those of you who want more information, either about the topic that we're going to discuss today or virtually any other topic in the consumer finance world, don't forget about our blog, also call Consumer Finance Monitor. We've hosted our blog since 2011 when the CFPB became operational, so there is a lot of relevant industry content there. We also regularly host webinars on subjects of interest to those in the industry. So to subscribe to our blog or to get on our mailing list for webinars, please visit us at ballardspahr.com. If you like our podcast, please let us know about it. You can leave us a review on Apple Podcasts, YouTube, Spotify, or wherever you access your podcast programs. Also, please let us know if you have any ideas for other topics that we should consider covering on our program, or speakers that we should consider inviting as guests on our show.

So let me tell you what we're going to talk about today, and then I have a very special guest on our show who is truly an expert in this area. The topic we're going to talk about are two related topics. One is the topic of universal or nationwide injunctions. The second related topic that we'll get to toward the end of our show today deals with So-called forum shopping or judge shopping.

Before I introduce our guest and we launch into our program, let me give you a quick example of a universal injunction or a nationwide injunction in a situation where it was absolutely necessary in order for all parties that were affected in the same manner by a new final regulation that had been issued by the CFPB that got challenged in court. And what happened here is a couple of trade associations, the Chamber of Commerce, the American Bankers Association, challenged a regulation issued by the CFPB. And there has literally been, since the start of this year, that I would consider it an avalanche of regulations issued by the CFPB.

And I think that's going to continue for the next month because there is a mad dash to what I'll call the Congressional Review Act deadline. The Biden administration wants all of its agencies to get cracking on proposed regulations that are in the pipeline but have not yet been finalized. And that's so that they will be able to have comfort in knowing that there aren't the votes, at least in the Senate, well, certainly President Biden will veto any action that's taken under the Congressional Review Act to override a regulation. It takes a majority of the Senate, majority of the House and the signature of the President. But there's a lot of uncertainty about next year. We don't know who the next president is going to be. And we don't know how friendly the next Congress is going to be to regulations that are issued by the Biden administration. So there's got to be a lot of this going on, making our topic of nationwide junctions all the more important.

But let me tell you briefly, and this is a true story. So lawsuit gets filed challenging the regulation in federal court in Texas, court issues an injunction, but says that it only applies to members of the Chamber of Commerce and the American Bankers Association. And I think there may have been one or two other trade associations. In other words, it didn't apply nationwide to non-parties. So all of a sudden my phone starts ringing from clients of mine who aren't members of those trade associations and they want to know what do they do? I said, well, you got a couple choices here. One is you can join one of these trade

associations whose members are the beneficiaries of the injunction, or you can file a separate pleading to become a plaintiff in the lawsuit, accompany it by a motion for preliminary injunction, and hope that the court allows you to join the lawsuit and grants the preliminary injunction and you'll be fine. Well, what happened here is the court got inundated with Joinder motions and with motions for preliminary injunctions and finally threw up his hands, it was a male judge, and said, "All right, enough is enough. I'm going to grant a nationwide universal injunction." And I think at least from my standpoint, that made a lot of common sense to me.

Anyway, let me now without further ado, introduce our guest. And our guest today is Alan Trammell. Alan is An associate Professor at Washington and Lee University School of Law, his scholarship in teaching focus on civil procedure, federal courts, constitutional law and conflict of laws. His scholarly articles have appeared in some of the company's most prestigious journals and law reviews including, Columbia, Virginia Cornell and Texas Law Reviews. He's an award-winning teacher. And as an expert on universal injunctions, he's often invited to talk about his research at conferences and on podcasts. And he's written extensively on this topic and what got me interested in talking to Alan on our podcast show was a law review article that was exactly on point.

So anyway, Alan a very warm welcome to you.

Alan Trammell:

Thank you very much, Alan. I'm delighted to be with you.

Alan Kaplinsky:

Great. So as I said to our listeners, we're going to begin our program by talking about universal injunctions or sometimes called nationwide injunctions, and they've generated enormous controversy and debate since the earliest days of the Trump administration, and there's been a resurgence of interest in recent years as I described in my introduction. First, let's level set and define for our listeners exactly what these injunctions are and why they're controversial.

Alan Trammell:

Sure. Let's start with what I think of as a working definition. Courts haven't really given us a firm definition of what counts as a nationwide injunction or a universal injunction. But by and large, what we are thinking about is a remedy that is focused on the totality of the defendant's conduct rather than remedying the specific harm that the plaintiffs in this particular lawsuit have alleged. So let's take a quick example. Very shortly after Donald Trump was inaugurated, he implemented a policy that was a severe limitation on immigration, to put it mildly, from predominantly Muslim countries, often referred to as the travel ban. You had some plaintiffs who sued and a district judge in the Western District of Washington agreed that this particular policy was unlawful. And so the judge issued an injunction, but it didn't simply benefit the very specific plaintiffs who were before him. What the judge said was the Trump administration is not allowed to enforce this policy anywhere or against anyone.

And so what strikes a lot of people as controversial about this is that you have a judge in one district who is essentially tying the hands of the President of the United States as to this policy in its totality. Now, I want to suggest that geography is a little bit of a red herring, but it is the sheer breadth of the remedy that is what provokes a whole lot of people to think that something might be amiss there. And we can get a little bit deeper into why that might be the case. But it is this sweeping remedy that again, is focused not just on the specific plaintiffs, but benefiting everybody who is similarly situated in the absence of a properly certified class action who might be affected by that particular policy.

Alan Kaplinsky:

Okay. So you seem to suggest that universal injunctions entered the popular imagination during the Trump administration, but my understanding is that these remedies go back much further than that.

Alan Trammell:

That's right. So the Obama administration and the George W. Bush administration faced a small number of what I'm going to call universal injunctions. By the way, let me add on the nomenclature point. The reason that I tend to prefer universal

injunctions today is because it is focusing not on the cosmic universe, but it's focusing on the universe of the defendant's conduct. Now that might be nationwide if you're talking about the Trump administration, it might be statewide if say you're talking about a state voting regulation that is going to apply throughout an entire state, but it's that focus on defendants that we're really concerned about.

So yes, President Bush, President Obama faced a number of these, but you really see these taking off during the Trump administration. As I suggested just a couple of minutes ago, even within the first couple of weeks, some of these Trump administration policies were being enjoined.

But it's a little bit of a mistake to think about these as brand new. Some scholars will trace these injunctions back in not particularly fraught situations in say in the context of the Administrative Procedure Act to the 1960s. Other scholars will say, look, we actually see these kinds of universal injunctions as early as the 20th century, perhaps even before. And legal historians will say, well, the Bill of Peace, which even predates the United States itself, was a pretty close analog to these universal injunctions.

So it's true that it was an extraordinary remedy, but it's also true that we really see this surge of interest in universal injunctions with the Trump administration. There's a recent article in the Harvard Law Review that does its best to try to count how many of these universal injunctions have been issued when you're looking at the second Bush and the Obama administrations we're by and large talking about a low double-digit number of universal injunctions. When it comes to the Trump administration, which again was only four years, the Harvard Law Review's count is 64 such universal injunctions that the Trump administration faced.

Alan Kaplinsky:

I'm wondering, and maybe we're going to get to this a little bit in more detail later on, Alan, but I'm wondering of these universal injunctions that were sought and granted, how many of them involved associations or associational standing where the injunctions that were issued were given to people who were members of an association as opposed to individuals or companies that sought injunctive relief?

Alan Trammell:

That's a great question. I don't have those numbers at my disposal, but I will say that there are a couple of factors that are going to play into this. One is, the decision in Massachusetts v. EPA where the Supreme Court in 2007 said that states would be given "special solicitude" when they're trying to get standing in order to get into federal court. Usually when we're thinking about these kinds of universal injunctions, to challenge a particular presidential administration policy or regulation. All right, so that lets states get into courts a little bit more easily.

Where you see plaintiffs having a lot more trouble is when it comes to associational standing. These are situations where you have an association that I would call an empty vessel. It's not an organization that does any particular activity on its own. You might think of a university or a corporation that has an existence in its own right. A university or a corporation can experience harm. For instance, it can suffer so-called wallet injury, it can be out money. An association's different. The reason I call it an empty vessel is because you essentially have these interested individuals who might not have standing on their own, who are trying to band together. The example that you cited in the introduction, I think is a very nice example of it. So these are individuals who are saying, "Well, we're a group, so can't we as a group get into court?" And the Supreme Court over the years has said, "Well, maybe." But the test is going to be pretty stringent. You're going to allow an association more or less to stand in the shoes of its constituent members if those members would have standing on their own.

So during the Trump administration, you very famously had CREW, that's Citizens for Responsibility and Ethics in Washington, who are trying to sue Donald Trump for violating the emoluments clause by continuing to do business while he was the President of the United States. Lower courts essentially said, "Look, this really isn't going to work because this association basically exists for the sole purpose of trying to sue Donald Trump." Now, it existed before Donald Trump became president, but the courts were saying, "Look, this is just self-inflicted injury. You're not actually trying to vindicate any genuine interest, whether that's a monetary interest or some other concrete interest that you as an organization have."

We see the same tax being tried. Now you can think about the mifepristone litigation coming out of the Fifth Circuit. We're imminently expecting a decision from the Supreme Court, and here the Supreme Court likewise seems skeptical about whether an association of this nature, this empty vessel, is going to have standing. They're deeply skeptical of whether the individual members who have banded together are going to be able to show that concrete and particularized injury. In fact, that the court often says is the hallmark of Article III standing.

Alan Kaplinsky:

Okay. So you've described to us a pretty lengthy history behind these injunctions, but courts really started issuing them with increasing frequency during the Trump administration, and that's continued through the Biden administration and this is when we see the start of a major debate about universal injunctions, right?

Alan Trammell:

Yeah, that's absolutely right.

Alan Kaplinsky:

Right. Let me come back to something you said, that geography is a red herring. What did you mean by that?

Alan Trammell:

Sure. I think that when, people perceive something as being amiss about these universal injunctions, they see the sheer breadth of the injunction. They see one district judge in the Western District of Washington tying the hands of the President of the United States to implement a particular policy anywhere in the entire country.

But equity has always operated across these geographic boundaries. Let me take a somewhat silly example. Imagine that I started roasting coffee beans and I developed a trademark with a couple of green concentric circles and a jaunty mermaid in there, and then Starbucks sued me for trademark infringement. Well, if they sue me, then they could get an injunction for everywhere that I am using this particular trademark where I am causing consumer confusion. And it doesn't matter if I have my coffee shops just in this particular district where I'm being sued or throughout the entire country. If I am causing harm outside of these geographic boundaries of the court, then I can be subject to an injunction.

So that's why I say that geography is a bit of a red herring. I think that the focus really should be on the fact that these universal injunctions are intentionally benefiting people who are not parties, who aren't formally joined as members of a class, who are not joined to the lawsuit itself. And yet the court is issuing a remedy that is directly benefiting those non-parties, that's where we get into the really controversial aspects of universal injunctions.

Alan Kaplinsky:

Right. So what would you say are the real problems with universal injunctions?

Alan Trammell:

Yeah, that's a great question. For one, I think that it is not a constitutional problem. There was a lot of sturm und drang during the Trump administration about whether there was an Article III problem here for reasons that we can get into if you'd like. I actually don't think that Article III has much of anything to do with this. To the extent that judges are issuing injunctions that are improper, that are too broad in their scope, that are benefiting people who should not be direct beneficiaries, that goes to the scope of the remedy and that is simply reversible error. That's not really a jurisdictional problem. So instead, I think of the major problems as what I would call the one and done problem, that is to say that if a plaintiff or a group of plaintiffs wins one lawsuit, then they can essentially shut down all other litigation. That in turn leads to prematurely freezing the law in place, preventing the usual percolation of these issues through the lower courts before they ultimately reach the Supreme Court, not giving the government a whole lot of latitude to continue litigating its position in good faith, incentivizing forum shopping, which we're going to get to in just a few minutes, and asymmetric preclusion, meaning that the government essentially has to run the table.

And it doesn't matter how many times the government wins, if they suffer even one single loss on a particular issue, and then that court issues a universal injunction, well, it effectively undoes all of the earlier victories that the government had won. So I think that all of those are very genuine concerns, but they're not constitutional in nature.

Alan Kaplinsky:

Yeah. Yeah. So without getting into a great deal of detail about the constitutional issues, we may have a few constitutional nerds like myself that are involved in the podcast show. Why is it not a constitutional problem?

Alan Trammell:

The argument on the other side, the Trump Justice Department argued that there was a constitutional problem. Essentially, they were saying that there is not a case or controversy if I as a non-party directly benefit from an injunction. Now, I think that's incorrect because in most of these cases you have plaintiffs who genuinely suffered a concrete injury, they were able to establish standing, and thus you did have a justiciable case or controversy in front of the federal courts. To the extent there is a problem, it is coming on what I call the backend of litigation when a court is issuing the remedy.

So let me give another silly example. Imagine that you crash into my car, I drive a 2011 Prius, and yet the court decides to award me a million dollars in damages. All right, my 2011 Prius is clearly not worth a million dollars. Well, we don't say that when the court issued that million dollar judgment against you that it was without jurisdiction, we simply say that it has engaged in reversible error. And so I think that that's how we should view universal injunctions. If a court has issued a remedy that is too broad, if it is benefiting people who shouldn't be beneficiaries, that shouldn't cause us jurisdictional consternation, we should simply say that's reversible error.

Alan Kaplinsky:

Okay. So it's fair to say that you think that universal injunctions are constitutional, but a bad idea?

Alan Trammell:

I think that that's a very fair assessment. In the mind run of cases, they probably are not a good idea. I think that a lot of courts, district courts and courts of appeals, have largely come to that conclusion. Now, I don't think that class actions are a panacea. That's what the Trump administration's Justice Department and certain scholars were arguing. Look, if you've got this large group of people just certify a class action, and you can have group-wide relief. The problem is that class actions aren't always going to be able to take care of things expeditiously enough. I mean, when you're dealing with imminent harm, for instance, green card holders who are trying to get back into the United States, time is of the essence. You have other situations where there simply is no incentive to certify a class action.

You can think about a Freedom of Information Act request where a plaintiff seeking information from the government has no incentive to try to band together with other people in a class action, because the class action won't give anything that individualized litigation could not. So class actions in short, I think are a really good mechanism to address some of these problems of aggregate litigation, but it's not the only solution. And so I do think that there are limited circumstances where these universal injunctions can be appropriate.

Alan Kaplinsky:

Well, let's talk about that. When do you think they make sense?

Alan Trammell:

To my mind, the quintessential situation is going to be perhaps even farther afield than the example that you started our conversation with. It's going to be a situation where the law is very clearly settled and government officials are actively trying to avoid their obligations. In other words, they're acting in contravention of very clearly settled law. And so, you can think back to massive resistance during the desegregation battles in the 1960s and the 1970s. More recently, you can think about certain individuals who have resisted complying with Supreme Court's clear directions on issues, for example, dealing with

same-sex marriage, refusing to issue marriage licenses to same-sex couples. When you have government officials who are clearly acting in contravention of their obligations, then I think it makes sense to issue these sweeping injunctions. And essentially tell government officials, you have to comply with the law and not force plaintiffs to engage in the serial litigation and essentially play whack-a-mole with these government officials.

Now, other scholars will say, "Oh, look, it should be broader than that. And equity, by its very nature, involves making judgment calls looking at how things work in the real world." One of my colleagues at W&L, Doug Rendleman, writing fairly early on in these debates about the Trump administration's universal injunctions said, "I actually think courts are doing a pretty good job. They're weighing the equities as they should, and they're not really abusing their discretion. They're acting well within the scope of what we think a court of equity should do."

Alan Kaplinsky:

Yeah. So I want to get your answer, Alan, to my example that I gave at the beginning of the program. It did not involve an issue of settled law. This was a case of first impression involving challenges to the regulation under the Administrative Procedures Act, under the certain statute that authorizes the rulemaking and a number of different things, and these were new issues for the court to resolve. And it just seemed to me that it makes sense in that situation not to say, "No, I'm not going to issue universal injunction. If you want to be covered by it, you've got to join one of those trade associations, or you've got to join the case and get your own injunction." I mean, what is your reaction to that?

Alan Trammell:

I think that based on the framework that I've laid out in my scholarship, technically I should have problems with that. But I am very, very sympathetic to the practical problems. And so again, my colleague, Professor Rendleman would say, "This is exactly the situation that courts should be trying to avoid. They have these tools at their disposal to avoid inefficiency. It doesn't sound like there's overreach on the part of the district court judge, and there's just no reason to force the court and to force the individual plaintiffs to play this game of whack-a-Mole."

I'll note, as something of an aside, that there is a closely related debate about the Administrative Procedure Act and whether the language about setting aside a regulation essentially calls for a universal injunction or not. I play in that sandbox a little bit, but I will leave it to my colleagues who are much more expert in administrative law to tell us exactly what the Administrative Procedure Act means.

Alan Kaplinsky:

Yeah, I forgot about that, that there is that language, and I think a few courts have dealt with it. Why is it that the U.S. Supreme Court hasn't spoken about this issue? At least I don't think they have. Right?

Alan Trammell:

We definitely have some dicta in the Hawaii case dealing with immigration in the Trump administration. You have Justice Thomas staking his claim to what people have called equitable originalism saying, "Look, if this kind of remedy did not exist at the founding, then that is not a remedy that federal courts are able to offer." It is, as Justice Thomas would have it, unconstitutional under Article III. Justice Gorsuch similarly expressed his skepticism of the propriety of these universal injunctions. During oral arguments he mused about whether they should be called cosmic injunctions, but you can tell from the tone of his questioning and his writing that he is also deeply, deeply skeptical of what is going on with these injunctions. But as I say, it's all dicta at this point.

Alan Kaplinsky:

Yeah. Do you think that the Supreme Court's waiting to get the right case grant cert and bring some uniformity to how the courts are dealing with the issue?

Alan Trammell:

I think they very well could be waiting for the right vehicle to decide this. You have some conflicting precedents on closely related issues, but where I really see the court focusing is on standing. We were talking about associational standing before, and the Supreme Court has really policed this area quite stringently. If you're reading the tea leaves, I think that the mifepristone case is one in which the Supreme Court is going to be ready to say the doctors in this particular association don't have standing. And so that is going to be the mechanism by which I think the court is going to try to shut down some of these more adventurous attempts to get these kinds of sweeping universal injunctions. They're going to peg it more to what I'm calling those front-end questions of standing rather than technically focusing on these back-end remedial questions.

Alan Kaplinsky:

So with due respect to the professors that are engaged in the debate, including Professor Rendleman, were there any real-world consequences?

Alan Trammell:

I think that there very much were. Again, when you think about the sheer breadth and number of universal injunctions that we were looking at during the Trump administration, you were seeing them affecting all manner of issues relating to immigration, who's allowed back into the country, who can serve in the United States military with respect to the Trump administration's ban on transgender service members? You can think about environmental regulations, and many of those same issues are coming up again today where the Biden administration is facing universal injunctions. For instance, dealing with the original 100-day moratorium on deportations, regulation of drugs by the Food and Drug Administration. There are all sorts of consequences to this.

And a lot of times, the real action is coming with respect to provisional remedies rather than on the ultimate question of who has the better view of the law. Again, when you're thinking about the green card holder who's trying to get back into the United States, it doesn't really matter if that person's position is ultimately litigated and vindicated on appeal. What matters is can that person get back into the United States today or tomorrow? And so the availability or not of these provisional remedies can make all the difference.

Alan Kaplinsky:

Right, right. So Alan, there's been renewed interest in universal injunctions, as you pointed out. Is that just because the shoe's on the other foot with now conservatives challenging Biden administration policies, or is something new going on here?

Alan Trammell:

I think that there definitely is an element of the shoe being on the other foot, and we see this toggling back and forth. So you had a lot of conservative scholars and jurists criticizing what was going on during the Trump administration when judges were issuing these universal injunctions against a Republican president. And now you have a whole lot of conservatives trying to use this mechanism to challenge Biden administration policies, and you have more progressive scholars and jurors saying, oh, well this is illegitimate. So yes, there is that shoe on the other foot phenomenon.

But there's something different, and it's what I would call universal injunctions 2.0, where not only do you see litigants going to courts that they think of as more favorable, but actually trying to get a very specific district court judge to hear the matter in the first instance. And by the way, you see the forum shopping happening on both sides. When Donald Trump was president, you had litigants going to traditionally bluer more progressive courts such as the Ninth circuit, whereas when you have President Biden's policies being challenged, you have plaintiffs going to the Fifth Circuit, which is generally regarded as the most conservative circuit in the country today.

Alan Kaplinsky:

Yeah. Well, that's a good segue into this related topic of forum shopping or judge shopping. Can you define for our audience what those two terms mean? Are they really synonymous or is there a difference between the two?

Alan Trammell:

Sometimes they are used interchangeably. I think of them as being very, very different. We hear about forum shopping a lot in a whole lot of different contexts, whether that is in the context of conflict of laws, whether we think about what's going on with challenging administration policies. Forum shopping is something that lawyers have talked about for decades, if not centuries. And it's often talked about as though it is something terribly nefarious. My view is that forum shopping itself is not nefarious, that it is simply one of the tools that lawyers have in their toolkit. And in fact, it would be irresponsible if you are not thinking as a lawyer about all of the ways that you could construct a lawsuit that is going to be most advantageous for your client. So forum shopping, choosing a particular court, is something that lawyers should be thinking about, and it's a problem only when it bespeaks a deeper evil, such as getting an entirely different set of laws.

Judge shopping, I think of as perhaps a very specific surgical example of this where you're not just going to a court that you think of as having better procedure or more favorable precedent, but actually getting the judge you think is going to rule in your favor because of a predisposition to your particular litigation position. And I do think that even though it might be difficult to draw a precise line between those two, that judge shopping is far more likely to be nefarious and to bespeak those deeper evils than forum shopping.

Alan Kaplinsky:

Right. It doesn't sound right to say that you're shopping for a judge. It sounds like you're shopping for a car or something. It just doesn't seem to fit with our system of justice.

So let's talk, get a little bit into the nitty-gritty of how this works. I mean, you are a, let's say, a trade association. You've been told by your members to challenge a Biden administration regulation issued by the CFPB, and you're asked, "Where should the lawsuit be brought?" And I think it's almost a knee-jerk reaction that it should be brought somewhere in Texas. Why would you bring it in Washington DC, which obviously you could because most agencies have their home office in Washington DC, but the federal district court bench is more balanced there. Maybe there are more liberal justices than conservative justices, and the backstop of the DC circuit is certainly considered more liberal than the Fifth Circuit Court of Appeals, which is the backstop for a lawsuit in Texas.

So the client asks you, "What are the legal requirements?" I've heard of there's got to be jurisdiction, there's got to be venue. What does that all mean? Let's start with jurisdiction first.

Alan Trammell:

Sure. If you are challenging a particular presidential administration's policy, it's usually going to be pretty easy to get into federal court on federal question jurisdiction. You're challenging a federal law. You might be challenging how a particular state official is administering it, in which case you can fairly easily bring a 1983 action. If you're challenging a regulation, as in your example, you very often are going to have the Administrative Procedure Act giving you that cause of action and conferring jurisdiction. So very often, subject matter jurisdiction is going to be the easier part of this calculation. I don't want to say that it's always easy, but it's going to be a whole lot easier.

Now, subject matter jurisdiction pertains to every single federal court in the United States. So the question then becomes, which federal court are you going to go to? You've got issues of personal jurisdiction, but where we get into judge shopping, we're really thinking about venue provisions and a confluence of a whole lot of factors that have enabled usually more conservative plaintiffs to go to Texas and engineer these particular lawsuits to get a very specific result.

Alan Kaplinsky:

Right. So what's the requirement for getting venue? Is it enough to have one member of a trade association who's doing business in that area where the lawsuit gets filed, or does it take more than that? Or is it just a discretionary thing on the part of the judge? I know there's this doctrine called forum non conveniens, the judges will often use. It seems like it's a sort of a squishy subject where the rules are not ironclad. What do you think?

Alan Trammell:

Let me break this down into a couple of different issues. So let's start with venue itself. By and large, what we're thinking about are a couple of different provisions in the federal venue statute. You can have what's called residential venue, if you've got all of the defendants who reside in the same judicial district or transactional venue. And here the statute says this is going to be a district in which a substantial part of the events or omissions giving rise to the claim occurred.

Now, when you're talking about an association, the way that the theory works is that you'll get this association, they will try to target a particular district, and even more than that, they will try to target a particular division within the district. Some districts are broken down into divisions, and some divisions will have only one or two judges. So if you can get into one of these specific divisions that has only one or two judges, then instead of just being in a lottery where you don't exactly know who's going to hear your case, you have in fact chosen the very specific judge who will hear that case.

Now, this is where it ties back into the standing issue that we had talked about a few minutes ago. It can be difficult for these associations to get standing, but the legal theory that they invoke is, well, we just need some member of our association who, for example, has a medical practice in this specific division. That's what was tried in the mifepristone case with the organization there, that is the Alliance for Hippocratic medicine. So they tried to say, "We have some doctors in this particular division." Now this is the Amarillo division of the Northern District of Texas. That's where a whole lot of this litigation is being brought in front of Judge Kacsmaryk, he is the judge who hears 95% of the cases that are brought in that division.

So that's the mechanism that they use. And they also know that appeals are going to be taken to the Fifth Circuit, which has over the last couple of years, rendered increasingly conservative decisions. And the Supreme Court is the only backstop. Again, we're about to see in the mifepristone case if the Supreme Court is going to clamp down on some of these more adventurous efforts on the part of associations to choose the specific judge who hears their case, but they can't catch them all, as Judge Reinhart once said.

Alan Kaplinsky:

Right, right. So let me ask you a couple of other things, and this is a situation that has risen right now in another challenge to a CFPB regulation dealing with late fees. CFPB wants to reduce the late fees on credit cards from $31 up to $41, down to $8 per delinquency. If there's been a lawsuit filed, a motion for preliminary injunction has been filed. And then the plaintiff immediately concurrently with the filing of the complaint, seeks a TRO or a preliminary injunction. But the court looks at this complaint and the allegations that focus on venue and says, "It's not a big connection to my district. I want the parties to brief the issue of venue. I'm more interested in dealing with that than in dealing with a TRO or preliminary injunction." And the court decides, I'm going to transfer a venue. Even though this was a very time-sensitive lawsuit that got filed with a very short window for the industry to get relief before the rule would go effective, and it was going to cost the industry millions and millions of dollars to get ready for the new regulation.

What's your reaction to that? Is that putting the cart before the horse, or is that the first thing that a court should look at before they deal with the merits of the lawsuit? Even if you're talking about provisional relief.

Alan Trammell:

It's hard to generalize because almost all of these are going to be equitable questions. And in almost all of these instances, we are talking about reposing an enormous amount of discretion in district court judges. And generally, appellate courts are going to be loath to reverse them for the way that they choose to exercise their discretion. So it might be that a district court says, "Hold on, you really are putting the cart before the horse. You are really trying to force my hand on this preliminary relief. When in fact, what that is going to do is more or less put a thumb on the scale, a huge thumb on the scale in favor of your side as to the merits."

Now, it might be that there is some ginned up urgency there and that a court can see through it, or it might be that there is genuine harm that the plaintiffs might experience in the absence of this kind of preliminary relief.

So again, that's going to be left to the discretion of the district court. That is also going to be true with respect to transfer venue. Which is a federal statutory provision that is based on that common law doctrine of forum non conveniens, but in fact is way more liberal because unlike a forum non conveniens dismissal, transfer is seamlessly moving a case within the federal

court system. It doesn't involve a dismissal, it doesn't involve a potential statute of limitations problem. So it is going to be granted far more liberally than a motion to dismiss for forum non conveniens.

Let me get the specific language of that statute. This is 1404. It says that, "For the convenience of parties and witnesses, in the interest of justice, a district court may transfer any civil action essentially to any other district court or division where the action could have been brought." So our key language is the convenience of parties and witnesses and the interest of justice. So again, we see that the language is conferring an enormous amount of discretion on district courts.

So if they choose to transfer to a place where the lawsuit could properly be heard, then an appellate court is usually going to leave that decision in place. Or if a court hangs onto the case, similarly, an appellate court is going to be loath to reverse.

Alan Kaplinsky:

Am I right, Alan, that if a court orders a transfer of the case to another federal court somewhere else in the country, that in and of itself is not an appealable order, right? You can't appeal that.

Alan Trammell:

That is correct. That is considered an interlocutory issue, and so you're not going to have a final judgment out of that. There have been a few doctrines that parties have used to try to get immediate review, the collateral order doctrine, the statute that permits certification of certain interlocutory questions. But over the last couple of decades, courts have been increasingly willing to grant mandamus relief. Now, that's not to say that they grant it regularly, and courts have not developed consistent standards around when to grant mandamus over abuse of discretion in decisions as to transfer of venue. But there is at least that mechanism by which appellants can get review before a final decision.

Alan Kaplinsky:

Yeah. Now all of a sudden there's been a lot of, I guess you could call it, political discussions that have been going on in Congress where the Democrats are very upset the way all these Biden regulations are being challenged in Texas, and a lot of them are getting invalidated. And he's introduced a bill that, as I recall, what it does, just if you file a lawsuit in the Northern District of Texas in a certain division, you don't automatically get a judge in that division. There would be a lottery that would include all the active judges either in the northern, I think in the northern district of Texas, or maybe even in all the districts in the state of Texas, I'm not sure. And then the Judicial Conference has come down with a recommendation that's not binding on any of the courts.

What's your reaction? Is any of these things a good idea for solving this so-called problem?

Alan Trammell:

I think that some of them are a good idea, but they are simply one step, and I don't think that we should view them as a panacea or in any way dealing with some of the partisan issues that we're seeing across all sorts of federal courts today.

So the Judicial Conference really started this conversation by proposing more or less what you just recapped, which is that if a plaintiff files in a particular division and seeks a universal injunction against a state law that would be applied statewide or an injunction that would be a nationwide injunction against the federal government, then to avoid this perception of judge shopping, you shouldn't just assign it to say, Matthew Kacsmaryk, the one district judge in his particular division in Amarillo, Texas. Instead, this case would go into the usual lottery, and it would be throughout the entire northern district of Texas. So that would reintroduce some element of chance as to which judge is going to hear the case in the first instance.

Now notice what this doesn't necessarily solve. It doesn't necessarily solve the problem that the Fifth Circuit seems in many instances, to be going rogue, to be running pretty far afield of the supreme Court's jurisprudence, but it at least as I say, would alleviate the perception that plaintiffs can choose their particular judge and would reintroduce a certain amount of randomness with the lottery.

Now, a number of judges, including the chief judge of the Northern District of Texas, and the chief judge of the Southern District of Texas have said This particular proposal by the judicial conference is not binding. And in fact, it runs afoul of a federal statute that says, chief judges of the individual districts decide how these cases are going to be allocated.

So in response to that, Senator Schumer said, "All right, I'm going to introduce a bill that would actually put into federal law this provision of random assignment when plaintiffs are seeking these universal injunctions against a state or a federal statute or regulation."

Again, I think that it might be beneficial, but my view is that this is not doing, I shouldn't say it's not doing much of anything. I think that it certainly is solving the perception of being able to choose the judge. In your case, that is important, but it is only one step. We have many, many more problems, in my view, with judges who are not adhering to Supreme Court precedent, and the problem that there are these increasingly inventive ways to handcuff a duly elected administration.

Alan Kaplinsky:

Right. And as you point out, even if you get a random district court judge in federal court in Texas, if your preliminary injunction is denied, you can take an immediate appeal to the Fifth Circuit and the Fifth Circuit's, predominantly a conservative bench.

Alan Trammell:

That's right. And again, there is not a lot of consistent jurisprudence around when mandamus should be granted, when a judge chooses to transfer venue or chooses not to transfer venue. So the Fifth Circuit really would still be left to its own devices as to the propriety of allowing specific judges to hear these cases.

Alan Kaplinsky:

Right, right. Okay. Well, this has been a absolutely fascinating conversation. And really want to thank you, Alan, for taking the time today to share with our listeners your very, very extensive knowledge about these two subjects that have really come to the fore recently because of all the challenges to Biden administration regulations that are going on.

One thing I guess I should mention, I'm very focused on the CFPB because consumer finance is the subject of our podcast show. But the Biden administration has urged a whole bunch of agencies to issue regulations banning, so-called junk fees, and that affects a lot of agencies, not just the CFPB. And so there's going to continue to be more and more challenges by industries to some of these regulations that the administration considers junk fees, but the industry considers it something completely different than that.

But anyway, my thanks again, Alan, you really educated all of us today.

Alan Trammell:

Well, I appreciate the invitation and the opportunity to geek out over some of these issues that have been occupying my scholarly mind for the last few years.

Alan Kaplinsky:

Great.

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