

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

NEW YORK STATE BAR,
ASSOCIATION,

Plaintiff,

v.

FEDERAL TRADE COMMISSION,

Defendant.

Civil Action No. 02-810 (RBW)

AMERICAN BAR ASSOCIATION,

Plaintiff,

v.

FEDERAL TRADE COMMISSION,

Defendant.

Civil Action No. 02-1883 (RBW)

ORDER

This matter comes before the Court on the parties' cross-motions for summary judgment following the issuance of the Court's August 11, 2003 Memorandum Opinion denying the defendant's motions to dismiss. New York State Bar Ass'n v. FTC, 276 F. Supp. 2d 110 (D.D.C. 2003). This action was initiated by the plaintiffs after "report[s] in the professional and trade regulation press" indicated that the Federal Trade Commission ("FTC") had decided that attorneys engaged in certain "financial activities" as part of their legal practice would be subject to the Gramm-Leach-Bliley Act (the "GLBA"). New York State Bar Association Complaint

("NYSBA Compl.") ¶ 37; see American Bar Association Complaint ("ABA Compl.") ¶ 18. As this Court explained in its Memorandum Opinion,

Title V of the GLBA, 15 U.S.C. §§ 6801-6809, contains a number of privacy provisions and reflects 'the policy of Congress that each financial institution has an affirmative and continuing obligation to respect the privacy of its consumers and to protect the security and confidentiality of those consumers' nonpublic personal information[,]' 15 U.S.C. § 6801(a). To implement this policy, Congress required that financial institutions provide consumers, '[a]t the time of establishing a customer relationship . . . and not less than annually during the continuation of such relationship,' a privacy notice detailing their practices with respect to disclosing and protecting nonpublic personal information. See 15 U.S.C. § 6803. In addition, Congress mandated that prior to disclosing any nonpublic personal information, the financial institution must provide a consumer with a nondisclosure or 'opt out' option, which if exercised, would prohibit the financial institution from disseminating the consumers' nonpublic personal information to non-affiliated third parties. See 15 U.S.C. § 6802(b).

New York State Bar, 276 F. Supp. 2d at 112. In response to the published reports about the FTC's intentions, the plaintiffs and numerous other bar associations across the nation, sent letters to the FTC formally requesting that the practice of law be exempted from the GLBA's privacy provisions. Id. (citing NYSBA Compl. ¶¶ 39-41; ABA Compl. ¶ 19). The FTC responded with the following April 8, 2002 letter:

We have carefully considered your concerns, and recognize the issues you raised regarding the application of the GLB Act to attorneys at law. However, there are significant questions as to the legal authority of the Commission to grant the exemption you request.

As you know, the GLB Act itself states that entities engaged in 'financial activities' are subject to the Act. Although the Commission has express authority under the GLB Act to grant exceptions, that authority is limited to providing exceptions to the requirements of Section 502 [, 15 U.S.C. § 6802]. The Act does not provide the Commission with express authority to grant exemptions from the other provisions of the GLB Act, including the initial and annual notice provisions. See GLB Act § 504(b), 15 U.S.C. [§] 6804 (b).

Id. at 112-13 (citing Memorandum of the American Bar Association in Opposition to the FTC's

Motion to Dismiss the Complaint, Exhibit ("Ex.") A; see NYSBA Compl. ¶¶ 45-50). Following the receipt of this letter, the plaintiffs filed this action seeking a declaratory judgment that: (1) the FTC's decision that attorneys engaged in certain "financial activities" as part of their practice of law are covered by the GLBA is beyond the FTC's statutory authority; (2) the FTC's decision that attorneys engaged in certain "financial activities" as part of their practice of law are covered by the GLBA is arbitrary and capricious agency action; and (3) the FTC's refusal to grant attorneys engaged in the practice of law an exemption from the GLBA also constitutes arbitrary and capricious agency action.

Summary Judgment is generally appropriate when the "pleadings, depositions, answers to interrogatories and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c). A material fact is one that "might affect the outcome of the suit under the governing law" Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986). To prevail under Rule 56, the moving party must show that the non-moving party "has failed to make a sufficient showing on an essential element of [his] case with respect to which [he] has the burden of proof." Celotex Corp. v. Catrett, 477 U.S. 317, 323 (1986). It is generally understood that when considering a motion for summary judgment a court must "draw all justifiable inferences in the nonmoving party's favor and accept the nonmoving party's evidence as true." Greene v. Amritsar Auto Servs. Co., 206 F. Supp. 2d 4, 7 (D.D.C. 2002) (citing Anderson, 477 U.S. at 255). The non-moving party must establish more than "[t]he mere existence of a scintilla of evidence in support of [his] position." Anderson, 477 U.S. at 252. The District of Columbia Circuit has stated that the non-moving party may not rely solely on mere

conclusory allegations. Greene v. Dalton, 164 F.3d 671, 675 (D.C. Cir. 1999). Thus, "[i]f the evidence is merely colorable . . . or is not significantly probative . . . summary judgment may be granted." Anderson, 477 U.S. at 249-50 (citations omitted). For all of the reasons set forth by this Court in its August 11, 2003 Memorandum Opinion, which is incorporated herein, the Court finds it appropriate to grant the plaintiffs' motion for summary judgment.

Turning first to the plaintiffs' Chevron challenge under 5 U.S.C. § 706(2)(C), the Court examined "whether Congress has directly spoken to the precise question at issue[.]" Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837, 842-43 (1984), and found that

utilizing the traditional tools of statutory interpretation, . . . [the Court] is unable to conclude as a matter of law that Congress intended for the GLBA's privacy provisions to apply to attorneys who provide legal services in the fields of real estate settlement, tax-planning and tax-preparation. This conclusion is compelled by the plain language, the underlying purpose, and the legislative history of the GLBA, which all indicate that it does not appear that Congress intended for attorneys to be considered 'financial institutions.' It is also doubtful that Congress would alter a regulatory scheme that has always been under the authority of the states without even a hint that newly enacted legislation was venturing into that area. In other words, the delegation of authority to the FTC by Congress to regulate the ethical conduct of attorneys in the face of approximately two hundred years of exclusive state regulation in such a subtle way would be, in the words of Justice Scalia, like 'hid[ing an] elephant[] in a mousehole.'

New York State Bar, 276 F. Supp. 2d at 136 (quoting Whitman v. American Trucking Associations, Inc., 531 U.S. 457, 468 (2001)). The Court also then noted that even if it had to consider the second-step of Chevron based on a finding that "the GLBA is ambiguous or silent on its applicability to attorneys engaged in the practice of law, the FTC's interpretation would still likely be invalid[.]" because the Court would be unable to afford deference to the FTC's April 8, 2002 letter, as it "appears to have been made without any degree of deliberation,

thoughtful consideration or comments from the public[,]" and the FTC's interpretation contained in their briefs to this Court would amount to little more than post hoc rationalization. Id. at 136, 139. Turning next to the plaintiffs' "arbitrary and capricious" challenge made pursuant to 5 U.S.C. § 706(2)(A), the Court concluded that the FTC's interpretation appeared to constitute "arbitrary and capricious" agency action as "[t]he FTC has failed to articulate any explanation, let alone a satisfactory one, for its interpretation." Id. at 141 (citing Motor Vehicle Manufacturer's Ass'n v. State Farm Mutual Ins. Co., 463 U.S. 29, 43 (1983)). Because review of this challenge overlaps to a large degree with the Court's analysis of the second-step of Chevron, the Court found that the FTC's post hoc rationalization could not "substitute for the reasoned decision-making process that an agency must undertake when making the decision itself." Id. at 142. Finally, turning to the plaintiffs' third challenge, the Court concluded that even if attorneys were deemed to be subject to the GLBA's privacy provisions, it appeared that the FTC's decision "not even to consider, much less take a 'hard look' at the ABA's de minimis exemption request, [was] arbitrary and capricious agency action." Id. at 146 (citations omitted).

Because of the posture of the case and the fact that the Court did not have the benefit of the administrative record before it at the time of its ruling, the Court was not in a position to grant any type of relief to the plaintiffs in its August 11, 2003 Memorandum Opinion. Instead, utilizing the traditional tools of statutory interpretation in addressing the plaintiffs' Chevron challenge and examining the FTC's April 8, 2002 letter to determine whether there was "arbitrary and capricious" agency action, the Court denied the defendant's motions to dismiss because it appeared that the FTC's interpretation that the GLBA applied to attorneys engaged in certain "financial activities" as part of their practice of law was invalid. Since issuing the Memorandum

Opinion, the defendant has filed the administrative record with the Court, which simply consists of: (1) numerous letters by various bar associations expressing concern to the FTC in response to learning that the FTC considered the GLBA applicable to the practice of law; (2) one-page letters sent to the bar associations in response to these letters by the FTC indicating that it would consider the concerns they had raised; and (3) the April 8, 2002 letter which this Court has already determined cannot be afforded deference. The Court finds the administrative record telling, as it reveals that the April 8, 2002 letter is the only evidence that the FTC can point to as support for its position that it appropriately considered the applicability of the GLBA to the practice of law, which the Court has already deemed to have been issued "without any degree of deliberation [or] thoughtful consideration[.]" *Id.* at 139. There is nothing else in the record that indicates that the FTC engaged in any type of reasoned decisionmaking, confirming the Court's belief that the FTC acted in an "arbitrary and capricious" manner. Now, with the parties having filed cross-motions for summary judgment, which reveal that there are no genuine issues as to any material fact, and having considered the administrative record, the Court finds that summary judgment should be awarded to the plaintiffs. This is because the case is now in a posture where, for all of the reasons expressed by this Court in its August 11, 2003 Memorandum Opinion, the Court can now definitively conclude as a matter of law, pursuant to 5 U.S.C. § 706(2)(C), that Congress did not intend for the GLBA's privacy provisions to apply to attorneys who provide legal services in the fields of real estate settlement, tax-planning and tax preparation, and that, pursuant to 5 U.S.C. § 706(2)(A), the FTC's interpretation that attorneys are subject to the GLBA's privacy provisions constitutes "arbitrary and capricious" agency action. Accordingly, it is hereby, this 30th day of April, 2004

ORDERED that the Plaintiffs' Motion for Summary Judgment is **GRANTED**. It is **FURTHER ORDERED** that the Defendant's Cross-Motion for Summary Judgment is **DENIED**. It is therefore

DECLARED and **DECREED** that the FTC's decision that attorneys engaged in the practice of law are covered by the GLBA is beyond the FTC's statutory authority. It is

FURTHER DECLARED and **DECREED** that the FTC's decision that attorneys engaged in the practice of law are covered by the GLBA is an arbitrary and capricious agency action.¹

SO ORDERED.

REGGIE B. WALTON
United States District Judge

¹ The plaintiffs recognize that "[t]here is no need for the Court to reach plaintiffs' claim that the FTC's refusal to exempt practicing lawyers from the GLBA under its de minimis authority constituted arbitrary and capricious agency action." Plaintiffs' Motion for Summary Judgment, Plaintiffs' Statement of Points and Authorities at 6. The Court must agree, as it has already found the FTC's decision that attorneys engaged in the practice of law are covered by the GLBA is beyond the FTC's statutory authority and the FTC's decision that attorneys engaged in the practice of law are covered by the GLBA is an arbitrary and capricious agency action.