NORTH DAKOTA BANKERS ASSOCIATION

LEGAL UPDATE

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# BANKING LITIGATION

## What is a "bank" under the tax code? The Fifth Circuit Answers, and a Global Payment Services Company Suffers Severe Tax Consequences *[5TH CIR]

A global services company was known for wiring money to individuals and financial institutions. The company also sells money orders through agents like Wal-Mart and other convenience stores. On its annual SEC filings, the company described itself as a "global payment services company" and its financial statements did not list any bank deposits as liabilities or any loans as assets. However, during the height of the Great Recession and without any meaningful changes in its business, the company described its activities to the IRS as "banking" and called its products "financial services." The company had recapitalized its business to maintain its operations, claimed "bank" status on its tax returns, and because it was a "bank," was able to deduct certain losses against its ordinary income. The IRS disagreed with the deductions, arguing that the company was not a bank and assessed tax deficiencies of millions of dollars. The company unsuccessfully challenged the IRS's decision in tax court, resulting in this appeal.

In MONEYGRAM INT'L V. COMM'R, 999 F.3d 269 (5th Cir. 2021), the court affirmed the tax court, holding that the company is not a bank because it neither accepts deposits nor makes loans. First, the court evaluated whether the company is a "bank" within the meaning of the Internal Revenue Code (IRC). The IRC breaks down the definition of a bank into three requirements: (l) that the entity be a "bank" within the common understanding of the term; (2) that a substantial part of the entity's business consist of deposits, loans, and discounts; and (3) that the entity be subject to state or federal regulation. The company argued that both its money-order customers and its official-check customers give it funds for safekeeping. Further, the company argued that when a customer buys a money order, the customer is placing funds with the company for safekeeping, at least until the recipient of the money order presents the money order for payment. The court rejected this argument, likening a money order to the purchase of a gift card rather than to a deposit in a bank account. Second, the court evaluated whether the financial institutions that use the company to process official checks do so for the purpose of safekeeping. The company contended that the "first day settlement" funds a sort of overdraft protection in the event the bank does not make the required daily payments for checks it has just issued are "deposits" because that money is not already obligated to the third-party recipient listed on an issued check. The circuit court also rejected this argument, stating that financial institutions do not leave their funds with the company for safekeeping; they do so to fulfill a contractual requirement for using the check processing service. In short, because the company had long described itself as a "non-depository" institution and did not meet the safekeeping requirement, the Fifth Circuit held that the company was not a bank within the meaning of the IRC. [By Carlos Gracia carlos.gracia@ttu.edu]

## Bank Bears Loss Because It Breached Wire Transfer Agreement *[TX APP]

A lawyer had an IOLTA account, which is a bank account in which an attorney deposits client funds. The lawyer fell victim to a complex check fraud scheme, whose perpetrator was a client of the lawyer. The client hired the lawyer for representation in negotiating a settlement. The client sent the lawyer a cashier's check, which the client claimed to be the settlement money. Subsequently, the client asked that a portion of the money be wire transferred to a foreign bank, and the lawyer complied before the check cleared at the lawyer's bank. In accordance with the bank's policy, the lawyer and an officer of the bank filled out the appropriate wire transfer forms, which specified that the bank verified the balance of the accounts before the transfer. Then the bank transferred funds to the foreign bank.

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Afterwards, the bank issuing the cashier's check dishonored the check and returned the check without payment. At that point, the lawyer's account was over-drafted, and the bank demanded repayment of the funds. The bank sued, alleging that the lawyer had breached the bank's deposit agreement. To answer, the lawyer claimed the bank breached the bank's wire transfer form, which entitled the lawyer to an offset.

In CADENCE BANK v. ELIZONDO, 606 S.W.3d 802, (Tex. App. 2020), the court held that the bank was not entitled to any repayment of the transferred funds. Clearly, by depositing a counterfeit check, the lawyer had breached the parties deposit agreement and the UCC transfer warranties. However, that was not the end of the story. The court first determined that the Texas UCC does not preempt the right to an offset. When the UCC explicitly overrules a common law defense, then that defense is preempted; however, when the UCC is silent as to a common law defense, that defense is not preempted by the UCC. The Texas UCC does not mention the right to an offset. Accordingly, the lawyer is entitled to an offset because the lawyer relied on the bank's representation that the funds were in the lawyer's account before the transfer was made. Second, the court addressed whether the wire transfer agreement was valid. The main issue with the agreement was that the transfer fee had not been paid, so the bank argued that the agreement lacked consideration. However, the court found that the promise to pay fulfills the consideration requirement to create an enforceable agreement. Third, the court analyzed the terms of the agreement. The court found that the agreement required the bank to transfer "verified collected balances." Thus, the agreement would not allow the transfer of funds from uncollected checks. Lastly, the court held that the bank caused the overdraft by violating the terms of the wire transfer terms, which required that the bank transfer the funds from a "verified collected balance." Had the bank not violated the transfer agreement, then the lawyer's account would not have been over drafted. Therefore, the court held that the lawyer was entitled to an offset, and the bank was not entitled to repayment. A dissenting judge argued that the bank was entitled to repayment because: (1) customers bear the burden of loss when the bank transfers money that customers request during a period when the funds are settling, and (2) the UCC preempts common law defenses when those defenses conflict with well-established principles of commercial law.

Editor's Note: The Texas Supreme Court granted a petition to review on June 18, 2021. Cadence Bank v. Elizondo, No. 20-0273, 2021 Tex. LEXIS 557 (Tex. June 18, 2021)

[By Grant Coffey - grant.coffey@ttu.edu]

# BANKRUPTCY

## No Cram-Down?; No Problem: Debtor Successfully Complies with Chapter 13 Plan Despite Trustee's Objections [6TH CIR]

Facing mounting debt, a debtor restructured her outstanding obligations in a Chapter 13 repayment plan. Among these obligations was a car loan, and as part of the debtor's confirmed repayment plan, the bankruptcy court permitted the debtor to repay her car loan directly to the creditor at the interest rate stated in the original loan agreement. The trustee challenged the plan using two arguments. First, the trustee argued that applying the original interest rate violated the "prime-plus" formula required for interest calculations in Chapter 13 cases. Under this formula, used to compensate creditors for the time value of their money and the risk of default, the court must choose an interest rate high enough to compensate the creditor for its risk. However, the interest rate may not be so high that it "doom[s] the plan." The debtor may propose an interest rate, but if the creditor does not accept that rate, it is up to the court to make this determine the proper interest rate using the prime-plus formula previously articulated by the Supreme Court in Till v. SCS Credit Corp., 541 U.S. 465 (2004). Second, the trustee argued that allowing the debtor to make direct payments to the creditor violates the bankruptcy code and a local bankruptcy rule. In making this argument, the trustee relied on 11 U.S.C. §1326(c), which states that the trustee shall make payments to creditors under the plan.

In MCDONALD v. CHAMBERS (IN RE CHAMBERS), 2021 Fed. App. 0024N (6th Cir. 202 l) the court affirmed the bankruptcy court's conclusion that the Chapter 13 plan was satisfied where no concerns were raised as to the debtor's ability to pay or comply with the plan, and that the debtor was current in her vehicle payments. To come to this conclusion, the court evaluated whether the Chapter 13 debtor's repayment plan complied with the requirements listed in § 1325(a)(5). The requirement at issue is known as a "cramdown," which occurs when an individual debtor, over a creditor's objection, proposes a plan in which the encumbered property will be retained by the debtor by changing one or more previously agreed to contract terms. When a cram-down occurs, the applicable interest rate is governed by the prime-plus formula under Supreme Court precedent. The trustee argued that the prime-plus formula should have applied to the interest rate calculations for the debtor's repayment plan for its secured debt owed to the creditor. The court rejected this argument because the elements of a cram down were not present; the debtor proposed to pay the creditor in accordance with the

original contract terms, without any modifications. Second, the court evaluated the trustee's objection to permitting the debtor to make direct payments to the creditor rather than to make those payments through the trustee. The court rejected this argument because the trustee had failed to object timely to the direct payment provision. [By Carlos Gracia carlos.gracia@ttu.edu]

## Breach of Contract turned Allocation dispute [BKR D DE]

Upon filing for Chapter 11 Bankruptcy affiliated debtors received a DIP (debtor-in-possession) order that provided for financing during its bankruptcy case. The debtors also obtained an initial interim order for the use of another lender's cash collateral as needed. This interim order contained milestones, including the sale of the debtors' assets, to be met by a specific date. The debtors also moved to obtain debtor-in-possession financing from an additional lender. The debtors and the two financers hereafter referred to as Lenders One and Two, came to an agreement regarding the DIP financing and the court approved a final DIP order. Later, the debtors accepted a bid at the auction for all assets to their company. After the auction, the proceeds were placed in an escrow account pending disbursement to the lenders, which disputed the amount of money properly allocable to each of them. Mediation sessions between the lenders failed to produce a resolution and Lender One moved for summary judgement. In response to the litigation, the court determined the value of each asset underlying each lender's security interest.

In IN RE AEROGROUP INT L, 601 B.R. 571 (Bankr. D. Del. 2019), the court weighed the testimony of the experts presented by the two lenders and determined the value of the collateral of each of the lenders. In accordance with the court's conclusions, the value of the hard assets was less than the sales price for the assets. Accordingly, a portion of the sales price was attributed to goodwill and another portion attributed to general intangibles. The court also found that one of the lenders had failed to pay operating expenses in accordance with its previous agreement and awarded the other lender reimbursement of its overpayment of such expenses, with interest. Based on the court's finding, Lenders One and Two were encouraged to settle any further disputes regarding future proceeds. [By Julia Ferron juferron@ttu.edu]

## Hotels Not "Single Asset Real Estate" Project; Therefore, Debtor Eligible for Subchapter V [BKR MD FL]

Debtor owned and operated a hotel when it filed for bankruptcy as a debtor under subchapter V of Chapter 11. The hotel contained 79 rooms, had several amenities, and was the only asset owned by the debtor. Creditor moved to determine that debtor was ineligible to file for subchapter V because the single hotel qualified as a "single asset real estate" project, which section 1182(1) of the Bankruptcy Code precludes from relief under subchapter V. Note that subchapter V offers several important benefits to debtors that are eligible for that subchapter, which may have inspired the creditor to contend that the debtor was ineligible for that subchapter.

In IN RE ENKOGS1, LLC, 626 B.R. 860 (Bankr. M.D. Fla. 2021), the court evaluated the motion of the creditor. Under 11 U.S.C. § 101(51B), the term "single asset real estate" is defined as real property constituting a single property or project that substantially generates the gross income of a debtor that is not a family farmer and "on which no substantial business is being conducted by a debtor other than the business of operating the real property and activities incidental thereto." Moreover, the definition of "single asset real estate" excludes residential real property with fewer than four residential units. The court reasoned that the definition required that a debtor that owns a real estate-based business must show it does more than just manage the real property. Applying this interpretation, the court decided that hotels are more than just "management" of a property because operating a hotel requires providing many services besides renting rooms. These services included laundry services, room cleaning services, internet services, a swimming pool and fitness center, and complimentary breakfast. Using this line of reasoning, the court concluded that the debtor qualified for subchapter V, and the creditor's motion was denied because hotels do not constitute "single asset real estate" under subchapter V of Chapter 11. [By Jessica Longoria jessica.longoria@ttu.edu]

## Section 523(a)(6) Only Applies to Individual Debtors in Subchapter V Cases [BKR MD]

Nineteen former employees of the debtor claimed the debtor violated the Fair Labor Standards Act of 1938, the Maryland Wage and Hour Law, and the Maryland Wage Payment and Collection Law in a Maryland district court case. In the midst of this lawsuit, the debtor filed for Chapter 11 bankruptcy, electing to proceed under subchapter V. The bankruptcy caused the action in the district court to be stayed. In the bankruptcy case,

the former employees filed a complaint seeking a determination that the debt owed to them by the debtor was non dischargeable under section 523(a)(2)(A) of the Bankruptcy Code. They argued that the debts arise from debtor's false pretenses, false representations, or actual fraud under 11 U.S.C. § 523(a)(6). The plaintiffs also alleged that the debtor had caused a willful and malicious injury to the employees, and that debt was non-dischargeable under § 523(a)(6). The debtor moved to dismiss the complaint, arguing that section 523(a) does not apply because debtor was not an individual debtor. The employees counter argued that Bankruptcy Code section 1192(2) expands the application of section 523(a) to subchapter V debtors even when they are not individuals.

In GASKE v. SATELLITE RESTAURANTS, INC. (IN RE SATELLITE RESTAURANTS INC.), 626 B.R. 871 (Bankr. Md. 2021), the court held that the discharge exceptions of section 523(a) only apply to individual debtors. Section 1192 is the discharge provision for cases under Subchapter V, which provides that if the reorganization plan is confirmed under 11 U.S.C. § 1191(b), the court shall grant the debtor a discharge of all debts under Section 1141(d) with the exception of debts "specified in section 523(a)." Section 523(a) states that a discharge under Section 1192 does not discharge an "individual" debtor from any debt of the type described in that section. The employees focused on the language in section 1192, stating that "debt of the kind specified in section 523(a)" means that any debt described in that section cannot be discharged, regardless of whether the debtor is an individual or non-individual debtor. The debtor, on the other hand, argued that the lack of discussion regarding nonindividual debtors means that section 523(a) simply does not apply to non-individual debtors. The court agreed with debtor, holding that the language was clear and unambiguous. Therefore, the debtor's motion to dismiss the complaint was granted because section 523(a) only applies to individual debtors. [By Jessica Longoria jessica.longoria@ttu.edu]

## Bank Was Holder of Note and Therefore Had Standing in Bankruptcy Court [BAP 1ST CIR]

The debtor and a bank entered into a loan agreement, and the debtor signed a mortgage note secured by a first priority mortgage on the debtor's property. The debtor promised to repay the principal amount to the bank and/or its successors. After a series of name changes and mergers, Wells Fargo became the successor-by-merger. The successor and debtor entered into a loan modification agreement in connection with the note and first mortgage. Later, the debtor filed for bankruptcy and the court granted the successor's motion for relief from the automatic stay, allowing foreclosure. To prevent foreclosure, the debtor argued in district court that the successor lacked standing by challenging the validity of its status as a holder of the note. Count I of the debtor's complaint alleged the creditor lacked standing, count Ill of the complaint was a promissory estoppel claim, and count V of the complaint alleged that the successor had failed to stop the foreclosure in violation of state law. The successor produced a chain of title of the note and pointed to the loan modification agreement, which identified the successor as the holder of the note and was signed by the debtor. For this reason, the debtor conceded that he could not prevail on count I and permitted its dismissal. At summary judgment, the court ruled in favor of the successor on counts Ill and V following discovery and a hearing on the motion. The debtor did not appeal the judgment. Subsequently, the debtor again argued that the successor lacked standing. However, the court found that collateral estoppel barred the issue. This appeal to the bankruptcy panel followed.

In NELSON v. WELLS FARGO BANK, N.A., 621 B.R. 542 (B.A.P 1st Cir. 2020), the debtor disputed the lower court's findings that ownership of the note had been established in the district court action. However, the bankruptcy appellate panel ultimately determined that issue preclusion did bar the claim for the following reasons. First, ownership of the note was the main issue of count I of the prior complaint and the successor's status as holder was relevant to both counts III and V of that complaint. Second, the panel noted that if a party has "actively or substantially" participated in prior proceedings, an issue can satisfy the actual litigation requirement of collateral estoppel. This is true even in the absence of an evidentiary hearing and when a motion to dismiss resolved the issue. The bankruptcy appellate panel found this requirement to have been satisfied because the debtor had permitted dismissal of Count I after the successor had defended its validity as holder and because of the parties' participation prior to the summary judgment ruling. Third, the district court's judgment was binding. Lastly, the panel emphasized that the district court found that the successor was in fact the valid owner of the note and beneficiary of the first mortgage. Even if ownership was "not the ultimate issue decided," the panel concluded that it was essential to the final decision because the district court's detailed findings about the chain of title reflected that the issue was "logically necessary" to the judgment. [By Brooke Allen brooke.n.allen@ttu.edu]

## Debtor Qualifies for Subchapter V Without Planning to Reorganize [BANKR D UTAH]

The debtor, a limited liability company that provided vendor marketing software, suffered financial problems because of legal claims and chargebacks starting in late 2019. The debtor was forced to sell its main operational asset, the software, in August 2020 in exchange for stock. In December 2020, the debtor filed for bankruptcy under chapter 11 and elected to proceed under subchapter V, a new subchapter designed for small business debtors. At the time of the filing, the debtor still maintained assets, had no employees, was no longer conducting business operations in vendor marketing, had no intention to reorganize its business, and was using reasonable efforts to pay its creditors and realize value for its assets. The United States Trustee objected to the debtor's subchapter V election. Of the four requirements the debtor needed to prove for eligibility under subchapter V, only one was in dispute. The parties argued about the interpretation of "engaged in commercial or business activities." The United States Trustee argued that a debtor must be operating a business at the time of filing to be eligible. The debtor argued it was still engaged in "commercial or business activities" even though it was not conducting business operations.

In IN RE OFFER SPACE, LLC., 629 B.R. 299 (Bankr. D. Utah 2021), the bankruptcy court held the debtor was engaged in commercial or business activities and therefore satisfied all four requirements to be eligible to elect subchapter V. The court looked first to the ordinary and common meaning of the words. The court found "engaged in" to mean currently taking part in an activity, and for that reason, on the date of the bankruptcy filing a debtor must be engaged in commercial or business activities. Next, the court found that "activities" and "operations" are distinct terms that are not interchangeable. The statutes' use of "activities" encompasses a broader and more inclusive range of commercial or business activities than the interpretation for which the trustee argued. The court stated, however, it would have agreed with the trustee' s interpretation if the statute had used "operations" instead of "activities." After looking at the totality of the circumstances, the court found that the debtor satisfied the disputed requirements for the following reasons: (1) it had active bank accounts; (2) it was owed accounts receivable; (3) it was engaged in analyzing and exploring counterclaims in a lawsuit; (4) it was managing stock; and (5) it was winding down and taking reasonable steps to pay its creditors and realize value for its assets. The bankruptcy court noted, however, that simply filing for bankruptcy and the activities involved in filing fail to satisfy the requirement. The court further noted that the legislative history was not contradictory and other jurisdictions' relevant case law was distinguishable from its interpretation. Ultimately, the bankruptcy court held that the debtor remained engaged in business activities for the purposes of the subchapter V election. [By Samantha Espino Samantha.espino@ttu.edu]

# SECURITIZATION

## Possession is Perfection [MN APP]

In 2007, a father guaranteed a loan for his son's law firm and secured that guarantee. In 2011, the father helped to pay off his son's loans, including the law firm loan, by taking out a different loan. In return for the father paying off the loans, his son signed a pledge agreement that pledged all the law firm's assets to the father. An attorney, who had previously worked for the law firm, obtained judgments in 2016 for unpaid wages. In 2018, the attorney sued the father to recover the $93,345.46 of unpaid wages under the Minnesota Uniform Fraudulent Transfer Act (MUFTA). The attorney alleged the son and law firm fraudulently transferred assets in the pledge agreement to the father to avoid paying the former employee. On appeal, the father argued the pledge agreement had been ineffective because the security interest in the collateral had never been perfected and that the district court had erroneously awarded damages to the former employee.

In Fafinski v. Johnson, No. A20-1275, 2021 WL 1846579, 2021 Minn. App. Unpub. LEXIS 465 (Minn. App. May 10, 2021), applying Minnesota state statutes, the court concluded (1) the son had transferred assets; (2) none of the findings of facts or conclusions of law of the district court were erroneous; and (3) the court did not err by awarding the employee damages. Under MUFTA, a transfer is voidable when a debtor transfers an asset with actual intent to hinder delay, or defraud a creditor. The court found the law firm's assets to be property under the statute. The court also determined that a transfer had occurred based on the pledge agreement. A pledge creates an interest in property for the purpose of securing the payment of a debt. A pledge can generally be perfected by filing a financing statement or through control or possession of the assets. The court held seven categories of the law firm's assets had been perfected by possession. Perfecting through possession occurs when the property "is committed by the pledgor to the exclusive control and charge of the pledgee." Minnesota does not require a manual delivery of assets. Thus, seven categories of tangible property had been transferred to the father in violation of MUFTA. The court also found that the security interest in the law firm's accounts receivables had not been perfected, because the accounts were

intangible. Because the value of the property transferred to the father was greater than the amount of the past wages owed to the ex-employee, he could recover the entire amount from the father, because the father had been the recipient of a fraudulent transfer.

Editor's note: The Minnesota law as described by this court does not require possession of the pledged property by the secured party or the secured party's agent for the security interest to be perfect. This appears to be inconsistent with the plain language of Article 9 of the Uniform Commercial Code. See U.C.C. § 9-313. [By Samantha Espino Samantha.espino@ttu.edu]

## SECURITIZATION

### Magistrate Recommends Approval of JPMorgan Chase Settlement in Class Action Suit Over Failure to Pay Interest on Mortgage Escrow Accounts [E.D.N.Y.]

The plaintiffs sued a bank in which they had deposited funds in a mortgage escrow account for breach of contract. The escrow account had been established in connection with the plaintiffs' mortgage to hold money that would be due for taxes and insurance. Under New York law the money in the escrow account remains property of the debtors. The plaintiffs alleged that bank was required to pay at least 2% interest on the money in the escrow account but failed to do so. Under a 2011 agreement between the debtor and bank, the bank was not required to pay interest on the escrow account. However, the agreement also provided that the bank would pay interest on the loan if applicable law required it to do so. The plaintiffs commenced this suit as a class action and alleged that a New York law requiring interest be paid was not preempted by federal law. This preemption issue is currently on appeal in the Second Circuit Court of Appeals and is not discussed further in this case. The issue before the magistrate judge was whether the court should approve of the settlement agreement between the settlement class and the creditors.

In CYMBALISTA v. JPMORGAN CHASE BANK, N.A., 2021 U.S. Dist. LEXIS 99093, (E.D.N.Y. May 25, 2021), the magistrate recommended approval of the settlement agreement between the settlement class, which includes the debtors and mortgagors in Connecticut, Maryland, Minnesota, New York, Rhode Island and Wisconsin, and the bank. The court considered multiple factors to reach its recommendation. These factors included the class actions guidelines set forth in Federal Rule of Civil Procedure 23(e), along with the additional benefits of coming to a settlement in this class action. The plaintiffs pointed to the risk of their claim being dismissed as an important reason for the settlement. Before reaching a settlement agreement, the bank had moved for dismissal of the complaint based on the allegation that the National Bank Act preempted the debtors' claims. The court does not address this issue. Instead, the court focused on the terms of the settlement agreement and other legal issues involved in the case. To evaluate the effectiveness, the court discussed Federal Rule of Civil Procedure 23. The court found that the settlement class shared a common question of law and that at least a majority of the class's grievance was caused by the conduct of the bank. Along with the common grievance, the court looked to the applicable state statutes that were relevant to the class. The court found that the applicable state statutes all required the bank to pay the interest on the escrow accounts. The court also found that a satisfactory notice system was in place to properly inform the class members of the terms of the settlement and additional information pertaining to the settlement. For these reasons, the court recommended approving the settlement agreement between the class of debtors and the bank. [By Julia Ferron juferron@ttu.edu]

## WIRE TRANSFERS

### Bank Entitled to Summary Judgment After Complying with Two-Step Verification for Wire Transfers [SD FL]

Four debtors collectively opened a total of ten accounts with a bank, consisting of four personal deposit and six business deposit accounts. In addition to the online banking platform, the bank offers clients access to a separate and an online wire transfer service. Debtor 1 requested access to this service and signed a form acknowledging security protocol applicable to online wire transfers. This security process requires: (1) successfully logging into the service using two forms of ID and a password, and (2) successfully completing a second login process using a code displayed on a security token the bank provides. Although the bank granted access to the debtors, the debtors' login was deactivated following non-use of the service. Three years later, the debtors changed the mailing address, phone number, and e-mail address associated with the accounts. Nearly one month after these changes, an employee of the bank received a request to reactivate the service. As required by protocol, the bank employee asked the caller questions for authentication and received an e-mail from the newly updated e-mail address with sufficient information to authenticate the client according to the bank's policies and procedures. The signatures on these forms were then reviewed separately by two additional employees. Upon verification of authenticity, access was then linked to one of the commercial

accounts and a token was sent to the requested address. Six wire transfers were later initiated from the account within three months. The debtors subsequently brought four claims against the bank in United States District Court for the Southern District of Florida, alleging that each of the transfers were unauthorized. The bank moved for summary judgment, and this hearing followed.

In RODRIGUEZ V. BRANCH BANKING & TRUST CO., No. l :19-c v-25191-KMM, F. Supp. 3d J21 WL 1169353, 2021 U.S. Dist. LEXIS 63606 (S.D. FL. March 29, 2021), the bank and debtors disagreed as to whether the parties had agreed to the security procedures of the online wire transfer service. The form acknowledging the security protocol was only signed before the debtors' initial access, that was later deactivated. Thus, the debtors argued, the agreement had terminated as well. However, the court ultimately agreed with the bank for the following reasons. First, the debtors failed to cite any legal authority or evidence.

**Tracy Kennedy**
NDBA General Counsel

## Role of NDBA General Counsel

NDBA's general counsel serves as the attorney for the association. Although Tracy is pleased to be able to serve as a resource for NDBA members in responding to their questions, she is providing general information, not legal advice. Banks must obtain legal advice from counsel who has been retained by the bank to represent the bank's interests in a specific matter.

**To contact Tracy Kennedy, NDBA General Counsel, call 701.772.8111 or email at tracy@ndba.com.**