

May 7, 2013

Michael Gans, Clerk of Court
111 South 10th Street, Room 24.329
St. Louis, MO 63012

Re: Nos. 12-2790, 12-2797, *Charvat v. Mutual First Fed'l Credit Union and First Nat'l Bank of Wahoo*

Dear Mr. Gans:

One week before oral argument, Appellees have raised an entirely new issue: They ask the Court to read the recent EFTA amendment as implicitly retroactive. This is a surprise. Before the appellees filed their briefs, the United States indicated in a letter to the Court that the amendment was not retroactive. Both Appellees' briefs discussed the amendment, but neither suggested reading it as retroactive. Banking industry advocates—including the Nebraska Banking Association's lobbyist—have recognized that it is not.¹ And so have the courts. Given “the lack of explicit congressional direction that the changes to the EFTA apply retroactively,” and “the fact that the law disfavors retroactive applicability of statutory law,” that is the only appropriate conclusion. See *Pike v. Nick's English Hut*, 2013 WL 1311149, at *3 (S.D. Ind. March 27, 2013).

The black-letter law is clear: Absent an express statement to the contrary, the “traditional presumption against applying statutes affecting substantive rights, liabilities, or duties to conduct arising before their enactment” controls. *Landgraf v. USI Film Prods.*, 511 U.S. 244, 278 (1994); Reply 3-4. Based on one hopelessly confused decision by a Southern District of Texas judge, however, Appellees argue that the amendment should be applied retroactively because *Charvat* lacks a “vested right.” But that argument misunderstands the term “vested right,” which refers to substantive (as distinct from procedural) rights, and there can be no doubt that the existence of a statutory cause of action is substantive rather than procedural. *Fernandez-Vargas v. Gonzales*, 548 U.S. 30 (2006); *Lindh v. Murphy*, 521 U.S. 320, 326 (1997); *Landgraf*, 511 U.S. at 278. If the law were otherwise, there would be little left of the presumption in cases involving statutes.

Respectfully submitted,

/s/ Deepak Gupta

Deepak Gupta

Counsel for Plaintiff-Appellant Charvat

cc: All Counsel of Record

¹ See, e.g., <http://www.kriegdevault.com/pdf/661-pb> (The amendment is “*not retroactive*, ... Ongoing litigation initiated for failure to have a sticker or placard affixed to the exterior of the ATM will not be terminated due to this non-retroactivity.”); http://www.martindale.com/banking-law/article_Weltman-Weinberg-Reis-Co-LPA_1651082.htm (Although the amendment will “drastically reduce *prospective* liability for ATM operators for not having a physical fee placard, *it will not have retroactive effect.*”); Banking Committee Hearing, Nebraska Legislature, Jan. 22, 2013, at 16, <http://www.legislature.ne.gov/FloorDocs/103/PDF/Transcripts/Banking/2013-01-22.pdf> (“The Nebraska bank is currently I think in the federal Court of Appeals on appeal with regard to a standing issue that we hope they’re successful on because *the change in federal law is not retroactive.*”).