NORTH DAKOTA BANKERS ASSOCIATION

LEGAL UPDATE

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BANKRUPTCY

Debtor Qualifies for Subchapter V Because of Litigation [BKR SD TX]

The debtor operated a waste heat facility. The debtor was involved in substantial arbitration and litigation concerning contractual obligations between the debtor and the business that leased land and sold equipment to the debtor. Subsequently, the debtor filed for chapter 11 bankruptcy and elected to proceed under Subchapter V as a small business debtor. The debtor's chapter 11 plan was to liquidate all its assets and distribute any recovery from the then-ongoing litigation to pay off its creditors. The United States' trustee and the opposing litigants objected to the Subchapter V election. The objecting parties argued that the debtor was no longer selling steam or electricity and for that reason the debtor could not qualify as a small business debtor under Subchapter V because it did not engage in "commercial or business activities." The debtor argued that it was still engaged in business activities by having managers and independent contractors working for it; it was in pending litigation; it was pursuing remedies on outstanding accounts; it actively maintained its facility and vehicles; the managers were working on a plan to pay off creditors before the bankruptcy filing; it sold assets in the months before filing; and it filed reports and tax returns.

In IN RE PORT ARTHUR STEAM ENERGY, L.P., 629 B.R. 233 (Bankr. S.D. Tex. 2021), the court held that "engaged in commercial or business activities" a requirement to qualify as a debtor under Subchapter V does not require a petitioner to conduct the historical business operations of the debtor. The court decided the following actions fell within the statute's meaning of "engaged in commercial or business activities:" (1) actively pursuing litigation against a third party; (2) trying to collect on outstanding accounts receivable; (3) selling an asset; (4) preserving asset value; and (5) having managers and an independent contractor oversee and maintain its facility. The court declined to consider legislative intent because the statutory text was unambiguous. The court also likened its decision to a similar case that had declined to require that the debtor was engaged in business "operations" rather than merely in business "activities," which is the term used by the statute. Finally, the court distinguished the current case from two cases the objectors cited because in those cases the debtor had ceased normal business operations before filing for bankruptcy, which was contrary to the facts of this case. By Samantha Espino samantha.espino@ttu.edu Ed. Grant Coffey

When the Discovery Rule Applies to Fraudulent Transfer Claims [BKR SD TX]

The debtor, an oil and gas company, transitioned its focus from actively producing wells to the discovery of new oil fields. After leveraging debt to finance the exploration, oil prices began to drop. Eventually, several creditors of the company filed an involuntary bankruptcy petition, which lead the company to file a petition to convert the bankruptcy to a voluntary Chapter 11 case. This petition was granted. Prior to the bankruptcy petition, a hedge fund routinely invested in and partnered with the company. Several of the company's board members were also directors of the hedge fund. The debtor's bankruptcy trustee sued the hedge fund for two allegedly fraudulent transfers that occurred several years before the bankruptcy petition. The trustee alleged that the hedge fund directors engaged in two fraudulent transfers: (1) the directors conspired to cause the company to overpay for assets, and (2) when the directors entered a transaction that released the directors from their capital commitments without receiving reasonably equivalent value for the exchange. The trustee's claims were brought under TEX. COM. & Bus. CODE§ 24.005(a)(1) dealing with transfers fraudulent as to present and future creditors and § 24.006(b) dealing with transfers fraudulent as to present creditors. In response to the trustee's claims, the hedge fund filed a motion to dismiss, arguing that under TEX. COM. & Bus. CODE § 24.010, the trustee's claims fell outside of the statute of repose and therefore the trustee's action should be extinguished.

In IN RE NORTHSTAR OFFSHORE GRP., LLC, 616 B.R. 695 (Bankr. S.D. Tex. 2020), the court held that the discovery rule applies to the intentional fraud claims under § 24.005(a)(l) but not to the constructive fraud claims brought under § 24.006(b). In reaching the conclusion that the discovery rule applies to the § 24.005 claims, the court reasoned that the language of § 24.010(a)(l) fails to extinguish claims brought under § 24.005(a)(l) if the claim is brought "within one year after the transfer or obligation was or could reasonably have been discovered by the claimant." Importantly, the trustee presented facts that indicated that the creditors had no way of knowing that the transactions were fraudulent until years after the transactions had occurred. Therefore, the court denied the hedge fund's motion to dismiss the claims brought under § 24.005(a)(l). Shifting focus to the claims brought under § 24.006(b), the court reasoned that § 24.010(a)(3) contains no language that applies the discovery rule to § 24.006(b) claims. Thus, the court dismissed the trustee's § 24.006(b) claims while allowing the § 24.005(a)(l) claims. By Grant Coffey grant.coffey@ttu.ed*u*

State Court Foreclosure Orders Cap Lender's Claim in Bankruptcy, Notwithstanding Contract Rights [BKR D SC]

Creditor filed a foreclosure action (hereinafter, the "foreclosure") against the debtor. The state court found that the debtor had defaulted on a mortgage note obligation owed to creditor and assessed damages. The contract between the parties permitted the creditor to increase the interest rate if the debtor defaulted on the note. However, the creditor chose not to assert its right to increase the interest rate in the state court foreclosure action. The debtor filed a Chapter 13 petition and the creditor filed its proof of claim in response. The creditor then filed an amended claim to reflect an amount including an increased interest rate. The debtor objected to the claim and asserted estoppel against the creditor to preclude it from claiming more money than allowed in the foreclosure order. The creditor responded and provided the loan documents and the order which had found the debtor to be in default. The court granted the debtor's objection to the creditor's claim.

In In re Cooper, 2021 B.R. Lexis 2258 (B.R. S.C. Aug. 18, 2021), the court held that although the creditor had the right to assert a new interest rate after debtor's default, "it did not do so, so for purposes of computing the arrearage under 11 U.S.C.S. § 1322(b)(5) in the plan, the claim was allowed as a secured claim computed at [the original interest rate of the note]." The court found that the state, in its foreclosure order, had determined the amount of the debt to the creditor based on the lender's pleadings and the interest rate contained therein. Because bankruptcy courts do not have jurisdiction to set aside a state court's foreclosure order, the relief granted became limited to the relief the lender had sought and obtained. See In Re Kennedy, No. 17-03101-5-JNC, 2019 Bankr. LEXIS 1400, at *10 (Bankr. E.D.N.C. May, 3, 2019). Accordingly, the court sustained the objection to the claims, and allowed the claim only for the amount adjudicated in the foreclosure order. By Miguel Escobar Miguesco@ttu.edu

"Eye-popping" Cramdown Interest Rates [BKR SD OH]

The debtors owned several coal mining operations which they purchased from mining companies that were in financial trouble. The debtors paid substantial consideration and took ownership of take-back debt that was to be paid to the selling company's creditors. The take-back debt was secured by virtually all assets of the mining operation. The debtors entered a debt restructuring agreement with all the debtors' lenders. The restructuring agreement provided that the debtors would sell all assets of two mining operations. Shortly thereafter, the debtors filed Chapter 11 cases. Later, due to market conditions, the debtors had idled the mine, leading to the debtors needing cash for operations. Certain creditors extended financing to the debtors for operational expenses that arose during the bankruptcy case. Later, the two mining operations were sold at auction pursuant to the restructuring agreement bit the money received was insufficient to pay all the lenders. As such, the main controversy in the present case surrounds equipment that was "leased" and used at one of the mines-the specific piece of equipment was a large piece of machinery that is only capable of being used underground in very specific mine settings, rendering the resale market for such equipment very small. During the bankruptcy cases, the debtors brought an adversarial proceeding against the party who "leased" the equipment, seeking to classify the lease as a disguised financing agreement. The trial court held that the lease was in fact a disguised financing agreement, and accordingly, the party who "leased" the equipment is the undersecured creditor in this controversy. The debtors' proposed Chapter 11 plan transferred the undersecured creditor's debt to the purchaser of the mine, and provided for a 6.25% interest rate, when the prime rate was 3.25%. The undersecured creditor objected to the plan, arguing that the plan was not fair and equitable. Additionally, the undersecured creditor asked the court to impose a 14.25% interest rate.

In IN RE MURRAY METALLURGICAL COAL HOLDINGS, LLC, 623 B.R. 444 (Bankr. S.D. Ohio 2021), the court confirmed the Chapter 11 plan with the 6.25%

interest rate. During the plan's confirmation hearing, the court found that the evidence provided by the undersecured creditor was insufficient to justify the "eye-popping" interest rate of 14.5% suggested by the undersecured creditor which represented an adjustment of 11.25% above the prime rate at the time the bankruptcy case was filed. The court looked to 11 U.S.C. § 1129(b), which allows courts to confirm a chapter 11 plan where a class accepts the plan and another class rejects it, if the debtor can establish (1) the plan does not discriminate unfairly against the class, and (2) that the plan is "fair and equitable" with respect to that class. Analyzing the first requirement, the court held that there was no discrimination against the undersecured creditor.

For discrimination to occur, one creditor must be treated differently than similarly situated creditors. In this case, the undersecured creditor could not show that any other creditor was similarly situated. Next, the court analyzed whether the undersecured creditor was treated fairly and equitably. The debtors argued, and the court agreed, that the Bankruptcy Code determines that plans are fair and equitable if each member of the class retains its lien and receives deferred payments totaling at least the amount of its claim "as of the effective date of the plan." Thus, the issue was whether the interest rate of the Chapter 11 plan ensures that the stream of payments to the undersecured creditor equals the present value of the undersecured creditor's collateral. The court, the debtors, and the undersecured creditor looked to the formula laid out in Till v. SCS Credit Corp. to determine the applicable rate. 541 U.S. 465 (2004). The court first began by identifying the prime rate, which both parties agreed was 3.25%. The next step was to adjust the prime rate based on the risk of nonpayment. The court stated an adjustment of 1-3% is generally sufficient, because if the adjustment is much higher than 3%, the plan is probably not feasible and should not be confirmed. The court looked to the factors from Till, the factors including: the circumstances of the estate, the nature of the security, the duration and feasibility of the reorganization plan, the characteristics of the loan, and the administrative expenses of enforcement (this last factor is found in Scalia's Till dissent but is approved of by the plurality in Till). Because the Chapter 11 plan proposed an interest rate that is already adjusted 3% over the prime rate, the high end of the generally accepted adjustment, the undersecured lessor had the burden of demonstrating that a higher interest rate was necessary to satisfy § 1129(b)'s fair and equitable standard. The evidence provided by the undersecured creditor to justify the 14.5% interest rate was the testimony of an expert witness. Contrary to the undersecured creditor's assertions, the expert gave the Chapter 11 plan a 75% chance of success. The expert stated that the purchasers of the mine had good management, and used several factors not found in Till or the decisional law interpreting Till, to adjust the prime rate. Ultimately, the court's impression was that the expert's Till analysis consisted of simply conjuring up a wide array of risk factors and making an upward adjustment for as many as possible in an attempt to support the 14.5% cramdown interest rate he proposed. On the other hand, the debtors' evidence was provided by the debtor's CEO and a debt advisor. Their testimony rebutted many of the assertions made by the undersecured creditor's expert. The court concluded that the risk of future default was not insignificant, and therefore a 3% adjustment to the prime rate is justified. However, the risk of future default was not so significant as to justify an 11% adjustment to the prime rate. Thus, the Chapter 11 plan was confirmed. By Grant Coffey grant.coffey@ttu.edu

SECURITY INTERESTS

Secured Creditor Failed to Prove its Entitlement to Insurance Proceeds [WD TX]

The creditor in this dispute agreed to finance tractor-trailers for the debtor which owned two trucking companies. Before the dispute arose, the creditor and debtor disagreed on the amount payable to the creditor. The creditor contended the debtor agreed to the full principal loan plus interest. The creditor also argued that the debtor granted it a security interest in all the debtor's equipment. While this dispute was ongoing, one of the financed tractor-trailers was destroyed in an accident. The debtor was subsequently denied coverage from his insurance company and the creditor enlisted a law firm on the debtors' behalf to sue the insurance company. The law firm was hired on a contingent basis. The law firm and the insurance company eventually entered into a settlement agreement. The dispute in this case arose out of the distribution of the settlement proceeds. The creditor brought this claim against the law firm and the debtor, seeking to declare it had priority in the insurance proceeds. The debtor failed to appear, and the court rendered a default judgment in favor of the creditor. Subsequently, the creditor moved for summary judgment against the law firm arguing that the creditor had a security interest against the proceeds that was superior to the lien of the law firm.

In VOLVO FINANCIAL SERVICES v. MCCLENNY MOSELEY & ASSOCIATES, 2021 WL 3494607, 2021 U.S. Dist. Lexis 149232 (W.D. Tex. Aug. 9, 2021), the court denied the creditor's motion for summary judgment. The creditor provided no evidence or case law in support of its argument for summary judgment. The evidence provided by the creditor included an unsworn declaration, illegible copies of contracts, and twelve pages of relevant UCC sections. The court reasoned that it is not the duty of the court to look for evidence within the record to support the creditor's argument that summary judgment is proper. Moreover, the creditor supplied only unsubstantiated assertions as evidence, and such unsubstantiated assertions cannot support a motion for summary judgment. Due to the failure to meet its burden, the creditor failed to show that there were no genuine disputes as to any material facts and that the moving party was entitled to a judgment as a matter of law. By Julia Ferron juferron@ttu.edu; Ed. Grant Coffey

Unperfected Secured Creditor Had No Right to Post-Petition Proceeds Denied [SD WV]

Before filing for bankruptcy under Chapter 11, the debtor in this case entered in an agreement to deliver coal to two states. This transaction became a source of debate after the petitions for bankruptcy were filed. The Department of Labor contended that the company that sold the coal in question owed outstanding wages to pay their laborers, causing the coal in question to be "hot goods." These goods could not be delivered until the debtor paid the laborers. In an attempt to pay off its obligations to the workers, the debtor entered into multiple settlement agreements. These agreements included the debtor selling a majority of their assets. After approval of these settlement agreements, the debtor was able to pay the unpaid laborers along with various other debts. In reaction to this settlement, the creditor who had a security interest in some of the debtor's accounts before the petition was filed claimed that it was entitled to the settlement funds because they were the proceeds of its security interest. As a result, the bankruptcy court ordered that all the settlement proceeds be placed in an escrow account to allow it time to determine who had a right to the funds. The bankruptcy court later entered an opinion concluding that although the creditor had a valid security interest, it had failed to properly perfect the security interest and for that reason as well as equitable considerations, had no right to the settlement funds on the theory that the money was the proceeds of its prepetition collateral.

In IN RE BLACKJEWEL, LLC., NO. 3:20-00866, 2021 U.S. DIST. LEXIS 121061 (S.D. W. VA. JUNE 29, 2021) (opinion not yet released for publication), the court affirmed the decision that the security interest in question failed to attach to post-petition proceeds. The decision in this case was based on a consideration of the equities as well as on the failure of the lender to properly perfect its security interest in the account's prepetition. Because the security interest had not been properly perfected prepetition, the court held that the creditor lacked a perfected security interest in the post-petition funds. Based on this conclusion, the court confirmed that the lower court did not err and affirmed the ruling that the creditor was not entitled to the debtor's post-petition settlement proceeds. By Julia Ferron juferron@ttu.edu

Are Managers Authorized to Take Out Mortgages on Behalf of Their Company? [BKR NM]

A large corporation, two limited liability companies, and a manager of one of the limited liability companies were named as defendants (debtors) in a suit for breach of contract and foreclosure. The manager had previously taken out three mortgages in the company's name and the company had defaulted on all payments. The case was then removed to bankruptcy court after one of the debtors filed a bankruptcy petition. The plaintiff (creditor) is a limited liability company and the holder of the notes and mortgages. The creditors asserted that the court should grant summary judgment in their favor, which would result in the notes and mortgages being valid and enforceable against the defendants and their property. Debtors asserted that the manager did not have the authority to execute the loan on behalf of the company. The creditor contended that the manager had apparent or actual authority to execute such contracts on behalf of the limited liability companies. The creditor pointed to an operating agreement which gave managers of the company the power to borrow money for the company and to encumber and grant security interests against its property to secure loans for the company as evidence of the manger's authority. Additionally, the debtors had sent a letter to the creditor to verify the managers ability to take out mortgages. The debtors contend that the manager was not authorized to make such decisions despite the operating agreement having been in place.

In IN RE LANE, 2021 WL 3438347, 2021 B.R. LEXIS 2084 (Bankr. D.N.M. Aug. 5, 2021), the court denied the motion for summary judgment because genuine issues of material fact still exist regarding whether the manager had the authority to execute the notes and mortgages on the debtor's behalf. To establish that it is entitled to collect amounts due under the notes, the creditor must show that it the holds the notes, the notes became due, and the amounts due have not been paid. The court reasoned the manager may have had actual authority to borrow money for the debtors and encumber the debtors' property to secure such loans because the operating agreement provided that each manager had the power and authority to borrow money from banks. Nevertheless, the court denied summary judgment because an issue of material fact existed. By Claire Andrews clandrew@ttu.edu; Ed. Grant Coffey

Secured Creditor Loses Deficiency Because it Filed Claim For Deficiency Late [BANKR MICH]

A credit union loaned funds to the debtor so she could purchase a vehicle, and as collateral, the debtor granted the credit union a purchase money security interest in the vehicle. Two years later, the debtor filed a petition under Chapter 13 of the Bankruptcy Code. On the same day she filed her petition, the debtor filed a proposed plan, in which she claimed that she will surrender the vehicle to the credit union upon confirmation of the plan. A month later, the credit union filed a proof of claim, asserting a claim secured by the car. In response, both parties and the Chapter 13 trustee agreed to stipulate that the credit union could file an unsecured proof of claim should there be any deficiency after it disposed of the vehicle. The plan was subsequently confirmed. In the following months, the credit union alleged it encountered difficulty repossessing the vehicle, further asserting that the debtor dodged all attempts to allow it to reclaim the vehicle. However, the credit union eventually repossessed the vehicle and sold it. The sale of the vehicle did not cover the entire debt owed to the credit union. The credit union then sent a notice of surplus or deficiency to the debtor, but it was neither filed with the court nor sent to the trustee. After the vehicle was sold, the credit union filed an amended proof of claim, asserting a deficiency. This claim was not filed by the deadline established in the confirmed plan and confirmation order. The trustee objected to the claim because it was not filed by the deadline but the credit union argued that although the amended claim was not filed before the deadline in the confirmed plan, its filing related back to its original claim, which was timely filed. The creditor additionally argued that the claim should be allowed because it's late filing was a result of excusable neglect.

In IN RE TESCH, 628 B.R. 60 (Bankr. W.D. Mich. 2021), the court sustained the trustee's objection to the amended claim. Bankruptcy Code section 502, governing the allowance of claims under section 501, states that a party in interest may object to claims if they are not timely filed. Federal Rule of Bankruptcy Procedure 3002 establishes deadlines for filing proofs of claim under Chapter 13, which is 70 days after the date of the original petition. The court observed that this deadline is "fairly rigid," and there are only limited exceptions (found in 3002(c)(l)-(7) of the Federal Rules of Bankruptcy Procedure) - none of which were found to apply to the present case. The credit union relied on Bankruptcy Rule 7015, which states that amendments relate back to the original pleading when the amendment asserts a claim that arose out of the conduct, transaction, occurrence set out in the original pleading. The court disagreed with this argument, stating that it expressly only applies to "pleadings," which, by definition, means complaints, answers, and cross/counter claims. The court did not find this to include proofs of claim. As for the credit union's argument regarding excusable neglect, the court disagreed with this, as well. To supplement its argument, the credit union cited Bankruptcy Rule 9006(b). The rule states that when an act is required or allowed to be done within a specified period, the court may grant a motion made after the expiration date where the failure to act was due to excusable neglect. The court reasoned that this provision cannot be used to enlarge time to taking action under Bankruptcy Rule 3002(c). As a result, the court sustained the trustee's objection to the claim for a deficiency, and the credit union's claim was dismissed. By Jessica Longoria jessica.longoria@ttu.edu

Creditor's Security Interest Continues in Collateral Notwithstanding Sham Sales [BK ED TENN]

Creditor possessed a perfected security interest in certain trailers previously held as its debtor's inventory. This creditor released its security interest in trailers when the debtor transferred a trailer to a lessor, but only after the debtor paid it for the trailer. A month before filing for bankruptcy, the debtor and the lessor (an affiliate of the debtor) transferred trailers that were subject to the creditor's security interest at a rate more than twenty times than the historical average monthly volume of such transfers, without any evidence of having been paid for the trailers. At all times, the debtor and lessor - which shared the same president -- were aware of the debtor's obligations to the original creditor. The creditor asserted a security interest in the transferred inventory and filed a claim in the lessor's Chapter 11 case. Subsequently, the creditor initiated an adversary proceeding seeking a declaratory judgment that its security interest in the inventory continued in the trailers that were transferred by the debtor to the lessor on the eve of bankruptcy, claiming that the transfers were outside the ordinary course of business. The bankruptcy trustee filed a motion for judgment on the pleadings to defeat the creditor's claim, arguing that the transfer had eliminated the creditor's security interest in the trailers.

In IN RE K&L TRAILER LEASING, INC., No. 3:20-bk-31620-SHB, 2021 WL 2013008 (Bankr. E.D. Tenn. May 19, 2021) (opinion not yet released for publication), the court denied the trustee's motion for judgment on the pleadings. The court first evaluated the state's UCC Article 9 provisions which, like the uniform UCC, granted limited exceptions to the "general rule that a secured creditor's interest in collateral continues 'notwithstanding sale, lease, license, exchange, or other disposition thereof unless the secured party authorized the disposition free of the security interest.'" TENN. CODE

ANN.§ 47-0-315(a). In reaching its outcome, the court focused on the character of the collateral in the hands of the secured party's debtor and obligor, the debtor in this case, rather than the character of the collateral in the hands of the transferee, here the lessor. Citing to comment 3 to § 9-507 of the UCC, the court explained that even though "the collateral may be owned by a person other than the debtor against whom the financing statement was filed" the financing statement remained effective. TENN. CODE ANN. § 47-9-507, cmt. 3. Section 47-2-403(2). However, a limited exception to that rule is that goods can be sold free and clear of a lender's perfected security interest (even without consent of the secured party) if the sale is a sale of inventory in the ordinary course of business. Therefore, the question turned on whether the transfer by the debtor to the lessor was either (l) approved by the creditor; or (2) a sale in the ordinary course of business, because these are the only two ways that the creditor's perfected security interest could have been lost as a result of the debtor's transfer to the lessor. The court "declined to find that the purported removal of goods from a retailer's inventory via 'sham sales' defeat[s] a lender's secured claims against the goods as inventory." Id. at * 6 (quoting *Auto. Fin. Corp. v. DZ Motors, LLC*, No. 16-7955, 2021 WL 1380605 at * 10 (D.N.J. Apr. 9, 2021) (citing *Homes Sav. Ass'n v. Gen. Elec. Credit Corp.*, 708 P2d 280, 286 (Nev. 1985). Here the sales were sham sales and therefore were not sales in the ordinary course of business. By Miguel Escobar Miguesco@ttu.edu

GENERAL BANKING LITIGATION

No Standing in Claim Against the OCC's New Rule Regarding "Special Purpose" Banks; Claim Not Ripe [2ND CIR]

On July 31, 2018, the Office of the Comptroller of Currency ("OCC") decided it would accept applications for special purpose national bank ("SPNB") charters from companies engaged in the "business of banking," including financial technology companies that do not accept deposits. This would be an amendment to a rule promulgated in 2003, which gave the OCC the ability to issue SPNB charters. Later, in 2016, the OCC, in accordance with the powers granted to it under 12 U.S.C. § l(a), proposed the amendment and allowed for comments. The superintendent of New York Department of Financial Services ("DFS") responded with its objections to the rule, arguing that it exceeded its statutory authority. The OCC gave its responses in return, stating the National Bank Act ("NBA") does not require a bank to take deposits to be in the business of banking. DFS objected to this change, arguing that it exceeded the OCC's statutory authority. DFS further argued the business of banking requires banks to take deposits. In response, the OCC argued it had the statutory authority to promulgate the new rule, in addition to arguing the DFS lacked standing, and the matter was not ripe for adjudication in federal court. The OCC, under the Department of Treasury, is charged with assuring the safety, soundness, and compliance with laws and regulations of federally chartered banking institutions. On the other hand, the DFS is in charge of the supervision of New York licensed banks and non-bank financial services and companies, and it is responsible for enforcing the state's insurance, banking, and financial services laws.

In LACEWELL v. OFFICE OF THE COMPROLLER OF CURRENCY, 999 F.3d 130 (2d Cir. 2021), the Court of Appeals reversed the district court's decision that the OCC exceeded its authority under the NBA. The court held that the DFS lacked constitutional standing because it failed to allege that the OCC's decision caused it actual or imminent injury. In addition, the circuit court held that the claims were not ripe for the same reason. First, the court evaluated whether the plaintiff had standing. To establish standing a party must allege: (1) it suffered an injury in fact, (2) the injury is fairly traceable to the conduct of the defendant, and (3) that the injury can be redressed by a favorable judicial decision. The DFS tried to argue, as a result of the new rule, it would lose regulatory power and revenues. The court disagreed because these injuries were merely speculative, because the OCC had not received an application for the SPNB charter at the time this suit was filed, and there was no way to determine whether the DFS' regulatory powers would be preempted in the way it feared it would be. As for the ripeness issue, the court held that the DFS' claims were immature for the same reasons. Accordingly, the court reversed and remanded the lower court's decision. By Jessica Longoria Jessica.longoria@ttu.edu

LOAN DISCHARGE

Debt Dischargeable Because Experienced Lender Failed to Act Reasonably [BKR ND CA]

This suit arose between an experienced lender and a debtor seeking a short-term loan for her place of residence. Upon seeking a short-term loan, the debtor was advised by a realtor that the lender in this case was experienced and would consider giving her a short term loan. The lender was told that the debtor's plan upon receiving the loan was to move out of the property and either refinance or sell the real estate. After reviewing the proper documentation, the lender agreed to a six-month loan totaling over a million dollars at ten percent interest. During this six-month period, the debtor failed to make any payments on the loan and failed to sell the property or refinance the loan. The lender filed suit and made multiple claims. The debtor filed for bankruptcy, and the lender brought an action to determine that the loan was not dischargeable in bankruptcy because it was based on the debtor's fraud. At the heart of these claims was the allegation that the debtor made false statements and representation to the lender in regard to the value of the debtor's property, income, and future intentions for the property. To rule on the lender's claims against the debtor, the court sought to determine what a reasonable and prudent lender would have done in a similar situation.

In IN RE LONGMIRE, Case no. 18- 42169 WJL, Adv. Pro. No. 18-04110, 2021 WL 1713016, 2021 B.R. LEXIS 1142 (N.D. Cal. Apr. 29, 2021), the debtor's summary judgment motion was granted in part and dismissed in part. Reviewing the multiple claims alleged in the lender's action, the court focused on the evidence presented by both the lender and the debtor to determine whether the debtor had violated the provisions of 11 U.S.C. § 523(a)(2)(A)-(B) by committing fraud. If so, the debt arising from the loan could not have been discharged. The court reasoned that Bankruptcy Code § 523(a)(2)(B) calls for an objective standard. The court reviewed this standard in light of all the circumstances in this case. The court relied on the question of what a reasonable and prudent lender would have done if met with a similar scenario. This led to the conclusion that the lender in this case fell below the traditional standard. The lender failed to verify much of the information provided by the realtor on behalf of the debtor. If the lender had verified the debtors' intentions for the property and income, it would have found that the debtor's income was not sufficient to pay the monthly amount of the loan combined with the interest rate. Due to the lender's failure to comply with the traditional expectations of a reasonable and prudent lender, the summary judgment motion was granted in part. The remaining claim involving the lender's reliance on the debtor's claims was dismissed by the court because any such a reliance would have been unreasonable. By Julia Ferronjuferron@ttu.edu

NEGOTIABLE INSTRUMENTS

Possession of a Note Endorsed in Blank Supports Standing [CT APP]

Debtor delivered a note to creditor in exchange for a loan to purchase a residence. The note was transferred multiple times between several parties. Eventually, the plaintiff became the holder and owner of the note. Shortly thereafter, the debtor failed to make payments on the note and declared bankruptcy. The original note holder had transferred ownership, not possession, of the note to the substitute noteholder. Before transferring possession of the note to the substitute noteholder, the original noteholder had commenced a foreclosure action alleging that the original note holder remained the holder of the note, the note was in default, it was electing to accelerate the balance due and foreclose on the mortgage securing the note. In response, the debtor filed a motion to dismiss, arguing that the substitute noteholder lacked standing to commence foreclosure proceedings because the substitute noteholder did not own the note.

In GOSHEN MORTG., LLC v. ANDROULIDAKIS, 2021 WL 2173678, 2021 Conn. App. LEXIS 182, 205, Conn. App. Ct. 15 (2021)., the court held that the original noteholder had standing to commence foreclosure proceedings. To have standing to bring a foreclosure action, the noteholder must be entitled to enforce the promissory note at the time the action is commenced. Further, possession of a note endorsed in blank is prima facie evidence that the plaintiff has standing to bring an action. Here, the debtor had endorsed the note in blank for the original creditor. A blank endorsed note is payable to the holder and may be negotiated by transfer of possession. Thus, the original note holder's standing turned on the possession of the note or lack thereof, at the time of commencement of the litigation. Because the original note holder maintained possession of the note during the commencement of the foreclosure action, it had standing to enforce the note even if, at the time, the note had been assigned to the substitute noteholder. By Grant Coffey grant.coffey@ttu.edu

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.