

NOT FOR PUBLICATION

FILED

UNITED STATES COURT OF APPEALS

JAN 27 2023

FOR THE NINTH CIRCUIT

MOLLY C. DWYER, CLERK
U.S. COURT OF APPEALS

CONSUMER FINANCIAL PROTECTION
BUREAU,

Plaintiff-Appellee,

v.

NATIONWIDE BIWEEKLY
ADMINISTRATION, INC.; et al.,

Defendants-Appellants.

No. 18-15431

D.C. No. 3:15-cv-02106-RS

MEMORANDUM*

CONSUMER FINANCIAL PROTECTION
BUREAU,

Plaintiff-Appellant,

v.

NATIONWIDE BIWEEKLY
ADMINISTRATION, INC.; et al.,

Defendants-Appellees.

No. 18-15887

D.C. No. 3:15-cv-02106-RS

Appeal from the United States District Court
for the Northern District of California
Richard Seeborg, Chief District Judge, Presiding

Argued and Submitted November 18, 2020
Pasadena, California

* This disposition is not appropriate for publication and is not precedent except as provided by Ninth Circuit Rule 36-3.

Before: CALLAHAN, BUMATAY, and VANDYKE, Circuit Judges.

In Case No. 18-15431, Nationwide Biweekly Administration, Inc. (“Nationwide”) appeals the district court’s conclusion that it engaged in deceptive practices in violation of the Consumer Financial Protection Act, 12 U.S.C. § 5536(a). In Case No. 18-15887, the Consumer Financial Protection Bureau (“CFPB”) cross-appeals the district court’s decision to deny restitution. We consolidated the appeals for appellate consideration.

In 2015, the CFPB brought a civil enforcement action against Nationwide. Following a bench trial, the district court found that Nationwide made materially misleading representations regarding its loan repayment program. On September 8, 2017, the district court issued an opinion and order imposing a statutory penalty of \$7,930,000 and permanent injunctive relief. In the same order, the district court declined to award the \$73,955,169 in restitution sought by the CFPB. Both parties timely filed appeals.

During the pendency of the cross-appeals, on June 29, 2020, the Supreme Court held the CFPB Director’s for-cause removal protection violated the Constitution and severed the offending provision. *See Seila Law LLC v. CFPB*, 140 S. Ct. 2183, 2211 (2020) (“*Seila Law I*”). Shortly after, on July 8, 2020, Director Kathleen Kraninger ratified the CFPB’s pre-*Seila Law I* decisions “to file the lawsuit against [Nationwide], and to file a notice of appeal” to this court.

On November 18, 2020, we held oral argument on the cross-appeals. That same day, we vacated submission of the cross-appeals pending our court’s resolution of *CFPB v. Seila Law LLC*, No. 17-56324 (“*Seila Law I*”). On December 29, 2020, our court issued the decision in *Seila Law II*, 997 F.3d 837 (9th Cir. 2021) (amended on May 14, 2021). On January 12, 2021, we further vacated submission of the cross-appeals pending our decision in *CFPB v. CashCall, Inc.*, No. 18-55407. On May 23, 2022, our court issued an opinion in *CFPB v. CashCall, Inc.*, 35 F.4th 734 (9th Cir. 2022). Furthermore, while the cross-appeals were held in abeyance, on June 23, 2021, the Supreme Court decided *Collins v. Yellen*, 141 S. Ct. 1761 (2021), which concerns remedies for constitutional separation-of-powers violations.

On May 24, 2022, we ordered supplemental briefing from both parties, which was completed on August 2, 2022. Exercising our jurisdiction under 12 U.S.C. § 1291, we vacate the district court’s order and remand, allowing it to reassess the case under the changed legal landscape since its initial order and opinion. While we do not limit the issues for consideration on remand, we specifically bring the district court’s attention to the following questions:

1. Nationwide believes that this case is distinguishable from *Seila Law II* and *CashCall* and that it is entitled to dismissal for the CFPB Director’s unconstitutional for-cause removal provision. Nationwide argues that Director Kraninger’s ratification was untimely and therefore invalid and that it can show “actual” or

“compensable harm” entitling it to relief. *See CashCall*, 35 F.4th at 742–43; *Collins*, 141 S. Ct. at 1788–89. On remand, the district court should determine the correct application of *Seila Law II*, *CashCall*, and *Collins*, in deciding these issues. The inquiries into the validity of the CFPB’s ratification and Nationwide’s showing of harm “turn[] on case-specific factual and legal questions” that should be resolved in the first instance by the district court. *Seila Law I*, 140 S. Ct. at 2208.

2. In briefing before the district court and in its supplemental briefing before this court, Nationwide contends that the CFPB’s funding mechanism is unconstitutional, violating the Appropriations Clause and the separation of powers. *See* 12 U.S.C. § 5497(a)(2)(C), (c)(2), (e) (automatically providing the CFPB with up to 12% of the Federal Reserve’s operating costs). The district court rejected the argument because it concluded the claim was “not tenable.” Since the district court’s order in 2017, our sister circuit courts have split on the issue. *Compare Cmty. Fin. Servs. Ass’n of Am., Ltd. v. CFPB*, 51 F.4th 616 (5th Cir. 2022) with *PHH Corp. v. CFPB*, 881 F.3d 75 (D.C. Cir. 2018) (en banc). Contrary to the CFPB’s contention, Nationwide did not forfeit the argument on appeal. On remand, the district court should provide further consideration to Nationwide’s argument on the constitutionality of the CFPB’s funding mechanism.

3. On cross-appeal, the CFPB urges this court to reverse the district court’s denial of restitution, which the CFPB maintains is mandatory and should be ordered

in the amount of \$73,955,169. We remand to allow the district court to consider the effect, if any, of *CashCall* and *Liu v. SEC*, 140 S. Ct. 1936 (2020) (discussing the bounds of equity practice), and whether the CFPB waived its claim to *legal* restitution by characterizing it only as a form of *equitable* relief before the district court. *See CashCall*, 35 F.4th 734 at 750.

In addition to these questions, the parties may raise, and the district court may consider, other issues raised on appeal. Our framing of the questions above should not be taken to provide our view of their merits. The parties and the district court are free to reframe the questions as they wish.

VACATED AND REMANDED.