NORTH DAKOTA BANKERS ASSOCIATION

LEGAL UPDATE

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ADMINISTRATIVE LAW

Statute of Limitations Runs from Plaintiff's Injury, Not from Rules Promulgation [U.S.]

The Administrative Procedures Act (the "APA") does not have its own statute of limitations, but case law has held the general six-year federal statute of limitations, in 28 U.S.C. § 2401(a), applies to challenges to administrative regulations. At issue was a regulation that set the amount that could be charged by a provider for debit card services. The pertinent regulation had been passed in 2011, and provided that the maximum interchange fees (the amount debit card issues could charge merchants for using its service) was $0.21 per transaction plus .05% of the transactions value. The plaintiff challenged this rule (Regulation II) facially. The plaintiff did not exist until 2018, seven years after the regulation had become effective. The agency who passed the regulation moved to dismiss, arguing the claim was time-barred.

In ***Corner Post, Inc. v. Bd. Of Governors of the Fed. Rsrv. Sys.***, 144 S. Ct. 2440 (2024), the Supreme Court held that an APA claim does not accrue under the statute of limitations, 28 U.S.C. § 2401(a), until the plaintiff is actually injured by a final agency action. That section provides that civil actions against the United States "shall be barred unless the complaint is filed within six years after the right of action first accrues." The Court reasoned that§ 2401(a) did not in any way indicate that it was designed to protect defendants rather than plaintiffs. Because the plaintiff had filed suit within six years after it was allegedly injured, its suit was timely. In reaching its conclusion, the Court relied on the language of the statute and its history.

By The Editors

ARBITRATION

No Acceptance: Bank's Motion to Compel Arbitration Fails [TX APP]

The bank sued the debtor for breach of contract by failing to make payments under the loan agreement. The debtor denied it had breached the contract and filed a counterclaim alleging the bank violated the federal Truth in Lending Act (TILA) in its initial disclosures. In response to the counterclaim, the bank moved to compel arbitration, claiming that the loan agreement was governed by an arbitration agreement, which required that claims be resolved by arbitration at the request of either party. The debtor argued that the creditor did not provide proof that he consented to the loan agreement or the arbitration clause before the bank disbursed the funds because there was no "opportunity to validly consent" during the application process. The creditor, however, claimed the debtor had to view the terms and conditions of the loan agreement multiple times before, during, and following the application process and "expressly agreed" to them. Additionally, the bank argued that the debtor's failure to return the loan proceeds or request to opt out of the arbitration clause within 30 days after receiving the loan agreement manifested his consent and, therefore, the terms and conditions, including the arbitration clause, should be enforced under the Federal Arbitration Act (FAA). The trial court denied the bank's motion, and the bank appealed.

In **Discover Bank v. Miller,** No. 01-23-00513-CV, 2024 WL 3973436, 2024 Tex. App. LEXIS 6467(Tex. App.-Houston [lst Dist.] Aug. 29, 2024) (opinion not yet released for publication), the court affirmed the trial court's denial of the bank's motion to compel arbitration. To compel arbitration under the FAA, the bank had to prove "that there is a valid arbitration agreement and the claims in dispute fall within the agreement's scope." In re Rubiola, 334 S.W.3d 220,223 (Tex. 2011). The court held that the bank failed to show the existence of a valid arbitration agreement. First, the court found that the bank made an offer under "definite terms and conditions" only after

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it approved the debtor's loan application and tendered the loan agreement and a check in the approved amount. The initial solicitation of the application process was merely an invitation to enter negotiations. Next, the court noted that while the agreement included provisions on how the debtor could reject the loan agreement and arbitration clause, no specific instructions were provided showing how the debtor could accept the loan agreement or arbitration clause before the disbursement of the loan. The court explained that although conduct can create an acceptance, it found no evidence of an acceptance of the loan or arbitration agreement by the debtor. There was no evidence showing "unequivocal intent" from the debtor to enter into an enforceable agreement to arbitrate. Therefore, no enforceable arbitration agreement existed.

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BANKRUPTCY

Subchapter V LLC Debtor Still Liable for Debts Owed [5TH CIR]

The creditor made a loan to a limited liability corporation (the debtor) in exchange for a sum of the debtor's future receivables. Before this agreement, the debtor claimed it "had not filed, nor did it anticipate filing, any Chapter 11 bankruptcy petition." However, two weeks later, the debtor petitioned for Chapter 11 bankruptcy under subchapter V. The creditor then filed an adversary complaint alleging the debtor had misrepresented its plans to file bankruptcy. The creditor sought a declaration that the debtor's debt owed to it was nondischargeable because subchapter V debtors "cannot discharge certain 'kinds' of debt listed in § 523(a)." Next, the debtor moved to dismiss on the grounds that 11 U.S.C. § 523(a) only applies to individuals, and because the debtor is a corporation, its debt would be dischargeable. The bankruptcy court ruled in favor of the debtor. On appeal, the creditor argued that the bankruptcy court erred in its interpretation and that the interpretation of the Fourth Circuit, that Subchapter V discharge exceptions apply to both individuals and corporations, was instead correct.

In **Avion Funding, L.L.C. v. GFS Indus., L.L.C. (In re GFS Indus, L.L.C.)**, 99 F.4th 223 (5th Cir. 2024), the Fifth Circuit reversed the bankruptcy court's ruling and followed the interpretation of the Fourth Circuit, holding that the § 523(a) discharge exceptions apply to both corporations and individuals in subchapter V cases. First, the court explained that interpretation of the Bankruptcy Code starts with the plain language itself. In 11 U.S.C. § 1182(1)(A), "'debtor' means 'a person engaged in commercial or business activities.'" Additionally, a "person" is defined to include both individuals and corporations. 11 U.S.C. § 101(41). Second, the court applied the "precise language" of the statute as written and concluded that "the most natural reading of § 1192(2) is that it subjects both corporate and individual Subchapter V debtors to the categories of debt discharge exceptions listed in § 523(a)." Further, the court highlighted the language "kind of debt" present in the statute and noted Congress' choice not to say "kind of debtor" in § 1192; this, the circuit court reasoned, indicated Congress' intent to refer to the list of different debts, not to different kinds of debtors. Third, the court noted that specific sections applying to subchapter V govern over general Bankruptcy Code provisions. Thus, "to the extent §§ 523(a) and 1192(2) clash, § 1192 governs as the more specific provision." The debtor attempted to argue that the presence of the word "individual" is "superfluous" in the statute. The court acknowledged this point but explained that the "preference for avoiding surplusage construction is not absolute," Lamie v. U.S. Tr., 540 U.S. 526, 536 (2004), and that avoiding the surplusage language would require the court to alter Congress' intent, which it opted not to do. Next, the court found that the debtor's citation to a committee report was of "no help" in resolving the issue disputed in this case because of the Supreme Court's reluctance to use legislative history over plain terms to alter a statute's meaning. The circuit court also concluded that the debtor's reasoning was a misrepresentation of how Congress counterbalanced benefits with costs in relation to 11 U.S.C. § 1192, the dischargeability statute that applies in subchapter V cases. As the court reasoned, this section allowed small business entity debtors benefits but still held them to answer to some dischargeability exceptions set forth in the Bankruptcy Code. Finally, if the court had agreed with the debtor, it would have had to rewrite the benefits and costs of the statute. It had no such power. Thus, the circuit court reversed and remanded the case, holding that both corporations and individuals are subject to the discharge exceptions listed in 11U.S.C. § 523(a).

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Court Would Not Allow Late Chapter 11 Claim [BKR SD NY]

The debtor was a lender. Certain mortgagors and the debtor agreed to a loan modification, and the mortgagors fulfilled their obligations under the modification. Later, the debtor filed for Chapter 11 bankruptcy. The debtor's bankruptcy plan set deadlines for consumer creditor claims to be made, and the court appointed a Consumer Claims Trustee (the "trustee"). Over two years past the deadline, the mortgagors filed a claim stating that the debtor did not "recast their loan as required when they completed the terms of their loan modification," resulting in significant monetary losses. Before bringing this claim in bankruptcy court, the mortgagors had reported the debtor to the Consumer Financial Protection Bureau (CFPB) seeking relief. When that proved fruitless, the mortgagors attempted to file their late claim with the consumer claims trustee (the "trustee"). The trustee objected to the claim, stating it was untimely and did not state a "legal claim for relief." The mortgagors responded by asking the court to excuse their late filing because they did not know whether it was appropriate to file a claim with the bankruptcy court while awaiting adjudication of their pending CFPB claim. The trustee replied again, arguing that the claim was untimely and stating that the mortgagors did not meet the excusable neglect standard under the case law. The court conducted a sufficiency hearing to determine whether "the contested claim states a claim for relief against the debtors under the legal standard employed on a Rule 12(b)(6) motion to dismiss."

In **In re Ditech Holding Corp.**, No. 19-10412 (JLG), 2024 WL 3561822, 2024 Bankr. LEXIS 1735 (Bankr. S.D.N.Y. July 26, 2024) (unpublished opinion), the court denied the contested claim because the mortgagors failed to show a sufficient reason for their late filing. The court stated that the mortgagors were given actual notice of the applicable claims deadline and failed to meet it. The court next addressed the mortgagors' argument of excusable neglect. The factors for determining excusable neglect include (1) prejudice to the debtor, (2) length of delay, (3) the reason for the delay, and (4) whether the movant acted in good faith. Pioneer Inv. Serv. Co. v. Brunswick Assocs. L.P., 507 U.S. 380, 395 (1993). The court determined that the reason for the delay is given the most weight. The mortgagors' reasoning for their untimeliness was that there was a pending claim against the debtor with the CFPB, and the mortgagors were unsure if it would be proper to file a claim in bankruptcy court at the same time. The court stated that "misunderstanding of the claims process is not a valid basis for finding excusable neglect." The court next found that the danger of prejudice weighed against the mortgagors because allowing their late claim would establish a precedent for more late claims to be submitted, prejudicing the trustee. Additionally, allowing late claims would disrupt the current reorganization plan and deplete funds available for creditors and other mortgagors. Next, the court found that the length of delay weighed against the mortgagors because they sought out their claim more than two years after the deadline. Finally, the court stated that the mortgagors likely acted in good faith, but "the good faith factor is rarely determinative." Therefore, the court denied the mortgagors' claim.

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Creditor Did Not Violate Stay and Could Pursue Payment [BKR WD VA]

The debtors filed for bankruptcy under Chapter 7. Their filing indicated that the debtor would "retain collateral and maintain payments" for the debt owed on his vehicle. Additionally, the debtor "did not claim the [vehicle] as exempt on Schedule C, nor did they express an intent to enter into a reaffirmation agreement." The court granted a discharge injunction and an immediate stay. Months later, the debtor alleged that the creditor called him and several of his family members 50 or more times regarding late payments on his vehicle. One debtor then filed a motion against the creditor for imposition of sanctions. The debtor claimed that the creditor's constant calls violated the automatic stay and discharge injunction.

In **In re Arnold**, No. 22-70561, 2024 WL 3948458, 2024 Bankr. LEXIS 1983 (Bankr. W.D. Va. Aug. 26, 2024) (opinion not yet released for publication), the court denied the debtor's motion for imposition of sanctions. Regarding the debtor's first claim, the court explained that the automatic stay regarding personal property was terminated under 11 U.S.C. § 362(h)(1) because the debtor had retained his vehicle (personal property) but failed to redeem the collateral according to § 722, and he had failed to enter into a reaffirmation agreement according to § 524(c). Further, the debtors were unable to use the "back door ride-through" exception to terminate the automatic stay because the exception is only available to "a debtor who does all he can to comply with § 362(h)(l) and § 524(c) by executing a reaffirmation agreement." Therefore, the automatic stay was terminated, and the creditor had the right to seek payment for the vehicle and repossess it if necessary. Regarding the debtor's second claim, the court ruled in favor of the creditor; it held that the creditor did not violate the discharge injunction. It noted that although discharge prevents collection efforts against a debtor's personal liability, "there is little to prevent a creditor from proceeding in rem... when such property secures a prepetition debt," and ordinary liens typically survive bankruptcy. Thompson v. Board of Trustees of the Fairfax Cnty. Police Officers Ret. System (In re Thompson), 182 B.R. 140, 154 (Bankr. E.D. Va. 1995). Therefore, because a loan on

a vehicle is an ordinary loan and the debtor defaulted under the terms of the agreement with the creditor, the court ruled that the creditor could seek to enforce its rights and repossess the car without violating the discharge. Additionally, the court noted that the debtor's testimony revealed that the debtor was late on the payments and did not present evidence that the creditor was trying to coerce the debtor to make payments. Ultimately, the court concluded that the debtor provided no proof to impose sanctions on the creditor under the "fair ground of doubt" standard and denied the debtor's motion.

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Lender Did Not Convince the Court it Had Relied on the False Statements [BKR WD LA]

A lender provided a line of credit loan to the debtor. The loan agreement included two revolving loans secured by the debtor's accounts and inventory. When seeking to draw on the line of credit, the debtor would submit "Borrowing Base Certificates," detailing the debtor's inventory, to the lender to obtain approval for further loans on the line. Between initiating the credit line and filing the motion, the debtor submitted seventeen Borrowing Base Certificates and obtained more money under the line of credit. Later, the debtor filed for bankruptcy but continued to draw on the line of credit. The lender claimed that all the Borrowing Base Certificates were false because the bankruptcy revealed that the debtor had not had any inventory for quite some time. Nevertheless, records showed that only the last two certificates were indisputably false. The lender filed a motion for summary judgment under 11 U.S.C. § 523(a)(2)(B), which allows creditors to have a debt determined to be nondischargeable if obtained through false written statements about the debtor's financial condition. 11 U.S.C. § 523(a)(2)(B). The lender also included a declaration regarding the falsification of the debtor's borrowing certificates. In opposition to the motion, the debtor argued that § 523(a)(2)(B) did not apply because the lender's reliance on the certificates was unreasonable, thus indicating a factual dispute.

In **Fundamental Funding, LLC v. Goodman (In re Goodman)**, No. 23-50226, 2024 WL 3586898, 2024 Bankr. LEXIS 1757 (Bankr. W.D. La. July 30, 2024) (opinion not yet released for publication), the court evaluated the lender's claims under 11 U.S.C. § 523(a)(2)(B), which requires proof that the debt was obtained through materially false statements and that the creditor reasonably relied on these statements. The court found that the lender failed to establish reasonable reliance, stating that it did not demonstrate whether a minimal investigation would have revealed the truth about the debtor's financial condition. Furthermore, the evidence indicated a factual dispute about whether the lender and debtor shared a relationship of trust from previous business dealings and whether the lender's account manager had ignored significant red flags. The lender argued that the Borrowing Base Certificates and declaration had established that it had relied on the false statements. However, the court disagreed, stating that it could not accept the declaration without addressing the genuine factual disputes in the record. While the lender met most of the requirements under § 523(a)(2)(B), the lender had not proven that there was no genuine dispute as to a material fact regarding the elements of reasonable reliance. Additionally, the court was not convinced that the lender had proved no factual dispute existed as to whether it renewed the entire existing loan balance when it made advances based on the false certificates. Consequently, the court denied the lender's motion for summary judgment and ordered the parties to address all relevant issues at trial, including reasonable reliance and the amount of the debt that was allegedly nondischargeable.

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Relief from Stay Upheld [BAP 6TH CIR]

The debtor failed to make mortgage payments and the bank initiated foreclosure proceedings. The trial court granted summary judgment in favor of the bank. Despite this judgment, the debtor filed a series of motions and proceedings in Ohio state court and eventually federal court seeking to prevent the enforcement of the foreclosure judgment. The debtor then filed for Chapter 13 bankruptcy. The proceedings delayed the foreclosure process for eight years. The creditor filed a motion for relief from the stay in the bankruptcy case under 11 U.S.C. § 362(d), which was granted. The debtor filed a motion seeking reconsideration of the order granting stay relief, which the bankruptcy court denied. The debtor then challenged the denial of its motion for reconsideration, arguing: (1) the court erred in finding cause to grant the stay because the creditor was not entitled to adequate protection payments, (2) the first-to-file doctrine, and (3) that "[t]he underlying state court foreclosure judgment is a nullity and void."

In **Lundeen v. Wells Fargo Bank, N.A. (In re Lundeen)**, No. 24-8005, 2024 Bankr. LEXIS2008 (B.A.P. 6th Cir. Aug. 28, 2024) (unpublished opinion), the United States Bankruptcy Appellate Panel for the Sixth Circuit upheld the bankruptcy court's granting of stay relief and its denial of the debtor's motion for reconsideration. The court noted that a creditor could request relief from an automatic stay "for a lack of equity in the property... when the property is not necessary for an effective reorganization, and 'for cause.'" 11 U.S.C.

§ 362(d)(l). Further, courts have discretion to determine whether relief from a stay should be granted because "cause" is not expressly defined under § 362(d)(l). Laguna Assocs. Ltd. P'ship v. Aetna Cas. & Sur. Co. (In re Laguna Assocs. Ltd. P'ship.), 30 F.3d 734, 737 (6th Cir. 1994). In this case, the bankruptcy court had granted the creditor relief "based on cause" through the following findings: lack of equity, absence of post-petition payments, and the existence of a pending state court case where the creditor could proceed. The court then addressed the debtor's three arguments. First, the debtor argued that because the bankruptcy trustee did not seek or provide evidence of the creditor's need for adequate protection payments, there was no "cause" for granting relief from the stay. The court disagreed, stating, "[a]lthough a lack of adequate protection may constitute cause... cause is not limited to a lack of adequate protection." The court explained that "cause" for granting relief from the automatic stay "is a broad and flexible concept" and that courts should consider the hardship on the parties and the overarching goals of the Bankruptcy Code when determining whether there is "cause" to grant relief. In re Jeffers, 572 B.R. 681, 684 (Bankr. N.D. Ohio 2017). The appellate panel reviewed the entire record and concluded that the bankruptcy court did not abuse its discretion by granting relief to the creditor. Second, the panel rejected the debtor's argument regarding the first-to-file doctrine. In applying the first-to-file rule; courts are permitted to consider evidence of "bad faith" and "anticipatory suits." Certified Restoration Dry Cleaning Network, L.L.C. v. Tenke Corp., 511 F.3d 535, 551-52 (6th Cir. 2007). Here, the debtor had exhibited bad faith and engaged in anticipatory litigation, having filed a district court action followed by a bankruptcy case in "an attempt to use the automatic stay to prevent [the creditor] from executing on its [f]oreclosure [j]udgment." Third, the debtor argued that the bankruptcy court should have exercised its "inherent equitable powers" under 11 U.S.C. § 105(a) to determine that the underlying state foreclosure judgment was void. However, due to the Rooker-Feldman doctrine, federal courts are precluded from reviewing state court judgments. VanderKodde v. Mary Jane M Elliott, P.C., 951 F.3d 397, 402 (6th Cir. 2020). Thus, the bankruptcy court and the appellate panel were unable to review the state foreclosure judgment. Ultimately, the debtor's motion for reconsideration was deemed insufficient to persuade the panel to overturn the judgment. The panel found the arguments repetitive and lacking in showing any abuse of discretion by the bankruptcy court and upheld its judgment.

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Small Business Owner Borrows Money for Gymnastics School and Vaults into Bankruptcy Court [BKR ED PA]

The debtor owned an LLC that operated a gymnastics school and sought funding from the creditor in exchange for the LLC's future account receivables and a right to debit a specific amount from the LLC's bank account each day. The debtor, who had guaranteed the loan to his LLC, represented that he did not anticipate closing his business over the next twelve months, nor did he anticipate the business would be filing for bankruptcy. After a few weeks, the debtor told the bank to stop payments to the creditor. The debtor also transferred a substantial amount of the LLC's funds to his personal bank account. The creditor filed suit against the debtor and the court granted judgment against the debtor for the full amount due to the creditor, interest, attorney fees, and court costs. Eventually, the debtor filed a voluntary petition for relief under Chapter 7 of the Bankruptcy Code. The creditor filed an adversary complaint in the bankruptcy court requesting that the debt owed to the creditor be deemed nondischargeable under 11 U.S.C. § 523(a)(2)(A), § 523(a)(2)(B), § 523(a)(4), and§ 523(a)(6).

In **In Re Smith, Bankruptcy** No. 20-14400-AMC, Adv. Proc. No. 21-00029-AMC, 2024 WL 4037496, 2024 Bankr. LEXIS 2035 (Bankr. E.D. Pa. Sept. 3, 2024) (unpublished opinion), the bankruptcy court held that the debt was nondischargeable because the debtor "willfully and maliciously converted the [r] eceivables, which belonged to [the creditor]." Debt arising from "willful and malicious injury by the debtor to another entity or the property of another entity" is nondischargeable under § 523(a)(6) of the Bankruptcy Code. The court explained that "conversion can constitute a willful and malicious injury to property for the purpose of§ 523(a)(6)." The court further explained that previously, courts have held that debtors willfully and maliciously injured a creditor by denying the creditor funds to which it was entitled. The court found that there was sufficient evidence that the debtor converted the creditor's property by refusing to pay the receivables and by moving large amounts into his personal bank account. The creditor had a right to the receivables and was deprived of its rights by the debtor's conduct. Moreover, the court found that refusing to pay the creditor without just cause was a malicious injury and that moving the money to a personal bank account was a willful injury, because it displayed a lack of intent on the debtor's part to honor the agreement. Finally, the court stated that the debtor seemed to want a "cash advance with no strings" and held that the debt was nondischargeable.

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CFPB

CFPB Rule Was Not Unreasonable or Unlawful Agency Action [SD TX]

The banking-related entities (the banks) filed an action against the Consumer Financial Protection Bureau (CFPB) and its director in response to the CFPB's "Final Rule." The rule added additional data points to the reporting requirements required by Section 1071 of the Consumer Protection Act of2010 (CPA), which was enacted to "identify business and community development needs and opportunities of women-owned, minority-owned, and small businesses." The banks challenged the final rule, arguing (1) that the CFPB had committed APA violations by abusing its statutory authority, (2) the final rule was arbitrary and capricious for failing to consider proper cost-benefit analysis, and the CFPB had failed to consider or respond to comments raised by interested parties. The banks filed a motion to supplement the administrative record and filed a motion for summary judgment. In response, the CFPB filed a cross-motion for summary judgment.

In **Tex. Bankers Ass'n v. Consumer Fin. Prot. Bureau**, No. 7:23-CV-144, 2024 WL 3939598, 2044 U.S. Dist. LEXIS 152401 (S.D. Tex. Aug. 26, 2024) (opinion not yet released for publication), the court denied the banks' motions and granted summary judgment for the CFPB. First, it denied the banks' motion to supplement the administrative record with an ABA Banking Journal of February 2024 because the scope of judicial review under the APA is "limited to the administrative record, that was before the agency when it promulgated the challenged regulation." Thus, because the article came out after the release of the CFPB's rule it cannot be included in the administrative record unless "unusual circumstances justifi[ed]" expanding the scope of judicial review. Medina Cnty. Env't Action Ass'n v. Surface Transp. Bd., 602 F.3d 687, 706 (5th Cir. 2010). One such exception identified in Medina would be if the proposed supplement to the record would provide "'background information' to help determine whether the agency considered all of the relevant factors." Id . However, the court found that the ABA Article did not supply the requisite background information and denied the banks' motion. Second, the court addressed the banks' motion for summary judgment on the claim that the CFPB had violated 5 U.S.C. § 706(2)(C) by acting in excess of its statutory authority and by abusing its discretion. Specifically, the banks assert that under the CPA, the CFPB's actions must advance the purpose of the statute, and the CFPB's final rule fails to do so and, therefore, exceeds its authority. However, the court disagreed and granted summary judgment in favor of the CFPB. It explained that the banks' argument "fundamentally misunderstands the Section 706(2)(C) inquiry." The final rule was issued to benefit women-owned, minority-owned, small businesses; thus, according to § 1071, it acted in the matter for which it was purposed. The court clarified that the banks' claims did not attack the legality of the CFPB's actions but rather the effectiveness of its final rule. Therefore, the court concluded that, under the statute, the CFPB also had the right to collect data points in addition to those required for the loan application process. Third, the court addressed the banks' argument that the final rule was arbitrary and capricious because it failed to consider the costs and benefits of the rule properly. The court explained that the CFPB satisfied the requirement that agencies "reasonably consider relevant issues" and "reasonably explain the decision"; additionally, it explained how the CFPB went even further than this standard by implementing various accommodations. Because the CFPB provided a reasonable rationale for its rule and the costs and benefits it predicted the rule would provide, the court held that the CFPB did not act arbitrarily and capriciously. Ultimately, the court denied the banks' motion to supplement the administrative records, denied its motion for summary judgment, and granted the CFPB's cross-motion for summary judgment.

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CFPB vs. USASF: How an Auto-Loan Servicer's Illegal Car Shutdowns and Deceptive Practices Led to Court [ND GA]

The debtor, an auto-loan servicer, engaged in numerous practices that adversely affected auto-loan borrowers. The debtor improperly repossessed vehicles, double-billed borrowers for insurance premiums, failed to issue appropriate refunds for overbilling, misapplied consumer payments, and disabled borrowers' vehicles, even when payments were made or promised. The debtor then filed for Chapter 7 bankruptcy, which triggered an automatic stay that prevented legal action, including those that were already underway or could have started before the bankruptcy. The Consumer Financial Protection Bureau (CFPB) investigated and found that these practices were illegal and unjust. The CFPB filed suit seeking liability and injunctive relief to secure redress for consumers and civil money penalties, aiming to prevent any future violations. The CFPB filed two motions: a motion to seal and a motion for default judgment. The motion to seal aimed to protect its exhibits during proceedings and to safeguard its law enforcement techniques and methods. The motion for default

judgment sought the use of an exception to the automatic stay rule, known as the "police power" exception, which would allow the CFPB to enforce laws and receive redress for consumers and civil money penalties from the debtor, regardless of the bankruptcy code.

In **Consumer Fin. Prot. Bureau v. USASF Servicing, LLC**, No. 1:23.:CV-03433.,VMC, 2024 WL 3967501, 2024 U.S. Dist. LEXIS 154236 (N.D. Ga. Aug. 28, 2024) (opinion not yet released for publication), the court denied the CFPB's motion to seal, finding that the CFPB failed to justify the confidentiality of the exhibits. Furthermore, the court partially granted the CFPB's motion for default judgment, establishing the debtor's liability and ordering restitution and compensatory damages. First, the court analyzed the debtor's bankruptcy status and its consequences, concluding that the debtor would not be liable to pay remedies under bankruptcy because of the automatic stay unless the CFPB can prove the "police power exception" applies. 11 U.S.C. § 362(a)(l). To determine if the exception applies, courts look to see if the agency's action was primarily for a pecuniary interest and whether it was primarily for a public purpose. Here, the court found that the CFPB's function and goal was to provide remedies for those who were adversely affected by the debtors and to prevent future violations. Additionally, the court found that CFPB's actions served a public purpose because they were "rooted in the concern for the financial wellbeing of the public by seeking an injunction against unfair and deceptive acts and practices." Thus, the court held that the "police powers exception" applied. Further, the court declined to grant the bankruptcy trustee's request for a discretionary stay because the trustee's concerns were "largely hypothetical," and no other creditors had objected. Next, the court found that the debtor was liable for violations of the Consumer Financial Protection Act and granted injunctive relief to impose "limits on the activities or functions of the [debtor]." Finally, the court held that CFPB needed to provide additional "expert evidence to support the veracity" of its expert's calculations on the amount of restitution and compensatory damages that the debtor owed.

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CONSUMER CREDIT

To Bring a Viable Suit, the Plaintiff Must Present the Evidence Accordingly [ND CA]

The debtor obtained a car loan from the creditor to purchase a car from a third-party used car dealership. After some time, the debtor opted to obtain a refund for the car from the dealership and asked for the amount to be refunded to him directly. The used car dealership refused and stated it would only send the refund to the creditor because the loan had been obtained from the creditor. The debtor then alleged that the creditor, without disclosures or notice of his rights, sent him harassing mail and emails, reported his debt as fraudulent and that the employment history the debtor had represented was also fraudulent. The creditor also stated the debtor had given it a false social security number. In addition, the creditor took other steps to encourage the debtor to pay it. The debtor asserted that the creditor's "purposeful" conduct was an attempt to make him pay, to discourage him from attempting to get credit in the future and to discourage other creditors from giving him credit. The debtor sued, alleging the creditor (1) violated the Truth in Lending Act (TILA) by failing to disclose his recession rights; (2) violated the Gramm-Leach-Bliley Act (GLBA) and the California Financial Information Privacy Act (CFIPA) by disclosing "nonpublic personal information" to credit reporting agencies (CRAs); (3) engaged in "abusive debt collection practices," which violated the Fair Debt Collection Practices Act (FDCPA) and California's Rosenthal Act; (4) failed to conduct an adequate investigation before reporting his debts to CRAs in violation of the Fair Credit Reporting Act (FCRA); (5) failed to give him notice of "potential claims and defenses" required by 16 C.F.R. § 433.2; (6) violated the Equal Credit Opportunity Act (ECOA); (7) had defamed him by providing false information to the CRAs; and (8) committed fraud.

In **Thompson v. Navy Fed. Credit Union**, No. 23-cv-01370-LB, 2024 WL 4050392, 2024 U.S. Dist. LEXIS 158146 (N.D. Cal. Sept. 3, 2024) (opinion not yet released for publication), the court held that the debtor did not bring viable claims for defamation, fraud, or a violation of the Equal Credit Opportunity Act. However, the court found that the debtor did bring other viable claims. First, the court found that the TILA claim was viable because TILA requires disclosure of the debtor's recission rights, and the debtor alleged the creditor had not provided that disclosure. Second, the debtor had a viable financial privacy claim under the CFIPA but not the GLBA, which "does not contain a private right of action." BGC, Inc. v. Bryant, No. 22-cv-04801-JSC, 2023 U.S. Dis.

LEXIS 107699;2023 WL 4138287, at *2 (N.D. Cal. June 21, 2023). The debtor's claim under the CFIPA was viable because financial institutions cannot disclose "nonpublic personal information" to CRAs, which the creditor had allegedly done by disclosing the debtor's social security number. Third, the court found that the debtor's claim that the creditor h d violated• the FDCPA and California's Rosenthal Act was viable. A key element for a claim under the FDCPA is a violation of a provision of 15 U.S.C. §§ 1692a-1692o, which the Rosenthal Act incorporates §§ 1692b-1692j. Thus, the claim is viable because the creditor allegedly failed to disclose its name to the debtor in violation of, is 15 U.S.C. § 1692g(a)(2). Fourth, the FCRA claim was also valid because the debtor plausibly alleged that the investigation after he had disputed the debt had been inadequate. Fifth, the claim that 16 C.F.R. § 433.2 had been violated was also viable because the debtor alleged that he had not been notified of all potential claims and defenses as required by the statute. Sixth, the court found that the debtor's ECOA claim was not viable because he had failed to allege any discrimination. Next, the court held that the debtor's claim for defamation was not viable because the FRCA preempts defamation claims based on allegations of false reporting to a credit reporting agency. Khankin v. JLR San Jose, LLC, No. 3:23-cv- 06145-JSC, 2024 U.S. Dist. LEXIS 45473, 2024 WL 1120118, at *3-5 (N.D. Cal. Mar. 14, 2024). Finally, the debtor did not meet the "more demanding standard" for alleging fraud, which requires a debtor to "state with particularity the circumstances constituting fraud." Fed. R. Civ. P. (9)(b). The debtor had failed to "allege fraud specifically... [and] instead alleges in a conclusory manner that he was tricked." Therefore, the court dismissed the debtor's ECOA, defamation, and fraud claims for not being viable but allowed the debtor to proceed on the remaining claims.

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ECOA

The ECOA Prohibits Discouraging Protected Groups from Applying for Credit [7TH CIR]

A mortgage lender who operated primarily in the Chicago area had advertised through programs on the radio and in podcasts that discussed mortgage loans. In those programs, the owner of the mortgage lender and an employee would banter about various other topics. There were several instances in which they described areas with a majority Black population as being dangerous and suggested that callers from Black neighborhoods did not spend their money wisely. Moreover, the CFPB established that the mortgage lender had received considerably fewer applications from Black potential customers. The Equal Credit Opportunity Act (ECOA) provides that an applicant is "any person who applies to a creditor directly for an extension, renewal, or continuation of credit, or applies to a creditor indirectly by use of an existing credit plan for an amount exceeding a previously established credit limit." 15 U.S.C. § 1691a(b). A regulation (Regulation B) promulgated by the CFPB provides "Discouragement. A creditor shall not make any oral or written statement, in advertising or otherwise, to applicants or prospective applicants that would discourage on a prohibited basis a reasonable person from making or pursuing an application." 12 C.F.R. § 202.4(6). The CFPB brought action against the mortgage lender alleging it had discouraged Black prospective applicants in violation of Regulation B. The district court held, however, that discouraging prospective applicants was not prohibited by the ECOA. The CFPB appealed.

In **Consumer Fin. Prot. Bureau v. Townstone Fin.**, Inc., 107 F.4th 768 (7th Cir. 2024), the circuit court summed up its duty "to determine whether Regulation B's prohibition on the discouragement of prospective applicants is consistent with the ECOA." To answer this question, the court looked at the ECOA as a whole. Under the ECOA, Congress provided that the Board (now the CFPB, as a result of the Dodd-Frank Act) could prevent "circumvention or evasion" of the law. 15 U.S.C § 1691b(a). That provision convinced the court that Congress intended the ECOA to be "construed broadly." In addition, Congress later amended the ECOA's civil liability provisions to provide cases be referred to the Attorney General when the agency thought a creditor "had engaged in a pattern or practice of discouraging . . . applicants for credit in violation ... of this title." 15 U.S.C. §e(g). That, the Seventh Circuit concluded, "confirmed" that discouraging applicants from applying for loans was within the actions prohibited by the ECOA. The mortgage lender had argued that its speech was protected by the First Amendment, but the district court had not reached that issue. The circuit court reversed and remanded the case to the district court, with instructions to address the First Amendment issue if Touchstone raised it again.

By The Editors

SECURITY INTERESTS

The Doctrine of Equitable Solution [MN APP]

The surety appealed a district court decision that granted summary judgment to the bank regarding disputed funds held by a receiver in a receivership action. The surety argued it was entitled to the bond principal's account receivable funds held in receivership under an equitable subrogation theory. In March 2020, the bond principal and surety effectively entered into a surety relationship by executing a General Agreement of Indemnity (the "indemnity agreement") for public works projects (the "bonded projects"). In April 2020, the bank provided three loans to the bond principal. For all three loans, the bank and bond principal executed security agreements that granted the bank a security interest in the debtor's property, including the debtor's accounts receivable. That same month, the bank perfected its security interest by filing UCC financing statements with the Minnesota Secretary of State. The bond principal defaulted on the bonded projects, and several subcontractors and suppliers filed claims with the surety for their losses. In April 2021, the surety issued several bonds, noting the bond principal as contractor and itself as surety, and paid a large sum on the bonded projects. In May 2021, the bank provided written notice to the bond principal that it had defaulted on its loans, and the bond principal failed to cure the default. In November 2021, the surety filed a UCC financing statement with the secretary of state, listing the indemnity agreement as collateral. In December 2021, the bank sued the bond principal. The district court entered judgment in the bank's favor and appointed a limited receiver over the bond principal's property. The receiver identified over $500,000 in accounts receivable; in February 2023, the bank and the surety filed motions for summary judgment seeking the accounts receivable funds. The district court denied the surety's motion and granted the hank's motion.

In **Receivership of United Prairie Bank v. Molnau Trucking LLC**, No. A23-1478, 2024 WL 1987878, 2024 Minn. App. Unpub. LEXIS 362 (Minn. Ct. App. May 6, 2024) (unpublished opinion), the court affirmed the district court holding that summary judgment for the bank was proper because (1) the doctrine of equitable subrogation was not available to the surety; (2) even assuming the doctrine was available, the bank had perfected its interest in the bond principal' s collateral before the surety's equitable subrogation claim would have attached; and (3) even if the indemnity agreement gave the surety the obligation to pay, the surety had not executed the agreement to bind itself to it. The doctrine of equitable subrogation provides that "a party 'who has discharged the debt of another may succeed in substitution to the rights and position of the satisfied creditor.'" Equitable subrogation is only applicable where "(a) the party seeking subrogation has acted under a justifiable or excusable mistake of fact and (b) injury to innocent parties will otherwise result." The court found that the surety failed to establish any mistake of fact to meet the first prong. The court reasoned that because the bank filed its UCC statement, the surety was on notice that the bank had perfected its interest in the bond principal's property. Despite that notice, the surety paid on the bonds. Therefore, the court could find no mistake of fact. Regardless, even if the surety agreement could meet the required prongs, the court agreed with the district court that the bank's security interest was first in time. Under Minnesota law, a surety's equitable subrogation claim attaches when the surety issues a payment bond. Here, the surety company did not issue the bond until the year after the bank already perfected its security interest. The court noted that the surety company was not required to pay the bonds under the indemnity agreement, and as such, there was no argument that the bank should not retain priority over any interest of the surety company.

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