NORTH DAKOTA BANKERS ASSOCIATION

LEGAL UPDATE

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BANKING REGULATION

If You Want to Bring an EFTA Claim You Better Do It Clearly and Timely [CD CAL]

On or about January 4, 2022, Gleason (the "account holder") noticed large amounts of money had been withdrawn from his account at PNC Bank (the "bank") from October 2021 to January 4, 2022. After requesting the bank freeze his account, he found that $130,000 of his retirement funds had gone missing. The bank did not freeze the retirement account, and the account holder continued to suffer as money was removed from his account. After being shown evidence of the thief withdrawing the money from his account, including pages of unauthorized purchases and video of the suspected thief at an ATM, the account holder demanded that the bank return the money stolen from him. However, the bank's agents declared that the withdrawals were not fraudulent and informed the account holder the bank would not repay him for his losses. The thieves were subsequently arrested and charged with criminal offenses. Yet, even after the thieves were caught, the bank still refused to repay the amounts stolen from the account holder. The account holder then sued the bank asserting two causes of action against the bank: (1) violation of C.F.R. § 1005.6; (2) negligent infliction of emotional distress. The bank then filed its motion to dismiss.

In ***Gleason v. PNC Bank, N.A.***, CV 23-100 DSF (SPx), 2023 U.S. Dist. LEXIS 35332 (C.D. Cal. Mar. 2, 2023) (unpublished opinion) the court granted in part the bank's motion to dismiss. The court found the bank's arguments persuasive in coming to its conclusion. Specifically, the bank argued the account holder's first cause of action failed to state a claim because he did not identify a specific statute that would grant him relief, he failed to establish the relevant timeline required for a violation of the Electronic Funds Transfer Act (EFTA), and his claim was time-barred. The court agreed that the account holder's first cause of action failed to state a claim on which relief can be granted because the court inferred that the account holder was alleging a violation of 12 C.F.R. § 1005.6, but nowhere in his amended complaint did he identify Title 12 of the Code of Federal Regulations. The court found the allegations to be confusing and concluded that they did not provide the bank with fair notice of the cause of action alleged against it. The court held that if the account holder intended to assert a cause of action against the bank for violating the EFTA, he must do so clearly. His allegation of a violation of "C.F.R. § 1005.6" was insufficient. Furthermore, the court noted that had the account holder properly alleged an EFTA claim, it would have been time-barred anyway. Although the Ninth Circuit has not decided the issue, the court found that most courts had held that the one-year window to sue begins when the first recurring transfer took place and that subsequent transfers do not each create a new cause of action that resets the statute of limitations clock. Thus, the court found that the EFTA claim was time-barred and dismissed the account holder's first claim with prejudice. Because the account holder's EFTA claim was the only federal cause of action, the court remanded the case to state court to address the account holder's state law claims. By Riley Caraway rcaraway@ttu.edu.

Sender Can Unilaterally Cancel Wire Transfer [ED KY]

A real estate buyer (the "Buyer") agreed to purchase property for $19,990 and gave a real estate title company, which provided escrow services, a cashier's check for $70,000. The title company immediately deposited the check into its escrow account with a bank (the "Title Company's Bank"). The title company then wired an $49,014.14 (the difference between the $19,900 purchase price and the amount of the cashier's check) to the Buyer's bank. At nearly the same time as the wire transfer, the title company discovered the Buyer had defrauded it. Within ten minutes, the title company sent a wire transfer recall to its bank, the Title Company Bank, and notified the Buyer's bank to rescind the transaction. The Buyer's bank told the title company that its own bank needed to file a dispute with it (the Buyer's bank) to begin an investigation. However, the Title Company Bank did not file a dispute, the Buyer's bank did not contact the title company with any investigative findings, and the Buyer's bank allowed the buyer to withdraw

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the funds despite the title company's allegations of fraud relating to the account. A week later, the Title Company Bank sent a wire recall notice to the Buyer's bank, which the Buyer's Bank rejected because there were insufficient funds in the account. The title company sued the Title Company Bank and the Buyer's bank, alleging they violated U.C.C. section 4A-211 by failing to return the funds after it had cancelled the wire transfer order. The title company also alleged claims for negligence per se based on the U.C.C., conversion, negligence, negligence per se for receiving stolen property, and punitive damages.

In ***Cosmopolitan Title Agency, LLC v. JP Morgan Chase Bank, N.A.***, No. 5: 22-286-DCR, 2023 WL 122379, 2023 U.S. Dist. LEXIS 2494 (E.D. Ky. Jan. 2, 2023) (unpublished opinion), the district court held that the title company had plausibly pled that its wire transfer had been canceled before the Buyer's bank accepted it, but held that the title company's common law claims were preempted by the U.C.C. The parties agree that Article 4A-101 of the U.C.C. governed the transfer. That section provides:

> a communication by the sender canceling or amending a payment order is effective to cancel or amend the order if notice of the communication is received at a time and in a manner affording the receiving bank a reasonable opportunity to act on the communication before the bank accepts the payment order.

Based on precedent, the court stated that all that is required for cancellation of a wire transfer before it is accepted is for the originator of the transfer to request that the transfer be stopped. The court stressed that "[t]he sender can unilaterally cancel or amend a payment order if the receiving bank has not yet accepted the order." § 355.4A-211 cmt. 3. Here, the title company was the originator and had alleged that the Buyer's bank received the recall notice before it accepted the payment order, and therefore its claim based on the U.C.C. would not be dismissed. However, because the company's common law claims of negligence and negligence per se were based on the wire transfer itself, they fell within Article 4A's provision that bars common law claims involving misconduct during the funds transfer process. The court also determined that allowing the company's common law claims to proceed would create rights inconsistent with Article 4A-101 because the Title Company's bank, not the company, sent the payment order to the Buyer's bank. The title company's punitive damages claims failed because its common law claims had failed. For these reasons, the district court granted in part and denied in part the Buyer's bank's motion to dismiss the company's amended complaint and dismissed with prejudice the title company's claims against the Buyer's bank for negligence per se, conversion, negligence, negligence per se for receiving stolen property, and punitive damages. By Ashley Boyce ashboyce@ttu.edu.

Squeeze Me but Don't Sue Me! A Bank Needs Actual, Not Constructive Knowledge of Fraud [MD LA]

On April 23, 2019, SunTrust (the "bank") attempted to effectuate a wire transfer on behalf of Squeeze Me Once LLC (the "transferee"). However, a hacker interfered and provided false instructions to the bank. Consequently, there was a misdescription in which the transferee's account number did not match its account name, and a large sum of the transferee's money went to the hacker. Under the bank's policies and procedures, had the wire stopped in the repair queue, the wire should have been manually reviewed to confirm whether the name and account number matched the name and account number on the wire transfer order. The record shows that the wire did not stop in the repair queue, and thus there was no manual intervention/review by anyone at the bank before processing the wire transfer order. The transferee then filed suit against the bank, alleging numerous claims. After the bank filed motions to dismiss, the only remaining claim was the one arising under the UCC. The bank then filed a motion for summary judgment, asking the court to find that it did not violate the UCC, specifically La. R.S. § 10:4A-207. The bank asserted that it did not have actual knowledge that the April 23, 2019, wire transfer at issue misdescribed the beneficiary before it made the wire transfer, as contemplated by § 10:4A-207.

In ***Squeeze Me Once, LLC v. Suntrust Bank***, 630 F. Supp. 3d 763 (M.D. La. 2022), the court granted the bank's motion for summary judgment. In its motion, the bank argued that because manual handling of a payment is both subject to human error and expensive, the benefits of automated payment are lost if a duty to make this determination is imposed on the beneficiary's bank. Thus, it cannot be liable under La. R.S. § 10:4A-207 unless it had actual knowledge before making the payment that the beneficiary was misdescribed. Here, the earliest that the bank could be shown to have had actual knowledge of the conflict was two weeks after the wire transfer. The transferee argued that because the automated system utilized by the bank processed the transfer, even though the account number did not match the account name, the bank was liable under La. R.S. § 10:4A-207 because the bank had constructive knowledge of the conflict between the name and number provided. In coming to its decision, the court looked to various sources to determine what level of knowledge was sufficient to impose liability. The court first examined Louisiana law, specifically Louisiana Revised Statute § 10:1-202(b), which holds "knowledge" means

actual knowledge. The court also relied on decisions from other circuits, such as the United States Court of Appeals for the Tenth Circuit, which had held that Article 4A of the UCC's use of the word knowledge "means actual knowledge, not constructive knowledge, and is determined at the time of payment." After reviewing all the sources in coming to its decision, the court ultimately ruled that the level of knowledge required to invoke liability under La. R.S. § 10:4A-207(b) is actual rather than constructive knowledge. The court stated that just because the bank's automated systems stored data regarding the misdescription does not constitute the bank having actual knowledge. The court ruled that if conflicting data like the one at issue in this case is merely stored electronically and not reviewed manually, the data will not constitute actual knowledge. Because the bank only acquired actual knowledge of the hacker's fraud two weeks after the transfer, the court found that no reasonable juror could find that the bank is subject to liability under La. R.S. § 10:4A-207 and granted the bank's motion for summary judgment. By Riley Caraway rcaraway@ttu.edu

Wire Transfer Gone Wrong but Outstanding Factual Issues Prevented Dismissal of Some Claims Against Bank [ED NY]

The buyer made an outgoing wire transfer request to the bank for $336,247.72 in order to close a real estate transaction. The bank removed the funds from the buyer's account to deposit them into the receiving account, which also had connections to the bank. The buyer believed that these funds had been wired to the seller of the property, but the seller did not receive the funds. Upon learning this, the buyer attempted to cancel the wire transfer, which failed and as a result, the buyer was unable to purchase the property. The buyer asserted that the bank failed to return the transfer or make the buyer whole again. The buyer brought claims against the bank for breach of contract, conversion, and breach of the implied covenant of good faith and fair dealing. The bank filed a motion to dismiss in this court, and the buyer filed an opposition.

In ***Jakob v. JPMorgan Chase Bank***, No. 22-CV-03921, 2022 WL 16798071, 2022 U.S. Dist. LEXIS 203490 (E.D.N.Y. Nov. 8, 2022) (opinion not yet released for publication), the bank argued that the buyer's claims should fail because, pursuant the terms of the Wire Transfer Agreement between the buyer and the bank, the bank received the cancellation request for the transfer after the transfer had already occurred. Further, the bank claimed that the conversion and bad faith claims were preempted by the UCC. Relating to the breach of contract claim, the buyer asserted that the Wire Transfer Agreement allowed for a cancellation if it was done immediately. The buyer also claimed that the bank had ample time to respond to the request, and that a recovery of the funds is proper under N.Y. UCC § 4-A-211. The court held that the buyer's breach of contract claims were not preempted by the UCC because the claim concerned the bank's actions before and after the wire transfer. Under N.Y. UCC § 4-A-211, there must be a reasonable opportunity for a bank to act on cancellation instructions. Here, the court determined this was a fact issue because, although the buyer executed the request immediately, the court did not know the precise time that the bank had executed the wire transfer. Further, the court found that the cancellation and return of funds to the buyer also remained a fact issue that could not be determined and as such, the buyer's breach of contract claim did not fail as a matter of law. For these reasons, the court denied the bank's motion to dismiss the buyer's breach of contract claim. However, the court did grant the bank's motion to dismiss the buyer's conversion claim because the elements of conversion had not been independently alleged, rendering the claims duplicative of the breach of contract claim. Even if the claims were not duplicative, the court found the conversion claim still failed as a matter of law because the funds at issue were not sufficiently specific to support a claim for conversion. Finally, the court granted the bank's motion to dismiss the buyer's claim of bad faith. The court found the bad faith claim was duplicative and determined it also failed as a matter of law because of the lack of particularity in the allegations of fraud. By Avery Bertagna abertagn@ttu.edu

BANKRUPTCY

How Late Can a Proof of Claim Be Amended in a Chapter 13 Bankruptcy? [BKR SD TX]

Two owners (debtors) of a home filed for bankruptcy protection under Chapter 13 of the Bankruptcy Code. Two days after the debtors filed, the mortgage company (mortgagee 1) advanced payments for ad valorem taxes assessed against the debtors' home. Then mortgagee 1 filed a proof of claim that included pre-petition arrearages. The ad valorem tax advances were not included within the calculation of the escrow advance balance in the proof of claim. A Chapter 13 plan (plan), confirmed by the court, provided for 60-month payment terms. In month 7 of the plan, mortgagee 1 transferred the claim to a new mortgage company (mortgagee 2). Sixteen months after the transfer, mortgagee 2 discovered the error in the arrearages amount. The original proof of claim understated the projected escrow shortage. Mortgagee 2 filed an amended proof of claim twenty months after the discovery of the error. The amended proof of claim provided the correct calculation of the projected escrow shortage. In month 56 of the plan, and two

years after the mortgagee filed its amended proof of claim, the debtors objected to the amended proof of claim. The debtors argued that mortgagee 2 should be precluded from amending the original claim over two years after confirmation of the Chapter 13 plan and two and a half years after the bar date. The debtors also argued they had been significantly prejudiced by the late filing and amendment, preventing the debtors from completing their plan. Last, the debtors contended that Bankruptcy Rule 3002.1(c) barred the amended proof of claim.

In ***In re Luera***, 647 B.R. 886 (Bankr. S. D. Tex., 2022) (mem. op.), the bankruptcy court held the original proof of claim to be valid, allowed the amended proof of claim by the creditor, and overruled the debtors' objection to the amended proof of claim. The court allowed the original proof of claim under 11 U.S.C. § 502. 11 U.S.C. § 502 provides that "a claim or interest...filed under § 501 is deemed allowed unless a party in interest...objects." The original proof of claim filed by the original lender was filed before the filing deadline for non-governmental proofs of claim and neither of the parties in interest objected to the claim. The subsequent transfer from the original lender to the second mortgagee did not negate the original proof of claim. Next, the court addressed permitting amending a proof of claim. Relying on Kolstad, the court outlined the test for determining whether to permit an amendment to a proof of claim: "(l) is the creditor attempting to stray beyond the perimeters of the original proof of claim... and (2) the degree and incidence of prejudice, if any, caused by the creditor's delay." In re Kolstad, 928 F.2d 171, 175 (5th Cir. 1991). Applying the test, the court determined the amended proof of claim did not stray beyond the perimeters of the original claim because it only corrected a calculation error. The court addressed that any prejudice to the debtor was partly self-imposed because the debtor failed to object to the amended claim for twenty-five months. Furthermore, the purpose of the amendment to the original claim was to cure a defect. Finally, Bankruptcy Rule 3002.1(c) only applies to fees, expenses, or charges that were incurred in connection with the claim after the bankruptcy case was filed. Because the ad valorem tax debt was incurred on January l, this obligation was a pre-petition debt and not subject to the 180-day notice requirement in Bankruptcy Rule 3002.l(c). By Melissa Hightower mehighto@ttu.edu.

CREDIT CARDS

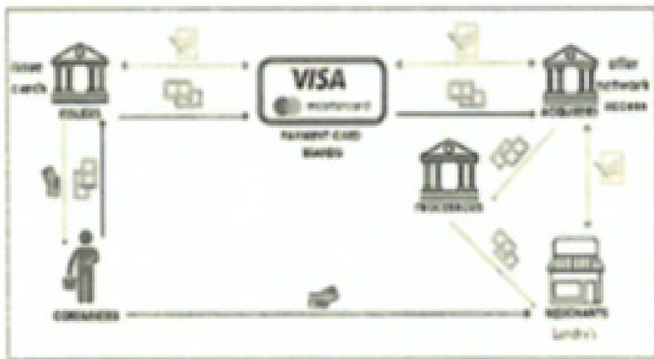
Merchant Must Indemnify Credit Card Processing Bank for Amounts Bank Owes Mastercard and Visa Arising from Merchant's Security Breach [5TH CIR]

A Merchant suffered major data breaches, resulting in information leaks for thousands of credit card holders. Some of the cards were issued by two credit card companies ("MC and Visa"), that imposed assessments on a bank and its subsidiary (the Bank) that had issued and processed the cards. MC and Visa could determine themselves whether a particular breach qualified for an assessment. In this case, MC and Visa individually determined that the breaches qualified for assessments from the Bank as credit card processor because of the Merchant's failure to comply with the contract rules and levied roughly $20 million in assessments against the Bank. The Bank sued the Merchant for indemnification and the Merchant impleaded MC and Visa into the suit, alleging that because the assessments were legally unenforceable it did not have to reimburse the Bank for the assessments it paid MC and Visa. The district court dismissed the Merchant's claims against MC and Visa, and granted summary judgment for the Bank, holding the Merchant had a contractual obligation to indemnify the Bank. The Merchant appealed.

In ***Paymentech, LLC v. Landry's Inc.***, 60 F.4th 918 (5th Cir. 2023), the Merchant alleged that MC and Visa's assessments were unenforceable, the grant of summary judgment for the Bank had been improper, and that it should be allowed to sue MC and Visa to be reimbursed for what it had to pay the Bank. The Merchant alleged that the assessments were unenforceable because they were not valid liquidated damages under either Texas or New York law. Damages, the Merchant argued, are meant to compensate third party credit card issuers for their breachrelated damages but here MC and Visa are not obligated to pay credit card processor's damages. The Merchant claimed that it had no duty to indemnify the Bank because the Bank had voluntarily paid MC and Visa, despite its not having been obligated to pay them. The circuit court held, however, that, whether New York or Texas law applied, the Merchant's caselaw did not support these claims, and further determined that the Bank was contractually obligated to pay assessments such as those imposed here, which defeated the Merchant's claims.

Turning to the claims made by the Merchant that summary judgment had been improper because of the remaining factual disputes, the circuit court agreed with the district court's determination. The Merchant attempted to argue that the indemnification provision in the contract required a showing that it had violated security guideline violations. The circuit court held that the contracts were sufficient to trigger the Merchant's obligation to indemnify the Bank and therefore summary judgment was proper against the Merchant. The Merchant finally alleged that it should be permitted to pursue claims against MC and Visa to recoup its losses. The circuit court considered equitable subrogation, which prevents a party from bearing a loss attributable to another party's wrongdoing. However, the circuit court held equitable subrogation was inapplicable here because Merchant's payment of the assessments made on the Bank was the Merchant paying its own debts, not those of the Bank. Further, the assessments arose from the conduct of the Merchant itself, who therefore could not challenge the assessments. Finally, the circuit court looked at the Bank's cross-appeal from the denial of prejudgment interest. The circuit court declined to reform the judgment, upheld the holdings of the district court against the Merchant, and remanded the matter to the district court to determine appropriate prejudgment interest.

Here is the chart relied upon by the circuit court to explain the facts in the case:



By Avery Bertagna abertagn@ttu.edu.

FDCPA

Debtors' Counsel was Entitled to Recover an Award of Reasonable and Necessary Fees and Expenses in FDCPA Case [BKR SD TX]

Debtor filed suit against Creditors alleging unfair debt collection practices regarding their home loan. The court concluded that Creditors for the Trust violated the Fair Debt Collection Practices Act ("FDCPA") and committed an abuse of process by not withdrawing the Notice of Claims Related to Security Interests despite not being owed the money claimed in the notice during the time period when Creditors had owned the Debtors' Loan. As a result, the court found Creditors liable to Debtors for statutory damages under the FDCPA and punitive damages. The court further deemed Creditors liable for Debtors' reasonable and necessary attorneys' fees and expenses in an amount to be determined following further proceedings. Subsequently, Debtors' Counsel ("Applicants") filed their application for compensation and reimbursement of expenses. After the conclusion of a four-day trial, the court ordered Applicants submit post-trial briefing addressing why particular requested fees should or should not be awarded in light of the evidence presented at trial. Defendants first argued that Applicants' fees and expenses should be denied entirely because Applicants failed to obtain court approval to represent Debtors and failed to timely disclose their fee arrangements. Second, Applicants contended that the rates charged were reasonable and consistent with the rates charged by attorneys of similar experience, skill, and reputation in the area of consumer bankruptcy litigation involving mortgage related abuses of the Bankruptcy Code and Rules and violations of the FDCPA. Alternatively, Creditors argued that the time spent by Applicants on motions practice was unnecessary, excessive, unreasonable, duplicative, vague, and improperly billed in blocks of time. Additionally, Creditors raised three arguments regarding attorney fees incurred while defending their Fee Application: 1) the court lacked discretion to award supplemental fees for defending a fee application; and 2) should the court award Applicants' fees incurred during the fee application process, various billing entries were unreasonable.

In ***In re Trevino***, 648 B.R. 847 (Bankr. S.D. Tex. 2023), the court held that because Debtors prevailed on an unfair debt collection claim relating to their home loan, they were entitled to recover an award of reasonable and necessary attorneys' fees and expenses. The court stated that determination of the proper amount of attorney's fees to award is guided by two sub-inquiries: l) whether the attorney was properly employed; and 2) if so, whether the fees charged are reasonable and necessary. First, Applicants failed to timely file the required disclosures under Bankruptcy Rule 2016(b) and comply with Local Rule 2014-1(d). Second, the court held that although Applicants' rates were reasonable, the fee award had to be further reduced because some claims were unsuccessful and sometimes entries were in impermissible blocks of time, vague, duplicative, or unreasonable. Additionally, the bankruptcy court had authority to award supplemental fees for fee defense litigation because 11 U.S.C. § 105(a) allowed for such awards as a sanction for bad faith conduct and 15 U.S.C. § 1692k(a)(3) expressly shifted attorney fees.

Under §105(a) sanctions to reimburse legal fees must be compensatory rather than punitive in nature, and the court must establish a causal link between the sanctionable conduct and the opposing party's attorney's fees through a but-for test. The court agreed with this proposition and noted that were it not for the underlying abuse of process, Applicants would not have had to defend their Fee Application, thus satisfying the "but for" test. Therefore, the court held that it had discretion to award reasonable attorney's fees. Similarly, § 1692k(a)(3) allows the court to award, in a successful action, "the costs of the action, together with a reasonable attorney's fee as determined by the court." The court reasoned that both statutes are nearly identical, and as such, the court concluded § 1692k(a)(3) does in fact allow for an award of attorneys' fees for fee defense litigation. Accordingly, the court denied in part and granted in part Debtors' Counsel's requested fees and reduced any award for fees to Applicants by fifty percent. BLB 193 By Elijah Benzvi elbenzvi@ttu.edu.

NEGOTIABLE INSTRUMENTS

If the Party Holds the Promissory Note to the Mortgage, That Party Can Foreclose [TX APP]

The mortgagor purchased the property at a constable's sale. The constable's deed conveyed to the mortgagor "all of the right title, interest and claim" the previous owner had held. Two years later, the mortgagee bank (who had acquired the mortgage loan from the original mortgagee) posted a notice of substitute trustee's sale to foreclose on the property. The mortgagor sued the mortgagee, the bank's mortgage servicer, and the bank's nominee. The mortgagor sought "a declaratory judgment declaring that [the mortgagee, the mortgage servicer, and the nominee] lacked standing to foreclose on the [p] roperty." Additionally, the mortgagor sought a claim to quiet title. The mortgagee, the mortgage servicer, and the nominee filed a motion for summary judgment that the trial court granted. The mortgagor appealed.

In ***Mendenhall v. Deutsche Bank Nat'l Tr. Co. as Tr. for Novastar Mortg. Funding Tr., Series 2006-5*** NovaStar Home Equity Loan Asset-Backed Certificates, Series 2006-5, No. 01-21-00103-CV, 2022 WL 17981836, 2022 Tex. App. LEXIS 9535 (Tex. App. Houston [1st Dist.] Dec. 29, 2022, pet. denied) (mem.op.) (unpublished opinion), the appellate court affirmed the trial court. First, the mortgagor claimed the trial court had erred in granting summary judgment with respect to his declaratory judgment claim. The court recited the "common law maxim" that a party has "standing to foreclose if the party is the holder or owner of a note secured by the instrument." Holding the mortgagee had standing, the court found the summary judgment evidence uncontrovertibly established the mortgagee held the promissory note for the mortgage loan. The mortgagor argued the mortgagee was not the holder because the mortgagee failed to establish on what date it received the note from the original mortgagee. The court disagreed, stating: "[the mortgagee] was not required to show the indorsement's date for it to be effective" and further ruled the mortgagee did not have to prove the chain of transfers. Because the Property Code grants mortgage servicers standing to foreclose, the court held the mortgage servicer also had standing. Regarding the nominee, the court explained declaratory judgment is proper only if a "justiciable controversy exists" between the two parties. Because the nominee was not the foreclosing party and had disclaimed all interest in the property, the court. affirmed summary judgment on the declaratory judgment claim in the nominee's favor. Second, the mortgagor argued the trial court had erred in granting summary judgment against him on his claim to quiet title. Because the mortgagee had the right to foreclose, the mortgagor could not realistically argue the mortgagee's claim was unenforceable. Thus, the appellate court sustained the lower court's summary judgment on the quiet title issue. By Peter Benson pebenson@ttu.edu.

The Unsecured Promissory Note Was a Negotiable Instrument [BKR D ID]

A debtor (debtor) and a borrower (borrower) entered into a romantic relationship. The debtor established a small business, from which some of the proceeds were used to pay the borrower's personal expenses and attorney fees incurred in his divorce. The borrower generated some revenue from the business through commission sales; however, the debtor existed as the sole owner and held all titles to the business. In addition, the debtor and the borrower entered into an unsecured promissory note (note) representing the borrower's obligation to repay additional cash the debtor had loaned to the borrower. The note, signed by both parties, stated the borrower agreed to pay the debtor unpaid principal at the rate of one percent per year and the borrower would make a balloon payment within twelve months of the borrower's dissolution of his marriage. The note also stated that if the payment was more than 30 days late, the borrower owed the debtor a five percent fee. The borrower failed to pay on the note.

Subsequently, the debtor filed a Certificate of Dissolution, dissolving the business and filed a Chapter 7 Bankruptcy. The debtor included the note as an asset in her bankruptcy schedules. The trustee (trustee) handling the bankruptcy estate sent an email to the borrower demanding payment in full, including interest and penalty fees. Having received no money from the borrower, the trustee commenced an adversary proceeding seeking a money judgment against the borrower to collect on the note. In response, the borrower claimed that the

debtor had signed a note cancellation document. The debtor claimed she had never seen nor signed the document. She stated that she only became aware of it during the bankruptcy case when the trustee's counsel provided it to her. During the trial, the borrower refused to testify under oath. After the adversary proceeding began, the borrower contacted the debtor by text message and attempted to settle the debt outside of bankruptcy. The trustee sought a final order and judgment on all claims from the bankruptcy court.

In ***Rainsdon v. Grant (In re Fasano)***, 648 B.R. 253 (Bankr. D. Idaho, 2023), the bankruptcy court held that because the unsecured promissory note contained a choice of law provision indicating it was governed by the laws of California and the note met the statutory provisions set forth by California Commercial Code, the promissory note was a negotiable promissory note. Cal. Com. Code § 3104 provides that a negotiable instrument is (1) a promise or order to pay a fixed amount to the lender; (2) payable at a definite time; and (3) does not require any act of the borrower other than payment. The note provided that the borrower agreed to pay the debtor within 12 months of the borrower's dissolution of marriage, and the note did not require any additional acts of the borrower other than payment. Furthermore, because the borrower sent a text message to the debtor offering to settle the debt and the borrower refused to provide testimony to contradict the debtor's statements that she had never seen the satisfaction and cancellation document and that she did not sign it, the borrower had failed to demonstrate the note had been satisfied. Therefore, the trustee established a right to collect payment on the note, including interest and penalties. By Melissa Hightower mehighto@ttu.edu.

SECURITY INTERESTS

Perfected Security Interest in Property Had Priority over Unsecured Money Judgment [NY]

Debtors executed a loan security agreement with Nonparty Bank, offering their interest in a cooperative apartment as collateral. Later, Secured Creditor became the recorded holder of the security interest in the apartment by filing a UCC-1 Financing Statement. Meanwhile, Unsecured Creditor obtained a judgment against Debtor in a separate proceeding. Subsequently, Debtors defaulted on the loan. Secured Creditor notified Debtors of their default and noticed the sale of the collateral. However, Unsecured Creditor objected to the sale and commenced this proceeding. On appeal, Debtor argued that Creditors did not have a valid security interest.

In ***Honeedew Investing LLC v. JP Morgan Chase Bank, N.A.***, 214 A.D.3d 595, (N.Y. App. Div. 2023), the court held that Secured Creditor perfected security interest in the subject property had priority over Unsecured Creditor's money judgment. Uniform Commercial Code § 9-310(d) provides that a security interest in a cooperative interest is perfected by filing a financing statement. Nonparty Bank and Secured Creditor filed financing statements long before Unsecured Creditor obtained its judgment. Further, the court rejected Unsecured Creditor's argument that Nonparty Bank and Secured Creditor did not have a valid security interest. Under UCC § 9-203(a), a security interest attaches to collateral when it becomes enforceable against the debtor. In turn, a security interest is enforceable against the debtor and third parties if: (1) value has been given; (2) the debtor has rights in the collateral or the power to transfer rights in the collateral to a secured party; and (3) the debtor has authenticated a security agreement that provides a description of the collateral. With respect to subsection (1), the court found that Unsecured Creditor improperly raised its fact-based argument that there was no evidence supporting Nonparty Bank actually lent money to the Debtors for the first time on appeal. As for subsection (2), Debtors had rights in the collateral. Because UCC § 9-203(b)(2) is in the disjunctive, Secured Creditor did not have to prove that the Debtors had the power to transfer rights in the collateral. Finally, with respect to subsection (3), Unsecured Creditors, on appeal, did not dispute that the Debtors authenticated a security agreement that provided a description of the collateral. Additionally, Unsecured Creditor argued that the Debtors did not personally sign a security agreement. However, their attorney-in-fact signed it. Thus, the court affirmed the district court's ruling in favor of Secured Creditor. By Elijah Benzvi elbenzvi@ttu.edu.

TRUTH IN LENDING ACT (TILA)

Attention Credit Card Account Holders - Not All Fees Must Be Itemized! [3D CIR]

A credit card consumer (consumer) was party to a credit card account issued by a bank (bank). A card member agreement governed the account and disclosed to the consumer that an annual membership fee would be billed to his account each year. The consumer asserted that he had received and reviewed the credit card renewal notice, which identified the pending annual membership fee and understood that the renewal notice represented that this fee had to be paid in its entirety for continued availability of credit. The consumer paid the fee in full but claimed that had he been aware the total fee included both the annual membership fee and a separate additional credit card fee, he would have paid only the annual membership fee. The consumer alleged that the bank caused him economic injury by failing to itemize the annual fees. The consumer filed a putative class action complaint, alleging that

the bank's failure to itemize each component of the renewal fee in the renewal notice violated the Truth in Lending Act (TILA).

In ***Weichsel v. JP Morgan Chase Bank, N.A.***, 65 F.4th 105 (3d Cir. 2023), the court held the consumer had standing to sue; however, he had failed to state how the bank had violated TILA because there is no requirement to itemize annual fees on renewal notices. First the court addressed the requirements for standing, which are that the plaintiff must have "(1) suffered an injury in fact, (2) that is fairly traceable to the challenged conduct of the defendant, and (3) that is likely to be redressed by a favorable judicial decision." Spokeo, Inc. v. Robins, 578 U.S. 330, 338 (2016). The consumer's allegation of financial harm satisfied the injury in fact. Moreover, the injury was connected to the bank, which did not itemize the annual fees on the renewal notice. In addition, the consumer's injury could be redressed by a favorable decision because a court could award him actual and statutory damages. However, TILA only requires that renewal notices must contain "clear and conspicuous disclosure[s]" of the "date the account will expire if not renewed"; "[a]ny annual fee, other periodic fee, or membership fee imposed for the issuance or availability of a credit card.."; and "the method by which the consumer may terminate continued credit availability under the account." 15 U.S.C. § 1637(d)(1). The renewal notice received by the consumer from the bank provided the date on which the account would close if not renewed and how to cancel the account. TILA also requires itemization governing periodic disclosures, but periodic disclosures are not applicable to renewal notices. See 12 C.F.R. § 1026.7(b)(6)(iii). The circuit court discussed the Supreme Court's holding in Ford Motor Credit Co. v. Milhollin, which stated that TILA and its regulations reflect a policy that "meaningful disclosure" does not necessarily mean "more disclosure." 444 U.S. 555, 568 (1980). Renewal notices are not subject to the same disclosure requirements as solicitations and applications because the consumer has already entered into the credit card agreement, the circuit court explained. During the period of account renewal, TILA requires only that a creditor disclose terms "that would apply if the account were renewed." 15 U.S.C. § 1637(d)(1)(B). By Melissa Hightower mehighto@ttu.edu.

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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.

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