

Summaries of Selected Opinions

No. 16-1252. Mayotte v. U.S. Bank National Ass'n. 1/23/2018. D.Colo. Judge Hartz. *CRCP 120—Nonjudicial Foreclosure—Real Estate Settlement Procedures Act—Rooker-Feldman Doctrine—Preclusion Doctrine.*

Plaintiff was the debtor on a note held by defendant U.S. Bank, NA. The note was secured by a deed of trust assigning a security interest in her home to the public trustee of Denver County and creating a power of sale in the trustee. Defendants filed a nonjudicial foreclosure action under CRCP 120 seeking title to plaintiff's home and obtained an order authorizing a foreclosure sale. Before the sale, plaintiff sued defendants in federal court seeking damages and a declaration that defendants had no interest in her home. The district court dismissed plaintiff's claim under the Real Estate Settlement Procedures Act (RESPA) and ruled that the *Rooker-Feldman* doctrine barred plaintiff's other claims.

Plaintiff challenged on appeal the dismissal under *Rooker-Feldman*. The Tenth Circuit explained that the CRCP 120 nonjudicial foreclosure procedure is available only if there is a deed of trust that authorizes sale of the property to pay a debt and names the county's public trustee as trustee. CRCP 120 requires creditors pursuing nonjudicial foreclosure to first obtain a Colorado trial court ruling that there is a reasonable probability that a default exists. The court examines only whether the facts authorize a sale and does not consider other issues that might affect the validity of the foreclosure. An order authorizing a sale is without prejudice to claims in an independent action seeking an injunction to prohibit the sale or other relief.

The *Rooker-Feldman* doctrine prohibits lower federal courts from modifying or setting aside a state-court judgment because the state proceedings should not have led to that

judgment. The Tenth Circuit held that the *Rooker-Feldman* doctrine did not apply to bar plaintiff's claims because she was not seeking to set aside the Rule 120 foreclosure order, and her claims were based on events predating the Rule 120 proceedings. Further, plaintiff could obtain damages without setting aside the foreclosure sale. Although her request that she be given title to her home could produce an inconsistent result with the foreclosure order, inconsistent judgments may be resolved by federal courts under the preclusion doctrine.

The dismissal of plaintiff's RESPA claim was affirmed. The *Rooker-Feldman* dismissal of the other claims was reversed and the case was remanded for consideration of whether the Rule 120 proceedings and the sale of plaintiff's home had any effect (preclusive, equitable, or otherwise) on the resolution of plaintiff's claims.

No. 16-1418. Hasan v. Chase Bank USA, N.A. 1/26/2018. D.Colo. Judge Moritz. *Fair Credit Billing Act—Amount of Credit Outstanding—Payment of Credit Card Balance—Plain Language.*

Plaintiff used credit cards issued by Chase Bank USA, N.A. (Chase) and American Express Centurion Bank (AmEx) to purchase nearly \$1 million of wine from Premier Cru to be delivered in the future. Plaintiff paid the balance due on the credit cards before receiving the wine. Premier Cru filed for bankruptcy before delivering the wine. Plaintiff sued Chase and AmEx asserting that under the Fair Credit Billing Act (FCBA) he was entitled to a refund of the amount he paid for wine that Premier Cru failed to deliver. The district court dismissed the complaint for failure to state a claim.

The Tenth Circuit held that the plain language of the FCBA limits claims against credit-card issuers to the amount of credit outstanding

with respect to the disputed transaction. The "amount of credit outstanding" is the amount of credit extended by the card issuer that the cardholder has not yet paid back. Thus, a cardholder's claim under the FCBA is limited to the amount of the debt that remains unpaid. Because plaintiff had paid off both credit cards, there was no "credit outstanding" and he has no claim against Chase or AmEx.

The order of dismissal was affirmed.

Nos. 16-2254 & 16-2285. United States v. Channon. 1/31/2018. D.N.M. Judge Kelly. *Rules of Evidence—Spreadsheets as Summary Exhibits—Hearsay Rule and Exceptions.*

Defendants used fictitious names and addresses to open rewards accounts at OfficeMax. They used the accounts to claim purchases by other customers, thus generating rewards to which they were not entitled. Defendants were convicted of wire fraud and conspiracy to commit wire fraud. After defendants were convicted, the government moved for a forfeiture order. The district court entered a money judgment for the value of the merchandise defendants fraudulently obtained.

On appeal, defendants challenged the district court's decision to admit summary exhibits regarding their account transactions that were drawn from Excel spreadsheets. Defendants argued that the exhibits were inadmissible because they were not originals and defendants were not provided with the full database from which they were developed. The district court's finding that the spreadsheets accurately reflect database information and are thus originals is supported by the record. And because the spreadsheets are originals and were provided to defendants, the argument that they were not provided access to the database also fails.

Defendants further contended that the summary exhibits were inadmissible hearsay because they were created for litigation and were therefore not admissible under the business records exception. The spreadsheets were machine-generated transaction records rather than declarations by a person and thus fall outside the purview of CRE 801. Further, even if the records were hearsay, they would fall under the business records exception.

Lastly, defendants argued that the government failed to meet its burden to prove that the amount forfeited was traceable to the offense of wire fraud. The government conceded a remand to conform the money judgment to the requirements of 21 USC § 853(p), the substitute asset provision.

The convictions were affirmed. The case was remanded for further proceedings on the order of forfeiture to conform the money judgment to the statutory requirements applicable to substitute assets.

No. 16-1242. United States v. Lynch. 2/5/2018. D.Colo. Judge McKay. *Assault or Intimidation of Flight Crew Member—Constitutionality of Statute.*

Defendant was a first-class passenger on a plane flight. He repeatedly placed his hands on a flight attendant's lower back and hugged and kissed her on her neck, causing her to push

him away and ask him to stop. His behavior caused the flight attendant to refuse to serve him a third in-flight drink, at which point he began yelling at her, stood up from his seat, and shouted profanities. A second flight attendant came to help the first, leaving a third flight attendant in charge of the remaining main cabin passengers, including an unaccompanied minor. When the second flight attendant asked defendant to calm down, he yelled obscenities and threatened to take adverse action against the airline. As a result of defendant's actions, the captain left the responsibility of flying the plane to his co-pilot while he called dispatch to apprise them of the situation, and two of the three flight attendants on board were unable to perform all of their duties. Defendant continued to scream, use profanity, and exhibit aggression toward the arresting officers who met him when the plane landed. Defendant was convicted of an in-flight assault or intimidation of a flight crew member or flight attendant that interferes with his or her duties.

On appeal, defendant first argued that the trial court erred in failing to instruct the jury that his crime required specific intent. The Tenth Circuit rejected this argument, finding that nothing in the applicable statute required a specific mens rea, and the statute therefore required only general intent.

Defendant also argued that the statute was

facially overbroad and unconstitutional as applied to him, because the things he said during the flight, even if offensive, were protected speech. Here, the statute was content-neutral and served the significant government interest of prohibiting conduct that could pose a significant threat to public safety. Defendant's conduct fell within the type of behavior prohibited by the statute. Nor was the statute unconstitutionally vague; a person of ordinary intelligence could foresee that defendant's conduct involved actions that could inhibit the performance of an attendant's duties.

Lastly, defendant claimed that the district court erred in not adjusting his sentencing level on the basis of his acceptance of responsibility. Defendant did not clearly demonstrate acceptance of responsibility because he disputed several factual contentions at trial. In addition, his conduct toward the arresting officers was not the behavior of a person who had accepted responsibility for his actions.

The conviction and sentence were affirmed.

No. 16-1282. United States v. Greer. 2/6/2018. D.Colo. Judge McHugh. *Motions under 28 USC § 2255—Timeliness—Newly Recognized Right.*

Defendant was convicted of armed bank robbery and sentenced in 2002. At his sentencing, the court found that he had four prior Colorado convictions that counted as "crimes



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of violence” for U.S. Sentencing Guideline purposes. Relying on these convictions, the district court sentenced him as a career offender under § 4B1.1(a) of the then-mandatory Guidelines.

In 2015, in *Johnson v. United States*, the U.S. Supreme Court struck down as unconstitutionally vague the residual clause of the Armed Career Criminal Act (ACCA). The language the Supreme Court struck down is identical to the Guidelines language that the sentencing court relied on to treat one of defendant’s Colorado convictions as a “crime of violence.” Within one year of *Johnson*, defendant moved under 28 USC § 2255 to file a second habeas petition. The district court denied the motion. While defendant’s appeal was pending, in *Beckles v. United States*, the Supreme Court rejected an argument that *Johnson*’s holding extended to the *advisory* Guidelines, but left open the issue of whether defendants who were sentenced

under the *mandatory* Guidelines (such as defendant) could mount vagueness attacks on their sentences.

On appeal, defendant contended that *Johnson* invalidates the provision in the mandatory Sentencing Guidelines that is identical to the provision struck in the ACCA. A § 2255 motion must be brought within one year of (1) the date on which the judgment of conviction becomes final, or (2) the date on which the Supreme Court newly recognized a right that was made retroactively applicable to cases on collateral review. Defendant argued that his motion was timely because he brought it within a year of *Johnson*, which the Supreme Court has made retroactively applicable to cases on collateral review. But the only right recognized in *Johnson* was a defendant’s right not to have his sentence increased under the residual clause of the ACCA, and defendant was not sentenced under any

clause of the ACCA.

The dismissal was affirmed.

No. 17-3092. *Digital Ally, Inc. v. Utility Associates, Inc.* 2/16/2018. D.Kan. Judge Kelly. *Arguments Waived on Appeal—Failure to Include in Appellate Brief—Proof Conceded—Patent Infringement.*

Plaintiff Digital Ally, Inc. sued defendant Utility Associates, Inc. for patent infringement and other claims. The district court granted summary judgment to defendant.

Plaintiff appealed from only four counts of the judgment and argued only the issue of bad faith as to those counts. Plaintiff was required to address in its opening brief the other grounds on which the district court’s decision rests. Plaintiff did not address the other grounds in its appellate brief, and the failure to do so amounts to a concession as to the proof. A complete failure of proof on an essential element of the nonmoving party’s case necessarily renders all other facts immaterial and entitles the movant to judgment as a matter of law.

The summary judgment was affirmed. 



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