[Cite as *Huntington Natl. Bank v. Hall*, 2021-Ohio-3111.]

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

The Huntington National Bank,	:	
Plaintiff-Appellee,	:	No. 20AP-449 (C.P.C. No. 17CV-4461)
v.	:	(REGULAR CALENDAR)
Stacy L. Hall,	:	
Defendant-Appellant,	:	
Ronnie Hall et al.,	:	
Defendants-Appellees.	:	

D E C I S I O N

Rendered on September 9, 2021

On brief: *Carlisle, McNellie, Rini, Kramer & Ulrich, Co., LPA,* and *Eric T. Deighton*, for appellee The Huntington National Bank. **Argued:** *Eric T. Deighton.*

On brief: *The Behal Law Group LLC,* and *John M. Gonzales*, for appellant. **Argued:** *John M. Gonzales.*

APPEAL from the Franklin County Court of Common Pleas

LUPER SCHUSTER, J.

{¶ 1} Defendant-appellant, Stacy L. Hall, appeals from a judgment of the Franklin County Court of Common Pleas awarding summary judgment in favor of plaintiff-appellee, The Huntington National Bank, and denying Hall's summary judgment motion. For the following reasons, we affirm.

I. Facts and Procedural History

{¶ 2} In May 2017, Huntington initiated this foreclosure action against Hall and other interested parties relating to 458 Ryan Avenue, Columbus, Ohio (the "property"). The

complaint alleged that in December 2007 Huntington (as lender) and Leeca and Gary Cooper (as borrowers) executed a personal credit line agreement secured by an open-end mortgage on the property. In connection with opening the credit line, the Coopers purchased a debt cancellation protection product from Huntington, the terms of which were set forth in the personal credit line agreement rider (the "rider"). On April 7, 2011, the Coopers deeded the property to their children, Hall and Matthew Cooper. Four days later, Leeca Cooper died. Gary Cooper died in December 2015. The complaint further alleged the loan was in default as of September 10, 2016, and Huntington was owed $28,944.86, plus interest at the rate of 4 percent per annum from the date of default. In defense of the action, Hall argued there was no outstanding balance on the personal credit line based on application of the rider. In response to Hall's argument, Huntington asserted the debt cancellation protection terminated when it canceled the personal credit line debt upon Leeca Cooper's death, and thus the debt owed upon Gary Cooper's death was not canceled.

{¶ 3} In April 2019, both Huntington and Hall moved for summary judgment. In August 2020, the trial court granted Huntington's summary judgment motion and denied Hall's summary judgment motion.

{¶ 4} Hall timely appeals.

II. Assignment of Error

{¶ 5} Hall assigns the following error for our review:

> The trial court erred by granting appellee's motion for summary judgment and not appellant's.

III. Discussion

{¶ 6} Hall's sole assignment of error alleges the trial court erred in granting Huntington's summary judgment motion and denying her summary judgment motion. This assignment of error is not well-taken.

{¶ 7} An appellate court reviews summary judgment under a de novo standard. *Coventry Twp. v. Ecker*, 101 Ohio App.3d 38, 41 (9th Dist.1995); *Koos v. Cent. Ohio Cellular, Inc.*, 94 Ohio App.3d 579, 588 (8th Dist.1994). Summary judgment is appropriate only when the moving party demonstrates (1) no genuine issue of material fact exists, (2) the moving party is entitled to judgment as a matter of law, and (3) reasonable minds could come to but one conclusion and that conclusion is adverse to the party against whom

the motion for summary judgment is made, that party being entitled to have the evidence most strongly construed in its favor. Civ.R. 56(C); *State ex rel. Grady v. State Emp. Relations Bd.*, 78 Ohio St.3d 181, 183 (1997).

{¶ 8} Pursuant to Civ.R. 56(C), the moving party bears the initial burden of informing the trial court of the basis for the motion and identifying those portions of the record demonstrating the absence of a material fact. *Dresher v. Burt*, 75 Ohio St.3d 280, 293 (1996). However, the moving party cannot discharge its initial burden under this rule with a conclusory assertion that the nonmoving party has no evidence to prove its case; the moving party must specifically point to evidence of the type listed in Civ.R. 56(C) affirmatively demonstrating that the nonmoving party has no evidence to support the nonmoving party's claims. *Id.*; *Vahila v. Hall*, 77 Ohio St.3d 421, 429 (1997). Once the moving party discharges its initial burden, summary judgment is appropriate if the nonmoving party does not respond, by affidavit or as otherwise provided in Civ.R. 56, with specific facts showing that a genuine issue exists for trial. *Dresher* at 293; *Vahila* at 430; Civ.R. 56(E).

{¶ 9} In its complaint, Huntington alleged the personal credit line was in default, with $28,944.86 in principal owed, entitling Huntington to foreclose on the mortgage securing the loan. To properly support a summary judgment motion in a foreclosure action, a plaintiff must present evidentiary quality materials establishing: (1) that the plaintiff is the holder of the note and mortgage, or is a party entitled to enforce the instrument; (2) if the plaintiff is not the original mortgagee, the chain of assignments and transfers; (3) that the mortgagor is in default; (4) that all conditions precedent have been met; and (5) the amount of principal and interest due. *U.S. Bank Natl. Assn. v. Lewis*, 10th Dist. No. 18AP-550, 2019-Ohio-3014, ¶ 23. In support of its summary judgment motion, Huntington presenting the necessary evidence supporting its foreclosure claim. Hall responded by presenting evidence that, according to her, demonstrated the loan was not in default as alleged.

{¶ 10} Resolving the issue of whether the loan was in default in the amount alleged requires review of the meaning of certain provisions in the rider. The meaning of a written contract is a question of law. *State v. Fed. Ins. Co.*, 10th Dist. No. 04AP-1350, 2005-Ohio-6807, ¶ 22, citing *Long Beach Assn., Inc. v. Jones*, 82 Ohio St.3d 574, 576 (1998). The

purpose of contract construction is to realize and give effect to the parties' intent. *Skivolocki v. E. Ohio Gas Co.*, 38 Ohio St.2d 244 (1974), paragraph one of the syllabus. "The intent of the parties to a contract is presumed to reside in the language they chose to employ in the agreement." *Kelly v. Med. Life Ins. Co.*, 31 Ohio St.3d 130 (1987), paragraph one of the syllabus. The court must read words and phrases in context and apply the rules of grammar and common usage. *Keller v. Foster Wheel Energy Corp.*, 163 Ohio App.3d 325, 2005-Ohio-4821, ¶ 14 (10th Dist.). Thus, "[c]ommon words appearing in a written instrument will be given their ordinary meaning unless manifest absurdity results, or unless some other meaning is clearly evidenced from the face or overall contents of the instrument." *Alexander v. Buckeye Pipe Line Co.*, 53 Ohio St.2d 241 (1978), paragraph two of the syllabus.

{¶ 11} The parties disagree as to whether the rider's debt cancellation protection terminated when Huntington canceled the existing personal credit line debt upon Leeca Cooper's death in April 2011. Huntington argues that, pursuant to section 3.1.4 of the rider, the debt cancellation protection automatically terminated at that time. Conversely, Hall contends that the rider's section 5.0.1, not section 3.1.4, controlled any possible termination of the debt cancellation protection. Hall argues Huntington's cancellation of debt upon Leeca Cooper's death did not terminate the debt cancellation protection because none of the four circumstances set forth in section 5.0.1 occurred. She also generally asserts the intent of the parties was for Huntington to provide joint protection for the borrowers, and therefore the debt cancellation protection did not terminate upon the death of Leeca Cooper.

{¶ 12} The rider, which amended the personal credit line agreement between Huntington and Leeca and Gary Cooper, defines "Debt Cancellation Protection" as Huntington's "forgiveness or cancellation of all or a portion of the Minimum Monthly Payment or the Outstanding Credit Line Balance due to the occurrence of a Protected Event." (Ex. D at 1.0 Definitions, attached to Apr. 4, 2019 Pl.'s Mot. for Summ. Jgmt.) A "Protected Event" is "a defined event that initiates protection" under the rider. (Ex. D at 1.0 Definitions.) The rider identifies a borrower's terminal medical condition diagnosis or death ("Loss of Life") as a protected event. Thus, the rider provided Leeca and Gary Cooper

debt cancellation protection for a terminal medical condition diagnosis or death. Based on Leeca and Gary Cooper's deaths, Loss of Life is the protected event that is pertinent here.

{¶ 13} Sections 3.1.1 and 3.1.4 of the rider provide that "[a]fter a Loss of Life," Huntington will cancel the "Eligible Debt Amount," which is defined as the lesser of the outstanding credit line balance, or $50,000. (Ex. D.) Any amount above that remains the obligation of the deceased's estate and any surviving borrower. Section 3.1.4 of the rider further states, "Upon Debt Cancellation Protection due to Loss of Life being credited to the Outstanding Credit Balance, this Rider will terminate." (Ex. D.)[1]

{¶ 14} In contrast with sections 3.1.4 (Loss of Life protection) and 3.2.4 (terminal medical condition diagnosis protection), sections 5.0.1, 5.0.2, and 5.0.3 of the rider provide for the termination of Huntington's debt cancellation protection under circumstances that do not involve Huntington first canceling borrower debt. Sections 5.0.2 and 5.0.3 address the rights of the borrowers and Huntington to voluntarily terminate the debt cancellation protection. And section 5.0.1 provides for the automatic termination of the debt cancellation protection in four specific circumstances. This section states that, "[u]nless terminated earlier as described in sections 5.0.2 and 5.0.3 below, and subject to section 5.0.4[[2]]," debt cancellation protection under the rider ends for all borrowers "on the earlier of" the protection expiration date, "the pay-off and termination of Your PCL Account," the renewal or refinancing of the personal credit line, or either of the borrowers reach 66 years old. (Ex. D.)

{¶ 15} As noted above, once proper notice was provided to Huntington indicating the occurrence of a protected event, namely Leeca Cooper's death, Huntington canceled the eligible debt amount. Under the plain language of section 3.1.4, the cancellation of that debt resulted in the automatic termination of the rider. Hall contends, however, that any termination of the rider involving the elimination of existing debt on the personal line of

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[1] Similarly, sections 3.2.1 and 3.2.4 provide that "[a]fter a Terminal Medical Condition diagnosis," Huntington will cancel the "Eligible Debt Amount," which is the lesser of the outstanding credit line balance, or $50,000. And like section 3.1.4, section 3.2.4 states: "Upon Debt Cancellation Protection due to a diagnosis of a Terminal Medical Condition being credited to the Outstanding Credit Line Balance, this Rider will terminate." (Ex. D, attached to Apr. 4, 2019 Pl.'s Mot. for Summ. Jgmt.)

[2] Section 5.0.4 provides a borrower the option to continue single coverage, upon the termination of joint debt cancellation protection, if that termination was due to age or the voluntary election of either borrower.

credit was limited to circumstances meeting the "pay-off" provision of section 5.0.1. Under the "pay-off" provision, the debt cancellation protection automatically terminates on "the pay-off and termination of Your PCL Account." (Ex. D.) Hall reasons that because the personal credit line was not terminated, the "pay-off" provision did not apply, and thus the debt cancellation protection coverage continued. But this reasoning is flawed. The "pay-off" provision addresses a circumstance that is substantively different than the circumstance addressed in section 3.1.4. As used here, to "pay-off" a debt is to pay the debt in full, and necessarily involves the transfer of money to Huntington satisfying the debt obligation. The cancellation of debt, however, does not involve the actual transfer of funds but the forgiveness of debt by the creditor. Moreover, no language in section 5.0.1 alters the meaning of section 3.1.4 or limits automatic termination to one of the four circumstances outlined in section 5.0.1. Thus, we reject Hall's contention that because section 5.0.1 did not apply, debt cancellation protection coverage continued after Huntington canceled debt based on Leeca Cooper's death.

{¶ 16} Hall also argues that the use of the term "joint debt cancellation protection" in the rider and associated disclosure documents indicated the parties' intent that debt on the personal credit line would be canceled after each borrower died. We disagree. The fact that the coverage the Coopers purchased was referred to as "joint debt cancellation protection" in the rider and accompanying disclosure documents did not alter the application of section 3.1.4. Under the terms of the rider, both borrowers were covered in the event of a borrower death or terminal medical condition diagnosis. In that sense, it was joint protection. Thus, we reject Hall's contention that, despite the plain language of section 3.1.4, the use of the term "joint debt cancellation protection" in the rider and associated disclosure documents required Huntington's continuation of debt cancellation protection coverage until Gary Cooper's death.

{¶ 17} For these reasons, we find Huntington was not required to cancel the existing debt upon Gary Cooper's death because the rider already had terminated when Huntington canceled the existing debt upon Leeca Cooper's death. Consequently, the loan was in default as alleged. Because the trial court did not err in granting Huntington's summary judgment motion and denying Hall's summary judgment motion, we overrule Hall's sole assignment of error.

IV. Disposition

{¶ 18} Having overruled Hall's sole assignment of error, we affirm the judgment of the Franklin County Court of Common Pleas.

Judgment affirmed.

DORRIAN, P.J., and BROWN, J., concur.

RECOMMENDED FOR PUBLICATION
Pursuant to Sixth Circuit I.O.P. 32.1(b)

File Name: 21a0213p.06

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

ROBERTA LINDENBAUM, individually and on behalf of all others similarly situated,
Plaintiff-Appellant,

UNITED STATES OF AMERICA,
Intervenor-Appellant,

v.

REALGY, LLC, a Connecticut limited liability company, dba Realgy Energy Services,
Defendant-Appellee.

No. 20-4252

Appeal from the United States District Court for the Northern District of Ohio at Cleveland.
No. 1:19-cv-02862—Patricia A. Gaughan, Chief District Judge.

Argued: July 29, 2021

Decided and Filed: September 9, 2021

Before: GIBBONS, STRANCH, and BUSH, Circuit Judges.

COUNSEL

ARGUED: Ellen Noble, PUBLIC JUSTICE, PC, Washington, D.C., for Appellant. Lindsey Powell, UNITED STATES DEPARTMENT OF JUSTICE, Washington, D.C., for Intervenor. Ryan D. Watstein, KABAT CHAPMAN & OZMER LLP, Atlanta, Georgia, for Appellee. **ON BRIEF:** Ellen Noble, Leah Nicholls, PUBLIC JUSTICE, PC, Washington, D.C., Katrina Carroll, CARLSON LYNCH LLP, Chicago, Illinois, Adam T. Savett, SAVETT LAW OFFICES LLC, Allentown, Pennsylvania, for Appellant. Lindsey Powell, UNITED STATES DEPARTMENT OF JUSTICE, Washington, D.C., for Intervenor. Ryan D. Watstein, Matthew A. Keilson, KABAT CHAPMAN & OZMER LLP, Atlanta, Georgia, Paul A. Grammatico, KABAT CHAPMAN & OZMER LLP, Los Angeles, California, for Appellee. Scott L. Nelson, Allison M. Zieve, PUBLIC CITIZEN LITIGATION GROUP, Washington, D.C., Thomas M. Fisher, OFFICE OF THE INDIANA ATTORNEY GENERAL, Indianapolis, Indiana, Tara

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OPINION

JOHN K. BUSH, Circuit Judge. Courts do not rewrite, amend, or strike down statutes. We only "say what the law is." *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803). The district court held that a court conducting severability analysis defies that time-honored rule and instead "eliminat[es]" part of a statute. *Lindenbaum v. Realgy, LLC*, 497 F. Supp. 3d 290, 297 (N.D. Ohio 2020). It does not. We therefore reverse.

I.

In 1991, Congress prohibited almost all robocalls to cell phones and landlines. *Barr v. Am. Ass'n of Pol. Consultants, Inc. (AAPC)*, 140 S. Ct. 2335, 2344 (2020) (plurality opinion); 47 U.S.C. § 227(b)(1)(B). That seemed to change in 2015, when Congress attempted to enact an amendment to those broad prohibitions to allow robocalls if they were made "solely to collect a debt owed to or guaranteed by the United States." 47 U.S.C. § 227(b)(1)(A)(iii), (b)(1)(B).

The amendment, however, was unconstitutional. So held the Supreme Court in *AAPC*. The Court determined that adding the exemption for government-debt robocalls would cause impermissible content discrimination. *AAPC*, 140 S. Ct. at 2347 (plurality opinion); *id.* at 2357 (Sotomayor, J., concurring in the judgment); *id.* at 2363 (Gorsuch, J., concurring in part and dissenting in part). The Court also held that the exception was severable from the rest of the restriction, leaving the general prohibition intact. *Id.* at 2356 (plurality opinion); *id.* at 2357 (Sotomayor, J., concurring in the judgment); *id.* at 2363 (Breyer, J., concurring in part and dissenting in part). During its severability analysis, the three-justice plurality offered a brief footnote musing on the liability of parties who made robocalls between the exception's enactment and the Court's *AAPC* decision. *Id.* at 2355 n.12 (plurality opinion). Those justices

thought that "no one should be penalized or held liable for making robocalls to collect government debt after the effective date of the 2015 government-debt exception," but that their decision "does not negate the liability of parties who made robocalls covered by the robocall restriction."[1] *Id.*

In late 2019 and early 2020, Roberta Lindenbaum received two robocalls from Realgy, LLC advertising its electricity services. She sued, alleging violations of the robocall restriction. After the Supreme Court decided *AAPC*, Realgy moved to dismiss the case for lack of subject-matter jurisdiction. The district court granted the motion. It reasoned that severability is a remedy that operates only prospectively, so the robocall restriction was unconstitutional and therefore "void" for the period the exception was on the books. *Lindenbaum*, 497 F. Supp. 3d at 298–99. Because it was "void," the district court believed, it could not provide a basis for federal-question jurisdiction. *Id.* at 299. Lindenbaum timely appealed. The United States intervened in support of Lindenbaum to defend its statute.

II.

Realgy moved to dismiss for lack of subject-matter jurisdiction under Federal Rule of Civil Procedure 12(b)(1), but its motion "is more accurately considered a Rule 12(b)(6) motion to dismiss for failure to state a claim." *Orion Marine Constr., Inc. v. Carroll*, 918 F.3d 1323, 1330 (11th Cir. 2019); *cf. Tackett v. M&G Polymers, USA, LLC*, 561 F.3d 478, 488 (6th Cir. 2009) (treating a motion to dismiss as a motion for summary judgment). After all, a district court has jurisdiction when "the right of the petitioners to recover under their complaint will be sustained if the Constitution and laws of the United States are given one construction and will be defeated if they are given another." *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 89 (1998) (quoting *Bell v. Hood*, 327 U.S. 678, 685 (1946)). That is the case here. If Lindenbaum's arguments about the continuing vitality of the robocall restriction from 2015 to 2020 are correct, she is entitled to relief. So we will treat the district court's dismissal as one under Rule 12(b)(6)

[1] No other justice indicated agreement with that dictum, so it is relevant only to the extent of its power to persuade. *See Fed. Express Corp. v. Tenn. Pub. Serv. Comm'n*, 925 F.2d 962, 966 n.2 (6th Cir. 1991) ("[A] concurring opinion has no binding authority.").

and review it de novo, assuming all facts in the complaint to be true. *West v. Ky. Horse Racing Comm'n*, 972 F.3d 881, 886 (6th Cir. 2020).

III.

On the merits, Realgy contends that severability is a remedy that fixes an unconstitutional statute, such that it can only apply prospectively. As a fallback, it argues that if it can be held liable for the period from 2015 to 2020, but government-debt collectors who lacked fair notice of the unlawfulness of their actions cannot, it would recreate the same First Amendment violation the Court recognized in *AAPC*. Neither argument has merit.

A. SEVERABILITY

The judicial power is the "power . . . to decide" cases through "dispositive judgments." *Plaut v. Spendthrift Farm, Inc.*, 514 U.S. 211, 218–19 (1995) (cleaned up). When making those judgments, we must determine the legal rule that applies to the parties before us. That requires us to "say what the law is." *Marbury*, 5 U.S. at 177. And to say what the law is, we must exercise "the negative power to disregard an unconstitutional enactment." *Massachusetts v. Mellon*, 262 U.S. 447, 488 (1923). After disregarding unconstitutional enactments, we then determine what (if anything) the statute means in their absence—what is now called "severability" analysis. *See Tilton v. Richardson*, 403 U.S. 672, 684 (1971). But those steps are all part of explaining what the statute "has meant continuously since the date when it became law" and applying that meaning to the parties before us. *Rivers v. Roadway Express, Inc.*, 511 U.S. 298, 313 n.12 (1994). Courts do not change statutes.

Instead, as the Supreme Court has made clear in recognizing the power of judicial review, the Constitution itself displaces unconstitutional enactments: "a legislative act contrary to the constitution is not law" at all. *Marbury*, 5 U.S. at 177; *see also Ex parte Siebold*, 100 U.S. 371, 376 (1879). This foundational principle of law is far from the "legal fiction" Realgy argues it to be—the Court continues to reaffirm that principle to this day. *See Collins v. Yellen*, 141 S. Ct.

1761, 1788–89 (2021) ("[T]he Constitution automatically displaces any conflicting statutory provision from the moment of the provision's enactment . . .").[2]

Because unconstitutional enactments are not law at all, it follows that a court conducting severability analysis is interpreting what, if anything, the statute has meant from the start in the absence of the always-impermissible provision. *See Tilton*, 403 U.S. at 684 (citing *Champlin Ref. Co. v. Corp. Comm'n*, 286 U.S. 210, 234 (1932)). The Court's standard for severability questions supports that understanding. It looks to Congress's intent, a hallmark of any federal statutory interpretive endeavor. *See Murphy v. NCAA*, 138 S. Ct. 1461, 1482 (2018). And when assessing the severability of state statutes, the court looks to the intent of the state legislature. *See Leavitt v. Jane L.*, 518 U.S. 137, 139 (1996) (per curiam). If severability were a remedy for violation of the federal constitution, then federal courts could do it without reference to state law; because it is interpretive, federal courts must apply the state's law of severability.

Therefore, like any judicial interpretation, a court's severability analysis is subject to the "fundamental rule of 'retrospective operation' that has governed '[j]udicial decisions . . . for near a thousand years.'" *Harper v. Va. Dep't of Tax'n*, 509 U.S. 86, 94 (1993) (alterations in original) (quoting *Kuhn v. Fairmont Coal Co.*, 215 U.S. 349, 372 (1910) (Holmes, J., dissenting)).

Realgy's argument that severance is instead a remedy misconstrues the nature of remedies. Remedies consist of "an injunction, declaration, or damages." *See AAPC*, 140 S. Ct. at 2351 n.8 (plurality opinion).[3] Further, that "[t]he relief the complaining party requests does not circumscribe" the severability inquiry also demonstrates that it cannot be a remedy. *Levin v. Com. Energy, Inc.*, 560 U.S. 413, 427 (2010); *see also Sessions v. Morales-Santana*, 137 S. Ct. 1678, 1701 n.29 (2017) ("That Morales-Santana did not seek this outcome does not restrain the

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[2]This principle makes the severability inquiry clearer in the case of an unconstitutional amendment. Because it is "a nullity," it is "powerless to work any change in the existing statute"; the original statute "must stand as the only valid expression of the legislative intent." *Frost v. Corp. Comm'n*, 278 U.S. 515, 526–27 (1929); *see also Truax v. Corrigan*, 257 U.S. 312, 342 (1921); *Eberle v. Michigan*, 232 U.S. 700, 705 (1914).

[3]The Court has, at times, described severance as a "remedy." *See, e.g.*, *Seila Law LLC v. Consumer Fin. Prot. Bureau*, 140 S. Ct. 2183, 2207 (2020); *United States v. Booker*, 543 U.S. 220, 245 (2005). But it still applied the rule its severability analysis generated to "all cases on direct review." *Booker*, 543 U.S. at 268. So the term "remedy" was used—admittedly confusingly—as shorthand for the interpretation Congress would have wanted had it known of the statute's constitutional problem, not in the traditional sense of a true remedy granted in a single case to make a party whole. *Id.* at 246.

Court's judgment. The issue turns on what the legislature would have willed."). In *AAPC*, the Court severed the exception in a way that gave AAPC none of the relief it sought. 140 S. Ct. at 2344 (plurality opinion); *id.* at 2365–66 (Gorsuch, J., concurring in part and dissenting in part) (criticizing that outcome). That cannot have been a remedy.

Because severance is not a remedy, it would have to be a legislative act in order to operate prospectively only. One district court that accepted arguments like Realgy's forthrightly acknowledged that premise, explaining that "a severability decision is quasi-legislative, and thereby prospective." *Cunningham v. Matrix Fin. Servs., LLC*, No. 4:19-CV-896, 2021 WL 1226618, at *6 (E.D. Tex. Mar. 31, 2021). Realgy is less candid, but the cases on which it relies make the necessity of that premise equally clear. *Grayned v. City of Rockford*, for example, rejected an argument that a subsequent legislative amendment affected the "facial constitutionality of the ordinance in effect when appellant was arrested and convicted." 408 U.S. 104, 107 n.2 (1972); *see also Morales-Santana*, 137 S. Ct. at 1699 n.24 (describing *Grayned* as showing that "a defendant convicted under a law classifying on an impermissible basis may assail his conviction without regard to the manner in which the legislature might subsequently cure the infirmity"). Similarly, *Landgraf v. USI Film Products* dealt with the question whether a legislative enactment applies retroactively. 511 U.S. 244, 265 (1994). Neither has any bearing on this case. "Under our constitutional framework, federal courts do not sit as councils of revision, empowered to rewrite legislation in accord with their own conceptions of prudent public policy." *United States v. Rutherford*, 442 U.S. 544, 555 (1979). In short, severance is interpretation, not legislation.

To sum up, the district court erred in concluding that, in *AAPC*, the Supreme Court offered "a remedy in the form of eliminating the content-based restriction" from the TCPA. *Lindenbaum*, 497 F. Supp. 3d at 297. Instead, the Court recognized only that the Constitution had "automatically displace[d]" the government-debt-collector exception from the start, then interpreted what the statute has always meant in its absence. *See Collins*, 141 S. Ct. at 1788. That legal determination applies retroactively. *Harper*, 509 U.S. at 94.

B. First Amendment

There are exceptions to the general rule that judicial decisions apply retroactively. Sometimes, "a previously existing, independent legal basis (having nothing to do with retroactivity)" will preclude the application of a newly recognized rule. *Reynoldsville Casket Co. v. Hyde*, 514 U.S. 749, 759 (1995). Realgy argues that the First Amendment provides one such basis here. As a premise, it contends that government-debt collectors have a due-process defense to liability because they did not have fair notice of their actions' unlawfulness. If that is so, Realgy claims, then holding private-debt collectors liable would create the same content-discriminatory system that the Court held unconstitutional in *AAPC*: it would be liable, and government-debt collectors would not. We need not decide whether Realgy is correct about government-debt collectors because this case does not present the issue. Even assuming that it is correct, that does not create a First Amendment problem.

The First Amendment limits government regulation of speech. *Reed v. Town of Gilbert*, 576 U.S. 155, 163 (2015). In *AAPC*, it applied because the robocall restriction regulated speech. 140 S. Ct. at 2346 (plurality opinion). Here, by contrast, the centuries-old rule that the government cannot subject someone to punishment without fair notice is not tied to speech. *See, e.g.*, *Landgraf*, 511 U.S. at 282–83 (discussing that principle with regard to employer liability under Title VII); *Usery v. Turner Elkhorn Mining Co.*, 428 U.S. 1, 17–18 (1976) (same for retroactive liability for mining-based illnesses). Whether a debt collector had fair notice that it faced punishment for making robocalls turns on whether it reasonably believed that the statute expressly permitted its conduct. That, in turn, will likely depend in part on whether the debt collector used robocalls to collect government debt or non-government debt. But applying the speech-neutral fair-notice defense in the speech context does not transform it into a speech restriction.

IV.

In 1982, the Supreme Court considered "[t]he principle that statutes operate only prospectively, while judicial decisions operate retrospectively" so obvious as to be "familiar to

every law student." *United States v. Sec. Indus. Bank*, 459 U.S. 70, 79 (1982). Today, we clarify that severability is no exception. We reverse.

NOT RECOMMENDED FOR PUBLICATION
File Name: 21a0428n.06

No. 20-2060

**UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT**

MARK R. KRUEGER,

Plaintiff-Appellant,

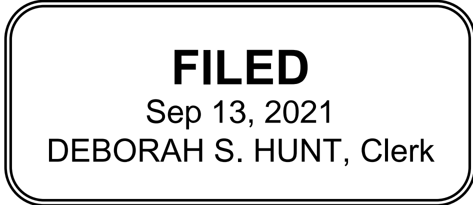
v.

EXPERIAN INFORMATION SOLUTIONS, INC.; TRANS UNION LLC,

Defendants,

CENLAR FSB,

Defendant-Appellee.



ON APPEAL FROM THE U.S. DISTRICT COURT FOR THE EASTERN DISTRICT OF MICHIGAN

Before: GIBBONS, KETHLEDGE, and MURPHY, Circuit Judges.

KETHLEDGE, Circuit Judge. For more than a year, the servicer for Mark Krueger's mortgage loan, Cenlar FSB, continued to tell credit-reporting agencies that the loan was past due—even though Cenlar knew that the loan had been discharged in bankruptcy. Krueger's credit score hovered in the low 500s as a result. After unsuccessfully seeking for months to have Cenlar correct its reports, Krueger brought this suit under the Fair Credit Reporting Act, alleging that Cenlar had negligently and willfully breached its duties under the Act. The district court granted summary judgment to Cenlar, holding that Krueger lacked standing to assert his negligence claim and that he lacked evidence that Cenlar violated the Act willfully. We respectfully disagree and reverse.

I.

Given that the district court granted summary judgment to Cenlar, we construe the factual record in the light most favorable to Krueger. *Upshaw v. Ford Motor Co.*, 576 F.3d 576, 584 (6th Cir. 2009).

Krueger filed for bankruptcy under Chapter 13 and eventually made all the payments required under his plan. In January 2018, the bankruptcy court entered an order discharging his remaining debts, including a mortgage loan on a property at 9405 Pardee Road. The servicer for the mortgage on that property was Cenlar.

After the discharge, Krueger looked forward to replacing his older, beat-up car with a new one. A month after the discharge, however, an online credit-monitoring app told Krueger that one of his accounts was past due. Krueger pulled his credit reports from Experian, Equifax, and TransUnion. Those reports said that Krueger owed $29,453 on the Cenlar loan, that $10,875 of the loan was past due, and that his credit score was 515—much lower than Krueger had expected, even with his recent bankruptcy.

Given that credit score, Krueger abandoned his plan to buy a new car and instead disputed his credit report. The credit-reporting agencies forwarded Krueger's disputes to Cenlar. At the time, Cenlar already knew that the bankruptcy court had discharged the mortgage loan; indeed Cenlar was in the process of stripping the lien from Krueger's property. In response to the dispute, Cenlar's credit analysts likewise noted that the bankruptcy court had discharged the debt—meaning, as Cenlar's representative admitted later, that Krueger "did not owe" anything on the loan and that his account was not past due. Yet when Cenlar purportedly sought to correct the mistaken report, it said the account had "no status"—which, according to Cenlar, meant that the

account's status had not changed from the month before. Cenlar also said that the account balance had increased to $31,783 and that the amount past due had increased to $11,191.

When Krueger next checked his reports, Experian and TransUnion still said that the Cenlar loan was past due. Over the following months, Krueger continued to dispute his credit reports, and Cenlar continued to say the same thing—that the account had "no status" and a past-due balance. In February 2019, more than a year after the discharge, Cenlar was still reporting that the loan was past due—now by $12,294.

Krueger sued Cenlar that month, alleging that it had willfully and negligently violated its statutory duties as a "furnisher" of credit information. *See* 15 U.S.C. §§ 1681s-2, 1681n, 1681o. Cenlar and Krueger cross-moved for summary judgment on those claims. The district court held that a reasonable jury could not find that Cenlar had violated the Act willfully and that Krueger lacked standing to bring a claim that Cenlar had violated the Act negligently. The court therefore granted summary judgment to Cenlar. This appeal followed.

II.

We review the district court's grant of summary judgment de novo. *See Fortney & Weygandt, Inc. v. Am. Mfrs. Mut. Ins. Co.*, 595 F.3d 308, 310 (6th Cir. 2010). Summary judgment is appropriate if "there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a).

A.

Krueger challenges the district court's conclusion that he lacked standing. A plaintiff has standing if he suffered an injury in fact, fairly traceable to the defendant's alleged misconduct, which the relief he seeks would likely redress. *See Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560–61 (1992).

Here, Krueger seeks damages under the Fair Credit Reporting Act, which gives him a cause of action against a furnisher of credit information (like Cenlar) who willfully or negligently violated its procedural duties under the Act. *See* 15 U.S.C. §§ 1681n, 1681o. But not every violation of the Act causes an injury in fact. *Spokeo, Inc. v. Robins*, 136 S. Ct. 1540, 1549 (2016). Instead, a plaintiff has standing to seek damages only if he can show that the defendant's alleged procedural violation—here, Cenlar's inaccurate reports about the mortgage loan's status—caused him to suffer a concrete harm. *See TransUnion LLC v. Ramirez*, 141 S. Ct. 2190, 2211 (2021).

Krueger argues that Cenlar's inaccurate reports inflicted a concrete harm because his low credit score caused him to abandon his plans to buy a new car. When the bankruptcy court discharged his debts, Krueger had been driving an older car for years, using his available funds to pay off his debts. A loan would have allowed him to replace his old car, with the added benefit of giving him a chance to rebuild his credit. But when Krueger saw his dismal credit score he chose not to apply for a loan, since a lower credit score meant that lenders would charge him a higher interest rate. The harm that resulted from Krueger's forbearance was "not abstract." *Spokeo*, 136 S. Ct. at 1548 (internal quotation marks omitted). To the contrary, for about 18 months after Krueger's debts were discharged, instead of driving a new Ford F-150, he drove a Ford Fusion that was not "always in the best of shape." And the record here supports a finding that this harm was real, rather than fictive: once the credit-reporting agencies removed the Cenlar account from Krueger's report, his credit score increased by almost 100 points and he promptly obtained a car loan to buy a new F-150.

Cenlar does argue that, since Krueger himself chose not to apply for a car loan, he cannot trace this harm to Cenlar's conduct—as opposed to the bankruptcy or to himself. But a plaintiff's role in his injury destroys traceability only when the injury is "so completely due to the plaintiff's

own fault as to break the causal chain." *Buchholz v. Meyer Njus Tanick, PA*, 946 F.3d 855, 866 (6th Cir. 2020) (alterations adopted). Here, when Cenlar reported that the loan was past due, Krueger's resulting credit score was only 515. That Krueger chose not to obtain a loan with higher interest than he could have obtained absent Cenlar's error does not make him at "fault" for the harm of driving his old car. Krueger has standing to assert his claims here.

B.

Krueger argues that his evidence would allow a reasonable jury to find that Cenlar had willfully and negligently violated the Act. To prevail on those claims, Krueger must show three things. First, Krueger must make "a threshold showing" that Cenlar provided false or "materially misleading" information to the credit-reporting agencies. *Pittman v. Experian Info. Sols., Inc.*, 901 F.3d 619, 629–30 (6th Cir. 2018). Krueger plainly made that showing: long after his mortgage loan was discharged, Cenlar continued to report it as past due. Cenlar responds that its report was not materially misleading because Cenlar also said that the account had "no status" and because Experian's credit report elsewhere noted Krueger's bankruptcy. The relevant inquiry, however, is whether Cenlar's information was misleading, not whether Experian's report as a whole was. *See id*. And Cenlar's failure to indicate that the debt had been discharged could mislead a person to believe that Krueger remained liable for the loan. Indeed, Krueger presented evidence that the credit reporting agencies actually construed Cenlar's responses that way: when the agencies removed the Cenlar account from his report, his credit score increased by 100 points. Thus, a reasonable jury could find that Cenlar furnished false or materially misleading credit information about Krueger.

Second, a reasonable jury must be able to find that Cenlar breached its duties under the Act. *See* 15 U.S.C. §§ 1681n(a), 1681o(a); *Pittman*, 901 F.3d at 628. As relevant here, the Act

required Cenlar reasonably to investigate Krueger's dispute and to correct any inaccurate or incomplete information that Cenlar had furnished. *See* 15 U.S.C. § 1681s-2(b)(1)(A), (E); *Boggio v. USAA Fed. Sav. Bank*, 696 F.3d 611, 616, 618 (6th Cir. 2012). The record would allow a jury to find that Cenlar breached that duty. Krueger repeatedly told Cenlar that his loan had been discharged in bankruptcy and that, as a result, he did not owe anything on the loan. Cenlar's credit analysts also saw that the loan had been discharged. And Cenlar's representative admitted in his deposition that the discharge meant that Krueger owed nothing on the loan. Yet Cenlar continued to report that Krueger owed a balance on the loan and that the loan was past due. From that evidence a jury could plainly find that Cenlar botched its investigation and failed to correct its mistaken reporting.

The same evidence supports the third element of Krueger's claims, namely that Cenlar acted negligently or willfully. *See* 15 U.S.C. §§ 1681n(a), 1681o(a). Again, Cenlar knew that Krueger's loan had been discharged but for more than a year told the credit-reporting agencies that the loan was past due. A jury could therefore find that Cenlar was either incompetent or willful in its failure to correct its reports sooner. Cenlar contends that its actions were not willful because it had implemented policies that guided its analysts in the resolution of credit disputes. But the mere existence of those policies hardly disproves as a matter of law that Cenlar acted willfully. *See Boggio*, 696 F.3d at 619. Cenlar was not entitled to summary judgment on Krueger's claims.

* * *

The district court's judgment is reversed, and Krueger's case is remanded for further proceedings consistent with this opinion.