Doug Lang:

Welcome to Appealing Strategies, sponsored by Thompson Coburn LLP. Hello. I'm Doug Lang, a retired appellate judge and appellate lawyer practicing at Thompson Coburn, along with my Thompson Coburn colleague, Booker Shaw, who's also a retired appellate judge and practicing appellate lawyer. Between the two of us, we've resolved thousands, literally thousands, of appeals, and we're going to discuss some lessons we learned as judges and in the practice of law.

Also, with us today are three additional Thompson Coburn partners. First, Cheryl Kelly of our St. Louis office, focuses her practice on financial restructuring, bankruptcy, financial services, and real estate. Second, Barry Fischer of our Chicago office, who focuses on all manner of corporate matters and is chair of our firm's Corporate Transparency Act task force, and Kenyen Brown of our Washington, DC office, who is an accomplished trial lawyer, I can say that for sure. Now, let's talk about a cluster of cases that challenge a federal statute called the Corporate Transparency Act.

First, we will talk about the CTA, the Corporate Transparency Act. Second, we're going to talk about nationwide injunctions, which is part of what's going on in this massive number of lawsuits, and you've also heard about that recently, with the change in administrations. Then we will talk about how jurisdiction is determined when a plaintiff attacks a statute like this. First of all, I want to address Cheryl and Barry. Hello. Can you talk about the background the CTA?

Cheryl Kelly:

Thank you, Judge Lang, and thank you to our audience for joining us. The Corporate Transparency Act, which we'll refer to as the CTA, was enacted as part of the Anti-Money Laundering Act of 2020. The aim of the act is to provide for transparency as to the formation and control of entities to discourage their use for nefarious activity, such as money laundering, financing of terrorism, and other financial crimes. The act targeted small business entities and trusts and other sorts of business beings, if you will, or private beings for that matter that were not typically subject to robust reporting regimes. But even with, you know, exemptions and exemptions from coverage, a lot of folks had no idea that this act was in the works.

In the United States, we typically haven't had much in the way of transparency as far as the formation, ownership, and control of entities. In other countries, that's a common feature. So, another, focus of the act was frankly to get the United States more in line with the Financial Action Task Force, which is an intergovernmental body that attempts to, again, set standards for management of financial transactions and to limit their use for bad purposes.

The act is administered by the Treasury through its Financial Crimes Enforcement Network, and we'll call that FinCEN. It took a number of years for the rulemaking process and to define exactly what sort of reporting was going to be required of parties that form,manage, and control companies that are subject to the act. I'm going to let Barry talk a little bit about what this reporting required because I think it's important to understand that it's really the thrust as to why litigation ultimately commenced as an effort to narrow the scope of the act.

Barry Fischer:

In a nutshell, FinCEN, a Department of the Treasury that handles a number of reporting functions -- you know, related to topics like this, such as anti-money laundering filings -- set up a database. And then under the CTA, companies or actually entities that were registered with a state secretary of state's office or equivalent, so corporations, LLCs, certain trusts that are registered, and other entities. The information can be divided into two parts.

The company itself has to provide some limited information. Basically, its name, its address, its tax ID number, certain other numbers in certain other cases, its organization, and where it was organized. A foreign company would have to provide where it was first qualified. You know, the more detailed data comes from the beneficial owners of the entity. And beneficial owners are divided in the CTA into two groups. One is those is people with substantial management control over the entity.

Doug Lang:

Barry, let me let me ask you. This based on what you and Cheryl have said, this is a self-reporting statute that's mandated. You have to determine if your company, your LLC, is included in what you're saying, and then report. And are there penalties for not reporting?

Barry Fischer:

There's a civil penalty of $500 per day for failure to file, and there are criminal penalties for knowing violations of the act, which can be up to two years in imprisonment and a $10,000 fine. So, we're talking about, you know, there's some real teeth behind this this law.

Doug Lang:

So, Barry, is it fair to say that if one uploads that information, pretty significant information, you can't really be sure where it's going?

Barry Fischer:

It was a law enforcement-based database, but obviously, the information that it asked for is particularly, you know, it's private and is things that people generally are reticent to just put up on a website, even if it is a government one. On 01/01/2024, the database opened, and companies that were formed in the calendar year 2024 had 90 days to provide their information. If information changed, there's an updating obligation that was 30 days. January 1, 2025, though, was a really important date. On that date, all companies that were in existence prior to 2024, which was estimated to be about 33,000,000 entities, had to provide their information. And once 2025 came around, companies had to file their information within 30 days.

Doug Lang:

Well, thank you, Cheryl and Barry, for that comprehensive outline. In talking to you guys quite a bit about this in the past, I know you could take an hour to tell us the ins and outs. But Kenyen, now I want to ask you to help us understand the litigation context on this. In 2019, 2023 through, you know, early 2025, a whole raft of litigation has ensued trying to stop the CTA. For a lot of reasons, including just the basic one, people, these 33,000,000 entities, didn't want to give up their information, that somebody could look at to start accusing them of a crime, and then they go through the hell of an investigation.

You were a trial lawyer in a case that was filed in the Northern District of Alabama, and it's now on appeal in the Eleventh Circuit.

Kenyen Brown:

Yeah, glad to do so. The case is *National Small Business United vs. Yellen*, and it is represented by a trade group and one of its named plaintiffs, Isaac Winkles. In a simplified description, we argue that the CTA sought to create a nationwide big brother type of database, with digital mugshots of American citizens who had not committed any crimes. This information was accessible to local and federal law enforcement, as well as you mentioned some federal rather foreign law enforcement entities as well to investigate, possible instances of, money laundering or terrorist financing. And while as a former federal prosecutor, I can appreciate the sentiment toward the goals of the CTA, it was just an overreach. And because of that, we argued that the 26 to 30 million entities that would be reporting under that would be unduly subject to reporting requirements that were not necessary under the Commerce Clause, and we argued that because the Commerce Clause, we argued, does not give authority for the federal government or Congress to take a peek at entities upon formation, when they have not engaged in any economic activity whatsoever, with the suspicion that they might have engaged in criminal activity. We also argued that the necessary and proper clause did not apply to this situation to justify the CTA in that it sought to regulate entities that were not already subject to federal regulation.

In many ways, we argued that the law tended to kind of infringe upon a state's sovereign right to govern entities and entity formation, and that this was improper.

Doug Lang:

Let me ask you, Kenyen. Those are significant constitutional issues. And, as far as I could tell from looking at the record, the government was, you know, really strongly opposed to anybody kicking this statute out. How did the court resolve it, and what was the mechanism that the court used to resolve the issue, in in favor of finding CTA unconstitutional?

Kenyen Brown:

Well, it was kind of unique in terms of process. The court granted the party's motion, for expedited briefing and to stay discovery, and we cross moved for summary judgment. And in the end, after conducting a hearing to hear the arguments orally, the court issued a 53-page memorandum in our favor, in that case. We really looked at it as a challenge when we formulated the idea to challenge the constitutionality of this. And so, we're very gratified, that, while we hate the morass that's created from it, and we'll hear a little bit about that, we're really satisfied that, this has been rolled back significantly.

Doug Lang:

And, of course, as we're going to hear, the federal government would change the regulations to it's not the 33,000,000, apparently, that have to respond. It is, foreign ownership, and individuals involved in that. Is that right, Barry?

Barry Fischer:

Yes. Basically, in March of this year after the series of roller coaster decisions you're going to hear about from the various appellate courts, FinCEN announced that it was going to reexamine the act and

provide, you know, provide some exempted relief, for certain holders. And what it came out with was an interim final rule that was put out in the third week of March of this year, but which is now in effect. Basically, amended the law so that where all the entities, all the domestic entities that I had mentioned earlier would be exempt from filing and beneficial owners who were US citizens or US persons under tax law were also not required to be disclosed even for the foreign entities

Doug Lang:

Yeah. Once again, it's self-reporting. So, leading up to that, there was this this great basket of lawsuits, all over the country, doing what Kenyen and his colleagues did, and that is fighting the statute, trying to get it declared unconstitutional. And, I think one circuit, I think it's the First Circuit, actually decided that it wasn't unconstitutional, so we've got some different decisions going on. But one of the cases that really heated up towards the end of 2024 was a case, styled *Texas Top Cop Shop Inc, vs. Garland*, which was filed in the United States District Court for the Eastern District of Texas. And in that case, after a lot of briefing and analysis, U.S. district judge, now chief U.S. district judge for the Eastern District, Amos Mazzant, wrote a pretty lengthy memorandum opinion like the one in federal court in Alabama, also declaring unconstitutional. But one thing that he did that's a little bit different, he imposed a nationwide injunction against everybody, not just the parties. And, Kenyen, in your case, it was just the parties that, were seeking the relief. Right?

Kenyen Brown:

Yeah. That's correct. Again, and Top Cop was very similar to ours in that there was a finding that the statute violated the Fourth Amendment, and the court entered a nationwide injunction or joined nationwide. But then, the Supreme Court ended up taking up the case and lifting that. But three days later, another case out of the Fifth Circuit imposed a nationwide, enjoinment on that. So, you had this whiplash that if you're corporate counsel, I felt sorry for you because you really didn't know what to do or how to report. So, there's still, some ambiguity there even though the statute is now narrowed, according to FinCEN direction.

Doug Lang:

Yeah. That as we discussed before, that's kind of like the whack a mole games. You know? You one gets pounded down and another one comes up again. So, and the Supreme Court didn't do anything about that, the case that, popped up with a nationwide injunction. Is that right?

Kenyen Brown:

That's correct. The Smith case out of the Fifth Circuit.

Doug Lang:

Yeah. All of these cases together were moving along, but the Topcop case was interesting because Judge Mazzant ordered nationwide injunction. The government sought a stay from Judge Mazzant of that injunction. He denied that. Then they, the government asked the Fifth Circuit to stay that injunction. A motions panel stated the plaintiffs asked for a rehearing, and the panel that got assigned the case lifted the stay. So, we got a ping pong game going back and forth between the Fifth Circuit and the US district court in Sherman, Texas, then the US Supreme Court did what? They imposed the stay, as you were saying.

Kenyen Brown:

Right. And I know, Judge Booker Shaw has some thoughts about nationwide injunctions. Are those legal? Is that normal?

Booker Shaw:

Well, Kenyen, I wouldn't say that they are necessarily normal, but this is not necessarily normal litigation. You know, nationwide injunctions actually were imposed for the first time in 1963 in a District of Columbia, a circuit court case, *Wirtz vs. Baldor Electric*. And there, the court said the secretary of labor's wage determination was valid as to any business in the industry and therefore would have nationwide effect. So, after that case, federal courts have gone on to find that constitutional violations apply equally to all states and the constitutional violations are not restricted to the jurisdiction where the case was filed or that plaintiff's locations in different parts of the country made nationwide relief appropriate. The primary argument in favor of nationwide injunctions is that the legislation or even an executive order has nationwide effect, and therefore, appropriate relief must necessarily have nationwide application. Of course, there are also as, we all know, there have been some, let us say, political ramifications, political effects, political aspects to these injunctions. Before President Trump, the president with the most nationwide injunctions was President Obama. And before Obama, it was President Clinton.

And, of course, the administration's current losing streak has somewhat been a product of precedent established by judges during the Obama and Biden administrations.

Doug Lang:

Well, the next issue that comes up in lots of litigation, but has come up in in the CTA, cases are whether there's jurisdiction. One of the issues about whether there's jurisdiction for the plaintiffs is whether they have standing, which normally requires them to show some injury. And in some cases, the government was saying, well, you don't have to file yet for the early ones, the way ahead of the deadline. So, there's no jurisdiction. But, Judge Shaw, could you give us a quick outline of that standing point and what's required and why it's a critical issue?

Booker Shaw:

Well, you know, even if the parties, have raised have not raised standing, the courts have a tendency to look at standing and jurisdiction suis sponte and to make a determination as to whether or not standing exists. So, I guess we'd start with *Gill vs. Whitford*, which is a 2018 case. And that case and his progeny have established that a plaintiff must satisfy the familiar three-part test under article 3 to establish standing. And there, the plaintiff must have, number one, suffered an injury in fact. Number two, that injury must be traceable to the challenged conduct of the defendant. And number three, that it is likely to be redressed by a favorable judicial decision. Now the party invoking federal jurisdiction carries the burden of establishing that they have standing. And because the elements of standing are not merely pleading requirements, but rather an indispensable part of the plaintiff's case, each element must be supported with the manner and degree of evidence required at the successive stages of litigation.

Booker Shaw:

Now a court may only issue a preliminary injunction if plaintiff makes a clear showing that they're entitled to relief. And further, plaintiff may challenge a fur federal statute or executive order before it has been enforced if they can demonstrate a realistic danger of sustaining a direct injury from the enforcement. Article 3 standing requirements do not require a plaintiff to expose themselves to actual arrest or prosecution or injury to challenge a statute.

Doug Lang:

Kenyen, I wanted to ask you. We've got all these lawsuits that are out there, and some people are arguing, you know, as kind of armchair quarterbacks, that these cases are moot. That is there's nothing left to decide because the government regulations have rolled it back to where it's foreign interest, apparently. As Barry said, down from 33,000,000 to about 12,000 who, should report. But would you say that there's still that little issue out there that somebody wants to attack? That issue of who has to report now? We've got this, although, you know, much reduced, group of people have to report, it's still there.

Kenyen Brown:

Yeah. Absolutely. Some courts are still taking a wait and see approach, and what they actually decide to do is almost anybody's guess. Yeah. But there for example, some members of Congress have talked about, with the Loper Bright decision, that the agency, FinCEN, cannot narrow the enforcement scope of the statute, and therefore, they should adhere to it. So, you know, someone might completely on the other side of that litigation that's been filed thus far, file a lawsuit that says, hey, we think that so and so should comply. Who knows? Maybe it has some competitive advantage to having that information disclosed.

So, I think a lot remains to be seen about whether or not this statute survives in its current form or where we go back to the old form. And as a general matter, during this administration, the executive orders tend to express a sentiment of deregulation, be it related to dodge or enforcement of the foreign corrupt practices act, which is suspended as they more narrowly focus that on international drug cartels and international criminal organizations. So at least for now, it appears that the government's position is that the statute should be narrowed in its application. But whether or not that survives or is maintained in another administration is an open question. So, I think there will be litigation to come for a while.

Doug Lang:

And, as we understand it, the Fifth Circuit was ready to go, had everybody briefed, and they were set for oral submission, and they canceled that. And as I understand it, the Eleventh Circuit, in the case you were involved in, Kenyen, they've just been kind of sitting on. That's fully briefed too. Probably a lot around the country are that way. This is pretty remarkable.

Barry Fischer:

There are reports that other states are looking at perhaps forming their own disclosure regimes for companies as well. FinCEN has indicated they'll finalize the rule this calendar year, but the scope of the rule could move depending on events as they occur going forward. So, there's still things that are very much in the up in the air.

Doug Lang:

What I'd like to do next is ask Judge Shaw about strategy. You and I have seen thousands of cases, and you can kind of read it's like a history book when you get a case on appeal. You look at from the beginning all the way up to when it was appealed, and you can kind of tell what they did along the way. And there's strategy that needs to be planned, but also there's strategy on appeal, as in this case. How do you figure that strategy out? You've got to read the rules and anticipate. Right?

Booker Shaw:

Yes. I mean, this, of course, this particular litigation is somewhat different in that not only is it complex with, various litigation going on in different circuits at different levels of the trial court and appellate courts, and we also have a legislature who may, in fact, be amending the statute. And we have an administration who may, in effect, decide not to enforce the statute or to limit enforcement in such a way that it will be very difficult for most parties to establish standing. So, in this case, in terms of strategy, the best strategy is perhaps to just keep your head down and, wait and see what develops.

Doug Lang:

And, well, it's very, very, much of a whirlwind and kind of a mystery tour here. Well, we talked about the CTA in some depth, nationwide injunctions, which is a very current issue as well, and the ever-present jurisdictional question. The, the next podcast, and there will be one because we're going to do a series of these, will be on issues regarding error preservation, which, you know, all of us know is if you don't make the right objection or right motion in trial court and you say the trial court was wrong, you're probably not going to get to bring it up on appeal. And that may mean if you can't bring it up, you may lose. But ladies and gentlemen, we want to thank you for tuning in. I want to thank my colleagues, Booker Shaw, Cheryl Kelly, Barry Fischer, and Kenyen Brown for their significant input.

Remember, if you don't preserve your point on appeal, you're likely to be out of luck. So, folks, until next time. Thank you.