No. 13-20211

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

Lisa Mabary,
Plaintiff-Appellant,

v.

Home Town Bank, N.A,
Defendant-Appellee.

On Appeal from the United States District Court
for the Southern District of Texas, Houston Division

BRIEF FOR PLAINTIFF-APPELLANT

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July 15, 2013

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CERTIFICATE OF INTERESTED PERSONS

No. 13-20211

Lisa Mabary, Plaintiff-Appellant,

v.

Home Town Bank, N.A, Defendant-Appellee.

The undersigned counsel of record certifies that the following listed persons and entities as described in the fourth sentence of Rule 28.2.1 have an interest in the outcome of this case. These representations are made in order that the judges of this court may evaluate possible disqualification or recusal.

Lisa Mabary—plaintiff-appellant

All non-customers who made an electronic fund transfer, from any account used primarily for personal or household purposes, between May 23, 2009, through the date on which Defendant came into compliance with the ATM Fee posting requirements of the EFTA, at any of the ATMs operated by Defendant at 1406 West Main, League City, TX 77573; 1050 North Bypass 35, Alvin, TX 77573; 13701 Farm to Market 3005, Galveston, TX 77554; and, 4424 Seawall Blvd., Galveston, TX 77550 and who were charged a "Terminal Fee."—putative class members

HomeTown Bank, N.A.—defendant-appellee

Moody Bancshares, Inc.—parent of HomeTown Bank, N.A.

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R. Bruce Carlson—counsel for plaintiff-appellant in district court and on appeal

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/s/ Adina H. Rosenbaum
Adina H. Rosenbaum

Attorney of record for plaintiff-appellant Lisa Mabary

REQUEST FOR ORAL ARGUMENT

Plaintiff-Appellant Lisa Mabary requests oral argument. This case involves important issues about when people can be denied remedies for violations of their statutory rights based on changes in the law that occurred after the events at issue, and about the effect of a change in the law on a class action in which the class is not yet certified. Ms. Mabary believes that oral argument would assist the Court in addressing these issues by clarifying how doctrines related to the retroactive application of statutes apply here.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

STATUTES, RULES, AND LEGISLATIVE MATERIALS

STATEMENT OF JURISDICTION

This appeal is from a decision of the district court denying plaintiff's motion for class certification and dismissing the case. The district court had jurisdiction under 28 U.S.C. § 1331 and 15 U.S.C. § 1693m. Its judgment was entered on March 18, 2013. USCA5 2160. Plaintiff Lisa Mabary filed her timely notice of appeal on April 17, 2013. USCA5 2161. This Court has jurisdiction under 28 U.S.C. § 1291.

STATEMENT OF THE ISSUES

1. Does an amendment to the Electronic Fund Transfer Act (EFTA) that removes the requirement that automated teller machine (ATM) operators disclose their fees on or at the machine apply retroactively to cases based on ATM transactions that occurred before the amendment was enacted?

2. Did the district court err in denying certification of a class in a case challenging an ATM operator's failure to disclose its fees on ATMs because the putative class members were not part of a certified class when EFTA was amended to remove the requirement that fees be disclosed on the machine, where the ATM transactions all took place before the law was amended?

STATEMENT OF THE CASE AND OF FACTS

A. The Electronic Fund Transfer Act

The Electronic Fund Transfer Act (EFTA), 15 U.S.C. § 1693 *et seq.*,

"provides a basic framework establishing the rights, liabilities, and responsibilities of participants in electronic fund and remittance transfer systems." *Id*. § 1693(b). In enacting EFTA, Congress specified that the Act's "primary objective . . . is the provision of individual consumer rights." *Id*.

Among other consumer protections codified in the Act, EFTA imposes certain fee disclosure requirements on ATM operators.[1] In particular, the Act requires any ATM operator that imposes a fee on a consumer for engaging in an electronic fund transfer to notify the consumer of the fact that a fee is being imposed. *Id*. § 1693b(d)(3). At the time of the events at issue in this lawsuit, EFTA required notice of a fee to "be posted in a prominent and conspicuous location on or at the [ATM] at which the electronic fund transfer is initiated by the consumer" and notice of both the fee and its amount to "appear on the screen of the [ATM], or on a paper notice issued from such machine, after the transaction is initiated and before the consumer is irrevocably committed to completing the transaction." 15 U.S.C. § 1693b(d)(3)(B) (2010). In accordance with this provision of the statute, EFTA's implementing regulation requires a fee notice both to be posted prominently on or at the machine and to be displayed, along with

[1]These requirements were added to EFTA in 1999 by the ATM Fee Reform Act, which was enacted as part of the Gramm-Leach-Bliley Financial Modernization Act, P.L. No. 106-102, Sec. 702, 113 Stat. 1338 (1999).

the amount of the fee, either on the machine's screen or on paper before the consumer is committed to paying a fee. 12 C.F.R. § 205.16(c).

EFTA provides that unless a consumer receives notice of the ATM fee in accordance with the statute's requirements and elects to continue with the transaction after receiving such notice, the ATM operator may not impose a fee on the consumer. 15 U.S.C. § 1693b(d)(3)(C); *see also* 12 C.F.R. § 205.16(e). EFTA also provides that if any person fails to comply with a provision of the Act with respect to any consumer, the person is liable to the consumer for actual and statutory damages. 15 U.S.C. § 1693m(a)(1) & (2). Further, EFTA expressly provides that it may be enforced through class actions. *Id*. § 1693m(a)(2)(B).

B. Factual Background and District Court Proceedings

On May 23, 2010, plaintiff Lisa Mabary made two separate withdrawals at ATMs operated by defendant HomeTown Bank, N.A.: one from an ATM in League City, Texas, and another from an ATM in Galveston, Texas. Both of the withdrawals were from her personal checking account, which is held by Bank of America. USCA5 89. Neither of the ATMs from which Ms. Mabary withdrew money contained a notice on or at the machine apprising consumers that a fee would be charged for using the ATM. USCA5 90, 113. Nonetheless, HomeTown Bank charged Ms. Mabary a $2.00 fee in connection with each of the transactions.

USCA5 89, 133-34.

On October 19, 2010, Ms. Mabary filed this lawsuit on behalf of herself and similarly situated ATM users, alleging that HomeTown Bank violated EFTA's fee disclosure requirements. USCA5 10.[2]

The complaint was followed by extensive district court proceedings. First, on January 14, 2011, HomeTown Bank filed a motion to dismiss for failure to state a claim or, in the alternative, for a more definite statement. USCA5 31. On February 3, 2011, HomeTown Bank made an offer of judgment under Rule 68 to Ms. Mabary, offering her $1,000 along with costs and reasonable attorneys' fees accrued to that date, to be determined by the court. USCA5 205. Ms. Mabary did not accept the offer. On February 7, 2011, Ms. Mabary filed an amended complaint and a motion for class certification. USCA5 85, 97. On February 21, 2011, HomeTown Bank filed a motion to dismiss for want of subject matter

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[2]Specifically, Ms. Mabary sought certification of a class consisting of:

> All non-customers who made an electronic fund transfer, from any account used primarily for personal or household purposes, between May 23, 2009, through the date on which Defendant came into compliance with the ATM Fee posting requirements of the EFTA, at any of the ATMs operated by Defendant at 1406 West Main, League City, TX 77573; 1050 North Bypass 35, Alvin, TX 77573; 13701 Farm to Market 3005, Galveston, TX 77554; and, 4424 Seawall Blvd., Galveston, TX 77550 and who were charged a "Terminal Fee." USCA5 90.

jurisdiction, asserting that its offer rendered the case moot, and a motion to stay all proceedings pending resolution of its motion to dismiss. USCA5 195, 284. The district court granted HomeTown Bank's motion to stay and ordered that the parties fully brief the motions to dismiss before the Court would proceed with respect to the motion for class certification. *See* USCA5 4.

On June 27, 2011, the district court denied Hometown Bank's motions to dismiss for failure to state a claim and for lack of subject matter jurisdiction. USCA5 495-520. Hometown Bank subsequently filed an answer to Ms. Mabary's complaint. USCA5 521. The district court then directed HomeTown Bank to file its response to Ms. Mabary's class certification motion. USCA5 541.

On September 29, 2011, after Ms. Mabary's motion for class certification was fully briefed, HomeTown Bank filed yet another motion to dismiss or, in the alternative, to stay proceedings. USCA5 1551. In that motion, HomeTown Bank asserted that Ms. Mabary lacked standing. In the alternative, HomeTown Bank asked the district court to stay the litigation pending the Supreme Court's decision in *First American Financial Corp. v. Edwards*, Supreme Court Case No. 10-708.

On November 22, 2011, the district court certified a class, making specific findings of fact on each of the requirements of Federal Rules of Civil Procedure 23(a) and 23(b)(3). USCA5 1701-08.

On December 5, 2011, the district court held oral argument on HomeTown Bank's motion to dismiss or stay. At the hearing, HomeTown Bank requested that the court "provisionally vacate" the certification order so it could avoid filing an appeal under Federal Rule of Civil Procedure 23(f). USCA5 1894. The district court granted the stay and decertified the class. USCA5 1877.

Before the district court entered its order decertifying the class, HomeTown Bank filed a petition for leave to appeal by permission, USCA5 1714, which the district court transferred to this Court as a notice of appeal. *See Mabary v. HomeTown Bank, N.A.*, No. 11-20900. HomeTown Bank also filed the petition for permission to appeal in this Court, where it was opened as a miscellaneous case. *See Mabary v. HomeTown Bank, N.A.*, No. 11-90048. The latter was dismissed on HomeTown Bank's motion after the district court entered its order decertifying the class, USCA5 1885, and the former was dismissed by this Court because an appeal of right does not lie from a Rule 23(f) order. USCA5 1904.

On June 28, 2012, the Supreme Court dismissed the writ of certiorari in *First American Financial Corp. v. Edwards* as improvidently granted. 132 S. Ct. 2536 (Mem.). Ms. Mabary then moved to lift the stay and recertify the class. USCA5 1906. In response, HomeTown Bank asked the district court to rule on its September 29, 2011, motion to dismiss and to allow further briefing on class

certification. USCA5 1911.

On August 30, 2012, the district court denied HomeTown Bank's September 29, 2011 motion to dismiss. USCA5 1994-2000. On November 19, 2012, the court entered an order indicating that it was "ready to reinstate certification," but "first wanted to hear from the parties regarding any changes in the class composition or in the law since the original order issued on November 22, 2011 that would inform the Court's decision." USCA5 2001. The parties filed additional briefs related to class certification. *See*, *e.g.*, USCA5 2002, 2015.

C. H.R. 4367 and the Decision Below

While the motion to recertify was pending, Congress amended EFTA to remove the requirement that ATM operators post notice of fees on or at the ATM in addition to on the screen or on paper. *See* P.L. No. 112-216, 126 Stat. 1590 (Dec. 20, 2012) (hereinafter referred to as H.R. 4367). The statute states in its entirety:

> Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,
>
> SECTION 1. FEE DISCLOSURE REQUIREMENT.
>
> Section 904(d)(3)(B) of the Consumer Credit Protection Act (15 U.S.C. 1693b(d)(3)(B)) (commonly known as the "Electronic Fund Transfer Act") is amended—
>
> (1) by striking "REQUIREMENTS." and all that follows

> through "The notice required under clauses (i) and (ii)" and inserting "REQUIREMENT.— The notice required under clauses (i) and (ii)" after "Notice"; and
>
> (2) by striking ", except that during the period beginning" and all that follows and inserting a period.

Id.

The House Report on H.R. 4367 stated that the requirement that fees be posted on the ATM was no longer necessary, noting that, in the years since the requirement was enacted, ATMs had become more prominent and better understood, and that screens had become larger and easier to read. H.R. Rep. No. 112-576, 112th Cong., 2d Sess. 2, *reprinted in* 2012 U.S.C.C.A.N. 731, 732. The House Report also noted that some people were removing notices from ATMs and then filing suit against the ATM operators for failing to provide adequate notice on the machine, and that eliminating the notice requirement would protect ATM operators from frivolous suits. *Id*.

Neither H.R. 4367 nor the House Report said anything about applying the amendments made by H.R. 4367 to ATM transactions that took place before the statute was enacted.

After H.R. 4367 was enacted, HomeTown Bank filed a notice of supplemental authority, asserting that class certification should be denied and the suit dismissed because the claims in the lawsuit ceased to exist in light of H.R.

4367. USCA5 2093. In response, Ms. Mabary explained that under the analysis in *Landgraf v. USI Film Products*, 511 U.S. 244 (1994), a presumption against statutory retroactivity applies if a law "attaches new legal consequences to events completed before its enactment." USCA5 2118 (citation omitted). She explained that because H.R. 4367 did not even hint at retroactive applicability and because it eliminated a right that existed when the lawsuit was filed (the right to on-machine fee notices), H.R. 4367 did not apply retroactively. USCA5 2118.

The district court denied Ms. Mabary's motion for class certification and dismissed Ms. Mabary's case with prejudice. USCA5 2154-60. The court first concluded that, because of H.R. 4367, a class could not be certified in the case. It held that "the basis of any class claim ceased before certification" and, therefore, that "class certification must be denied." USCA5 2156. The district court cited cases addressing whether putative class members are parties to a case, but cited no cases addressing retroactivity in the class action context. In fact, the court did not mention retroactivity in this portion of its opinion. USCA5 2155-56.

The district court next considered whether Ms. Mabary's claim "survives the passage of H.R. 4367," recognizing with regard to her claim that the pertinent question was whether the Act should be applied retroactively. USCA5 2156. The court explained that in *Landgraf*, 511 U.S. 244, the Supreme Court established a

framework for determining whether a statute applies retroactively. Under *Landgraf*, a statute applies retroactively if Congress explicitly indicated that it intended for it to do so. "[W]hen the statute contains no such express command, the court must determine whether the new statute would have retroactive effect, *i.e.*, whether it would impair rights a party possessed when he acted, increase a party's liability for past conduct, or impose new duties with respect to transactions already completed." USCA5 2158 (citing *Landgraf*, 511 U.S. at 280).

The district court acknowledged that "H.R. 4367 does not explicitly indicate that it is intended to apply retroactively." USCA5 2157. And it recognized that "Plaintiff's claim is based on a statutory right to receive on-machine fee notices." USCA5 2158. Nonetheless, it held that H.R. 4367 applied retroactively to eliminate Ms. Mabary's claim. According to the court, because "repeal of the notice provision did not increase a party's liability for past conduct, nor impose new duties upon either party," the presumption against retroactivity would only apply if H.R. 4367 impaired Ms. Mabary's "vested rights," and "[c]ourts have long held that there is no vested right where a cause of action is based solely on a statute, and that statute is repealed." USCA5 2158. "Because Plaintiff did not have a vested right," the court concluded, "the presumption against statutory retroactivity does not apply" and "there is no longer a statutory basis for Plaintiff's

claim." USCA5 2159. The court denied class certification and dismissed the case with prejudice. USCA5 2160.

SUMMARY OF ARGUMENT

Citing the "presumption against retroactive legislation [that] is deeply rooted in our [country's] jurisprudence," the Supreme Court in *Landgraf v. USI Film Products* set forth a two-part test for determining whether a statute operates in cases arising from events that took place before the statute's enactment. 511 U.S. at 265, 280. First, a court asks whether Congress expressly prescribed the scope of the new statute. If so, Congress's express intent prevails. If not, the court engages in a common-sense examination of whether applying the new statute retroactively would attach new legal consequences to events that took place before it was enacted, such as by impairing rights a party possessed when the events at issue took place. *See id.* at 280. If it would, the court does not apply the new statute to the case. Instead, it applies the law as it stood when the events at issue occurred.

Here, Congress did not expressly prescribe the scope of H.R. 4367. And applying H.R. 4367 to Ms. Mabary's claims, which are based on ATM transactions that took place before H.R. 4367's enactment, would impair rights Ms. Mabary possessed at the time of those transactions and change the legal

consequences of HomeTown Bank's failure to comply with the on-machine notice requirement. Accordingly, H.R. 4367 does not apply to Ms. Mabary's claims, and the district court erred in dismissing the case.

Likewise, the district court erred in relying on H.R. 4367 to deny class certification. Because the class members' ATM transactions occurred before H.R. 4367's enactment, the *Landgraf* analysis applies to the class claims as well. And under that analysis, whether or not the class members were parties to the case when H.R. 4367 was enacted is irrelevant. Because applying H.R. 4367 would impair the class members' rights, just as it would impair Ms. Mabary's rights, the statute does not apply to the class claims. Instead, the law as it stood at the time of the ATM transactions applies, and at that time, the class members had a right to on-machine notice of ATM fees and an entitlement to statutory damages if HomeTown Bank did not provide that notice.

ARGUMENT

I. Standard of Review

This Court reviews a district court's grant of a motion to dismiss de novo, accepting all well-pled facts as true. *See, e.g.*, *United States v. Alvarez*, 710 F.3d 565, 567 (5th Cir. 2013); *Bowlby v. City of Aberdeen, Miss.*, 681 F.3d 215, 219 (5th Cir. 2012). Therefore, this Court reviews the dismissal of this case de novo.

This Court reviews denials of class certification for abuse of discretion. "Because, however, a court by definition abuses its discretion when it applies an incorrect legal standard, [the Court] review[s] such errors de novo." *Benavides v. Chicago Title Ins. Co.*, 636 F.3d 699, 701 (5th Cir. 2011); *see also*, *e.g.*, *Fener v. Operating Eng'rs Constr. Indus. & Miscellaneous Pension Fund (Local 66)*, 579 F.3d 401, 406 (5th Cir. 2009) ("Whether the district court applied the correct legal standard . . . is a legal question that [the Court] review[s] de novo." (citation omitted)). Because the effect of H.R. 4367 on putative class actions is a legal question, this Court reviews de novo the district court's holding that class certification had to be denied because the class was not yet certified at the time H.R. 4367 was enacted.

II. Under the Analysis Established by the Supreme Court in *Landgraf*, H.R. 4367 Does Not Apply Retroactively.

The Supreme Court has emphasized that "the presumption against retroactive legislation is deeply rooted in our jurisprudence." *Landgraf*, 511 U.S. at 265. The "principle that the legal effect of conduct should ordinarily be assessed under the law that existed when the conduct took place has timeless and universal appeal." *Id*. (citation omitted). At the same time, the Court has stated that, "in many situations, a court should 'apply the law in effect at the time it

renders its decision.'" *Id*. at 273 (quoting *Bradley v. Sch. Bd. of Richmond*, 416 U.S. 696, 711 (1974)).

To resolve the tension between these two rules of statutory construction, in *Landgraf v. USI Film Products*, "the Supreme Court set forth a two-step test to determine whether a federal statute applies retroactively to conduct occurring before it was enacted." *Ojeda-Terrazas v. Ashcroft*, 290 F.3d 292, 297 (5th Cir. 2002). First, the court must "determine whether Congress has expressly prescribed the statute's proper reach." *Landgraf*, 511 U.S. at 280. If so, "there is no need to resort to judicial default rules," *id*.; the court must follow Congress's express prescription. "When, however, the statute contains no such express command, the court must determine whether the new statute would have retroactive effect, *i.e.*, whether it would impair rights a party possessed when he acted, increase a party's liability for past conduct, or impose new duties with respect to transactions already completed." *Id*. "If the court decides that the statute would have an impermissible retroactive effect if applied to past conduct, *Landgraf* instructs that the statute does not apply retroactively." *Ojeda-Terrazas*, 290 F.3d at 297.

Because the ATM transactions on which Ms. Mabary's claims are based occurred prior to H.R. 4367's enactment, *Landgraf*'s two-step test governs in

determining whether H.R. 4367 applies. Application of that test demonstrates that H.R. 4367 does not apply to Ms. Mabary's claims. Instead, this case is governed by the "law that existed when the conduct took place," *Landgraf*, 511 U.S. at 265 (citation omitted), under which Ms. Mabary has a claim against HomeTown Bank for statutory damages based on Hometown Bank's failure to provide her with on-machine notice of its fees.

A. Congress Did Not Expressly Prescribe H.R. 4367's Reach.

The first step of the *Landgraf* test is to "determine whether Congress has expressly prescribed the statute's proper reach." 511 U.S. at 280. If Congress clearly intends a statute either to apply or not apply retroactively, Congress's will controls. Courts employ ordinary tools of statutory construction in determining whether Congress has spoken to the issue of retroactivity, but the standard for finding the "requisite clarity" by Congress "is a demanding one." *I.N.S. v. St. Cyr*, 533 U.S. 289, 316 (2001). As this Court has explained, "[c]ongressional intent [with regard to retroactivity] must be an 'unambiguous directive.'" *Heaven v. Gonzales*, 473 F.3d 167, 172 (5th Cir. 2006) (citation omitted).

Here, as the district court recognized, H.R. 4367 "does not explicitly indicate that it is intended to apply retroactively." USCA5 2157. The statute makes no mention of retroactivity or of EFTA's private right of action. *See* H.R.

4367, *supra* pp. 7-8. It removes the requirement that an ATM operator post a fee notice on the ATM machine, but it gives no indication that it intends to deprive consumers of the ability to bring claims if an ATM operator failed to provide them with an on-machine fee notice at a time when EFTA explicitly required the ATM operator do to so.

Likewise, H.R. 4367's legislative history does not mention retroactivity. *See* H.R. Rep. No. 112-576; 158 Cong. Rec. H4664-66 (July 9, 2012) (debate on House floor); 158 Cong. Rec. S7751 (Dec. 11, 2012) (debate on Senate floor). In the district court, HomeTown Bank pointed to statements in the legislative history indicating that one of the statute's purposes was to protect banks from frivolous lawsuits related to the fee notice requirement, *see* USCA5 2094-95, 2124-25, and argued that H.R. 4367 therefore applies here. As the district court noted, however, "it is not clear from the legislative history that H.R. 4367 was to put an *immediate* end to such lawsuits." USCA5 2157.

Even applying only prospectively, H.R. 4367 advances the objective of protecting banks from frivolous lawsuits related to the on-machine fee notice requirement. For example, in discussing frivolous lawsuits, the House Report pointed to suits in which people purposely removed the posted ATM notice and then sued on the basis that notice was not posted. H.R. Rep. 112-576, at *2.

Preventing such suits does not require retroactive application of the amendment, because as soon as Congress eliminated the posting requirement, no suit could be created by purposeful removal. To be sure, in addition to ending non-frivolous suits such as this one, retroactive application would also eliminate any frivolous suits based on failure to post fee notices before H.R. 4367's enactment. But as the Supreme Court has explained, even with regard to a statute's primary purpose, the fact "that retroactive application of a new statute would vindicate its purpose more fully . . . is not sufficient to rebut the presumption against retroactivity." *Landgraf*, 511 U.S. at 285-86. "[C]ompromises necessary to [statutes'] enactment may require adopting means other than those that would most effectively pursue the main goal," and "[a] legislator who supported a prospective statute might reasonably oppose retroactive application of the same statute." *Id*. at 286; *see also Vela v. City of Houston*, 276 F.3d 659, 674 (5th Cir. 2001) (citing *Landgraf* and explaining that a legislative statement that lawsuits under a statute "have resulted in State and local governments being liable for millions of dollars" does not make "clear a congressional intent to impair rights that existed and accrued prior to the passage" of an amendment to that statute (citation omitted)); *Mathews v. Kidder, Peabody & Co., Inc.*, 161 F.3d 156, 164 (3d Cir. 1998) (holding that amendment to Racketeer Influenced and Corrupt Organizations Act (RICO) did not apply

retroactively even though the amendment's legislative history made clear that the amendment was intended to address frivolous lawsuits).

In short, H.R. 4367 contains "no express command from Congress that it be applied retroactively," and the question of retroactivity is therefore not decided at *Landgraf* step one. *Heaven*, 473 F.3d at 172.

B. Application of H.R. 4367 Would Have an Impermissible Retroactive Effect.

The second step of the *Landgraf* analysis looks to whether the statute has an impermissible retroactive effect. A statute has such an effect when "it would impair rights a party possessed when he acted, increase a party's liability for past conduct, or impose new duties with respect to transactions already completed." *Landgraf*, 511 U.S. at 280.

The Supreme Court has explained that the "inquiry into whether a statute operates retroactively demands a commonsense, functional judgment about 'whether the new provision attaches new legal consequences to events completed before its enactment.'" *Martin v. Hadix*, 527 U.S. 343, 357-58 (1999) (quoting *Landgraf*, 511 U.S. at 270). Here, when Ms. Mabary used the ATM in 2010, she had "a statutory right to receive on-machine fee notices," USCA5 2158, and the right to statutory damages when HomeTown Bank failed to provide her with that

notice. 15 U.S.C. § 1693m(a) (2010). Applying H.R. 4367 to Ms. Mabary's ATM transactions, which occurred before the statute's enactment, would impair Ms. Mabary's rights and change the legal consequences of HomeTown Bank's failure to provide on-machine notices of fees associated with Ms. Mabary's transactions. Accordingly, the pre-H.R. 4367 fee disclosure requirements govern this case, and Ms. Mabary maintains a claim for statutory damages based on HomeTown Bank's failure to abide by those requirements.

Although applying H.R. 4367 retroactively would change the legal consequences of events that occurred before it was enacted, the district court applied it to Ms. Mabary's claims, stating that "there is no vested right where a cause of action is based solely on a statute, and that statute is repealed." USCA5 2158. This Court, however, has refused to apply a law retroactively when doing so would impair statutory rights.[3] In *Vela v. City of Houston*, a group of paramedics and emergency medical technicians who worked for the City of Houston Fire Department argued that they were not fire protection employees for the purposes of the Fair Labor Standards Act (FLSA), 29 U.S.C. § 201 *et seq.*,

[3]Although whether a statute is repealed or just amended is not relevant to the *Landgraf* analysis, it should be noted that H.R. 4367 did not repeal EFTA or its private right of action. Instead, it amended EFTA's substantive requirements, just as the statute at issue in *Vela*, 276 F.3d 659, discussed in the paragraph on this page, amended the Fair Labor Standard's Act's substantive requirements.

and, thus, that they were entitled to overtime compensation if they worked more than the standard forty-hour workweek, although, under a special exemption, fire protection employees were only entitled to overtime compensation if they worked more than an average of fifty-three hours in a week. 276 F.3d at 664-65. While the case was pending, Congress amended the FLSA, adding a definition of "employee in fire protection activities" that included paramedics and emergency medical technicians and that the defendants argued applied to bar plaintiffs' claims. *Id*. at 672-73. Applying the *Landgraf* analysis, the Court held that the FLSA amendment did not apply retroactively to the employees' claims. *Id*. at 674. Although the right to overtime compensation is a right provided by statute (FLSA), the Court refused to give the amendment retroactive effect because "this broadening of the exemption would impair the [plaintiffs'] rights to overtime compensation that accrued before Congress enacted" the amendment. *Id*.; *see also*, *e.g.*, *Killingsworth v. HSBC Bank Nevada, N.A.*, 507 F.3d 614, 622 (7th Cir. 2007) (holding that application of amendment to Fair Credit Reporting Act (FCRA) that removed private right of action for certain FCRA violations, including violation of disclosure requirements, would impair plaintiff's rights if applied to events that occurred prior to amendment's effective date); *Scott v. Boos*, 215 F.3d 940, 944-46 (9th Cir. 2000) (holding that retroactive application of RICO amendment that

eliminated plaintiffs' ability to rely on conduct that would have been actionable as securities fraud in establishing a RICO violation would impair rights); *Mathews*, 161 F.3d at 163-65 (same).

Here, as in *Vela*, Ms. Mabary's rights accrued before H.R. 4367 was enacted. At the time she made her ATM withdrawals, she had the right to an on-machine notice of ATM fees, and the right to statutory damages when HomeTown Bank failed to provide that notice. *Cf. Killingsworth*, 507 F.3d at 622 (noting that right to statutory damages under FCRA arose when defendant allegedly willfully failed to comply with the law, and that plaintiff's rights would be impaired if later law repealing private right of action were applied retroactively). Further, as in *Vela*, if applied retroactively, H.R. 4378 would impair those rights, by eliminating her ability to succeed on her claim. *See Vela*, 276 F.3d at 674 (noting that it "is enough [for FLSA amendment not to apply retroactively] to note that the retroactive application of [the amendment] would impair the [plaintiffs'] rights by making it much more difficult for them to prevail"); *Mathews*, 161 F.3d at 164, 165 (explaining that elimination of a cause of action impairs rights). Accordingly, as in *Vela*, the new statute should not be given retroactive effect.

In applying H.R. 4367 retroactively, the district court also noted that courts have held that "rights in tort do not vest until reduced to a final judgment."

USCA5 2159. This case, however, does not involve right in tort, but a statutory right. More importantly, to the extent that the district court was stating that the "impair rights" analysis in *Landgraf* does not apply unless there is a final judgment, it is wrong. In *Vela*, for example, although there was not yet a final judgment, this Court held that the FLSA amendment could not apply retroactively because it would impair rights. 276 F.3d at 675; *see also Scott*, 215 F.3d at 947 (specifically rejecting the argument that *Landgraf* did not apply to a pending case because the right to a suit does not vest until final judgment). And it would be nonsensical for *Landgraf*'s "impair rights" analysis to apply only after a final judgment, because the purpose of *Landgraf* is to determine whether a new law applies in cases that are based on events that happened before the law's enactment but in which the case is not over at the time of the law's enactment.

More generally, the district court's focus on whether Ms. Mabary's rights were "vested" was misplaced. Although, in describing the test for retroactivity, courts often quote from a statement by Justice Story that a law is operating retroactively if it "takes away or impairs vested rights acquired under existing laws, or creates a new obligation, imposes a new duty, or attaches a new disability, in respect to transactions or considerations already past," *Landgraf*, 511 U.S. at 269 (quoting *Society for Propagation of the Gospel v. Wheeler*, 22 F. Cas. 756,

767 (No. 13,156) (C.C.N.H. 1814)), the Supreme Court has specifically rejected the argument that "*only* statutes with one of these effects are subject to [the] presumption against retroactivity." *Hughes Aircraft Co. v. U.S. ex rel. Schumer*, 520 U.S. 939, 947 (1997). Rather, "any such an effect constitute[s] a *sufficient*, rather than a *necessary*, condition for invoking the presumption against retroactivity." *Id*. Instead of adopting an "exclusive definition of presumptively impermissible retroactive legislation," *Landgraf* "recognized that the Court has used various formulations to describe the 'functional conceptio[n] of legislative 'retroactivity.'"" *Id*. (quoting *Landgraf,* 511 U.S. at 269). And the Supreme Court specifically stated in *Landgraf* that neither it nor Justice Story "restrict[ed] the presumption against statutory retroactivity to cases involving 'vested rights.'" *Landgraf*, 511 U.S. at 275 n. 29.

Whether or not it affects "vested rights," a statute has an impermissible retroactive effect if it "'affect[s] substantive rights, liabilities, or duties [based on] conduct arising before [the statute's] enactment." *Landgraf*, 511 U.S. at 278. Because applying H.R. 4367 retroactively would have such an effect, it does not apply to Ms. Mabary's claims. Instead, the applicable law is the law in effect when the ATM transactions at issue took place, at which time Ms. Mabary had a right to statutory damages based on HomeTown Bank's failure to give on-machine

notice of its fees.

III. Because H.R. 4367 Does Not Apply Retroactively, the Fact that the Class Had Not Yet Been Certified at the Time of H.R. 4367's Enactment Was Not a Proper Reason to Deny Class Certification.

In addition to dismissing Ms. Mabary's claim because of H.R. 4367, the district court denied class certification because the class was not yet certified at the time H.R. 4367 was enacted. The court noted that absent class members are not parties to a case before class certification, stated that the "basis of any class claim ceased before certification," and concluded that therefore "class certification must be denied." USCA5 2156. But that the class had not been certified at the time H.R. 4367 was enacted is irrelevant to whether the class should be certified. Because the ATM transactions at issue in the class claims occurred before H.R. 4367 was enacted, H.R. 4367 would affect the class claims only it if applies retroactively under the *Landgraf* analysis. And what is important to the *Landgraf* analysis is whether the new statute impairs rights based on conduct that occurred before the statute's enactment, not whether the people whose rights are affected were parties to a case at the time of the statute's enactment. As explained above, applying H.R. 4367 to claims based on ATM transactions that occurred before the statute's enactment would impair rights based on conduct that occurred before the statute's enactment. Accordingly, H.R. 4367 does not apply, and the absent class

members maintain claims under EFTA based on HomeTown Bank's failure to provide them with on-machine notice of ATM fees.

Under *Landgraf*, whether a statute can be applied retroactively is based on whether application of the statute would affect rights based on conduct that occurred before the statute was enacted, not on whether a proceeding was pending at the time of the statute's enactment. *Landgraf* holds that whether a statute has impermissible retroactive effect depends on whether "it would impair rights a party possessed *when he acted*" or attach "new legal consequences to *events completed before its enactment*." 511 U.S. at 270, 280 (emphasis added); *see also id.* at 280 (explaining that its test applies to cases that "implicate[] a federal statute enacted *after the events in suit*" (emphasis added)). When the party whose rights were impaired became party to a suit is irrelevant to this analysis. *See*, *e.g.*, *Scott*, 215 F.3d at 949 ("The *Landgraf* decision . . . does not turn on whether the plaintiff's case was pending on the date of enactment[.]"); *Maitland v. Univ. of Minn.*, 43 F.3d 357, 361 n.3 (8th Cir. 1994) ("The date of filing is irrelevant; the date of 'the events in suit,' . . determines whether a court must consider a statute's potential retroactive effect." (quoting *Landgraf*, 511 U.S. at 280)).

In accordance with *Landgraf*'s focus on the timing of the conduct giving rise to the litigation, rather than on the timing of litigation itself, the Supreme

Court has rejected retroactive application of statutes in cases in which the events at issue occurred before the statutes were enacted, but the cases were not filed until afterwards. For example, in *Hughes Aircraft*, 520 U.S. 939, the Court considered whether a 1986 amendment to the False Claims Act (FCA) that partially removed a bar against filing qui tam suits based on information already in the government's possession applied to a qui tam case based on allegedly false claims submitted before the 1986 amendment. Although the case itself was not commenced until 1989—that is, although the entity opposing retroactivity was not a party in a case until after the statute's enactment—the Supreme Court held that the 1986 statute did not apply to the pre-1986 conduct, and that the applicable law was the version of the FCA in effect when the conduct occurred. *Id*. at 941-42, 943.

Likewise, in *St. Cyr*, 533 U.S. 289, the Supreme Court applied *Landgraf* to determine whether restrictions on discretionary relief from deportation in the Antiterrorism and Effective Death Penalty Act of 1996 (AEPDA) and Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA) applied "to removal proceedings brought against an alien who pleaded guilty to a deportable crime before their enactment." *Id*. at 293. Although the removal proceedings were not commenced until after AEDPA and IIRIRA became

effective, so that the alien was not a party to the case until after they were enacted, the Supreme Court held that the restrictions on discretionary relief in the statutes did not apply to him.

Here, as in *Hughes Aircraft* and *St. Cyr*, the events giving rise to the litigation took place before the law was changed. Because the only timing that matters under *Landgraf* is the timing of the events in question in relation to the statute's enactment, the district court erred in concluding that H.R. 4367 applies to the class claims.

Furthermore, although cases such as *Hughes Aircraft* and *St. Cyr* demonstrate that the timing of the litigation does not matter to the *Landgraf* analysis, *Landgraf* makes clear that, at the very least, its analysis applies to "cases pending" when a new statute is enacted. 511 U.S. at 250. This case was pending long before H.R. 4367's enactment. Indeed, when H.R. 4367 was enacted, this case had been pending for over two years, there had been extensive proceedings related to class certification, and plaintiff's request for recertification had been pending for over five months. Particularly under circumstances such as these, H.R. 4367 should not be given retroactive effect to deprive the putative class members of a remedy for the statutory rights they possessed at the time of the ATM transactions.

In sum, under the *Landgraf* analysis, it does not matter whether or not the people objecting to retroactivity were parties to a case at the time the new statute was enacted. All that matters is whether the Act expressly prescribes its reach and, if not, whether it would impair rights a party possessed when it acted. As described in Part II, above, H.R. 4367 does not expressly direct retroactive effect, and its retroactive application to ATM transactions that occurred before it was enacted would impair rights that the unnamed class members possessed when they engaged in those transactions. Accordingly, H.R. 4367 does not apply retroactively to the class claims, which involve transactions that took place prior to its enactment. The version of EFTA that was in place prior to H.R. 4367 applies to the class claims; nothing in H.R. 4367 changes the class members' ability to seek the statutory damages to which they are entitled through a class action; and the district court erred in denying class certification based on the enactment of H.R. 4367.

CONCLUSION

For the foregoing reasons, this Court should reverse the district court's dismissal of the suit, vacate the denial of class certification, and remand to the district court for further proceedings.

Respectfully submitted,

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July 15, 2013

CERTIFICATE OF COMPLIANCE WITH RULE 32(a)

1. This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because it contains 6,434 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii) and the Rules of this Court.

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because it has been prepared in a proportionally spaced typeface using WordPerfect X5 in 14-point Times New Roman.

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CERTIFICATE OF SERVICE

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