NORTH DAKOTA BANKERS ASSOCIATION

LEGAL UPDATE

A newsletter covering bank legal and compliance information.

Volume 25 • Issue 2

February 20, 2025

ARBITRATION

Arbitration Decision Reigns Supreme [ED NY]

A bank customer sued his bank for violations of the Electronic Fund Transfer Act (EFTA), the Uniform Commercial Code (UCC), and breach of contract after three unauthorized wire transfers totaling $161,200 were made from his account. The bank recovered $28,000 of the transfers but failed to recover the remaining $133,000. The customer sued the bank for the unrecovered amount. The dispute was referred to arbitration, where the arbitrator found in favor of the bank, holding that wire transfers are excluded from EFTA coverage. Following arbitration, the bank filed a petition to confirm the award, which the customer opposed, arguing that the arbitrator manifested a "disregard of the law." However, the customer then failed to explain what law the arbitrator allegedly disregarded.

In ***Bhuya v. Citibank, N.A.,*** No. CV 22-6006 (AMD)(AYS), 2024 WL 3256723, 2024 U.S. Dist. LEXIS 101179 (E.D.N.Y. June 6, 2024) (opinion not yet released for publication) the court found no basis for vacating the arbitration award and granted confirmation of the award in the bank's favor. The court analyzed the plaintiff's claims and objections to the arbitration award by examining the arbitrator's interpretation of the law and the procedural fairness of the arbitration. It upheld the arbitrator's finding that wire transfers are expressly excluded from the EFTA under 12 C.F.R. § 1005.3(c)(3); thus, the claims were not covered by the statute. The court rejected the plaintiff's argument that the arbitrator manifestly disregarded the law, noting that the arbitrator had explicitly considered and correctly applied the relevant legal principles. Accordingly, the court upheld the arbitration award.

By Maycee Redfearn
Edited By Ashley Boyce ashboyce@ttu.edu
Edited By Hayden Mariott hayden.mariott@ttu.edu

CFPB

Court Urges Brief Stay Following Venue Transfer Orders [5TH CIR]

A banking association (the association) in Texas brought suit against the Consumer Financial Protection Bureau (the Bureau) regarding the Bureau's new rule about credit card late fees. This was the second petition for a writ of mandamus in the case's history, with the association arguing that the district court abused its discretion by transferring the case to the United States District Court for the District of Columbia. The association's challenge of to new Final Rule issued by the Bureau regarding credit card late fees had been transferred twice under 28 U.S.C. § 1404(a). The first time, a writ of mandamus was issued because a panel found that the district court had lacked jurisdiction to transfer the case while an appeal was still pending. A few days later, the district court granted a renewed motion to transfer the case. The association petitioned for a writ of mandamus and requested a stay.

In ***In Re Chamber of Commerce of United States***, 105 F.4th 297 (5th Cir. 2024), the Fifth Circuit found that the transfer order was a clear abuse of discretion and granted the association's petition for a writ of mandamus. The Fifth Circuit held that the district court had erred in considering the convenience and location of counsel and the interest that D.C. residents had in the case. The events surrounding this case did not give rise to local interests because it was likely to impact citizens equally nationwide; therefore, local interest neither favored nor disfavored transfer. Additionally, the court held that a venue transfer under § 1404(a) "cannot be granted solely because of court congestion." In re Clarke, 94 F.4th 502, 515. Therefore, the bureau did not satisfy the good-cause standard of the statute. The Fifth Circuit urged all district courts to briefly stay its venue-transfer orders to allow parties to seek a calmer, less rushed review. In this case, the rushed

The NDBA Legal Update is designed to provide accurate and authoritative information in regard to the subject matter covered. It is provided with the understanding that the publisher is not engaged in rendering legal, accounting, or other professional service. If legal advice or other expert assistance is required, the services of a competent professional person should be sought.

consideration of a mandamus proceeding could have been avoided twice. Ultimately, the Fifth Circuit granted the writ of mandamus.

By Sara Williams sara.williams@ttu.edu.
Edited By Maycee Redfearn maredfea@ttu.edu.
Edited By Ashley Boyce ashboyce@ttu.edu
Edit By Hayden Mariott. hayden.mariott@ttu.edu

Proper Foreclosure Sale of Secured Property [ND TX]

The borrower obtained a home equity loan from the bank and executed a note and a security instrument which secured the repayment of the note. The loan documents were assigned to a third party, but the bank remained the mortgage servicer on the loan. The borrower filed for bankruptcy, and during the bankruptcy case, the bank permitted two different loan modification agreements. However, the borrower stopped making payments on the loan in 2012. For the next almost nine years, the bank attempted to foreclose on the mortgage, but the borrower continually avoided foreclosure by filing bankruptcies and lawsuits. Eventually, in 2018, the bank obtained a Rule 736 order in state court permitting it to foreclose. However, the bank was again slowed in its efforts due to investor-requested delays as a result of COVID-19. Finally, in 2021, the bank notified the borrower that the property would be sold in a foreclosure sale in January 2022. At the sale, the property was sold to a third party for $321,000 after being appraised for $405,000. The borrower filed a lawsuit against the bank and the third party for injunctive relief, removal of the foreclosure from public records, and $6 million in damages, claiming wrongful foreclosure, violations of the Texas Debt Collection Act (TDCA), violation of the Real Estate Settlement Procedures Act (RESPA), and violation of the Coronavirus Aid, Relief and Economic Securities Act (CARES). The bank sought summary judgment on all the borrower's claims.

In ***Reese v. Wells Fargo Bank, NA,*** No. 3:23- cv-524-N-BN, 2024 WL 3927808, 2024 U.S. Dist. LEXIS 152775 (N.D. Tex. Aug. 5, 2024) (unpublished opinion), the district court held that all of the borrower's claims should be dismissed and the bank's motion for summary judgment granted. The court first addressed the wrongful foreclosure claim. Such claims require a showing of "(1) a defect in the foreclosure sale proceedings, (2) a grossly inadequate selling price, and (3) a causal connection between the two." Martins v. BAC Home Loans Servicing, L.P., 722 F.3d 249,259 (5th Cir. 2013). The court found neither a defect in the foreclosure proceedings nor a grossly inadequate sale price. Section 51.002(d)-(e) of the Texas Property Code requires that plaintiffs be provided with a notice of default via certified mail and that the plaintiff must be given 20 days to cure the default before notice of a foreclosure sale. The court found that the bank properly mailed this notice to the borrower on March 23, 2018, and further, the borrower stated he received it (although a showing of actual receipt is not a requirement under the code). The bank then sent its notice of the foreclosure sale on November 24, 2021, more than twenty days after the initial default notice. The borrower argued that the notices of default were voided by subsequent proceedings - namely, their filing for bankruptcy in 2018. The court found that their argument was incorrect because Tex. R. Civ. P. 736.10 provides that a Rule 736 proceeding must be stayed if the borrower provided proof of their bankruptcy filing before the Rule 736 order was signed and that a bankruptcy stay remained in effect. Here, not only was the order signed before the bankruptcy filing, but the bankruptcy court lifted its stay to permit the foreclosure. Additionally, the sale price was almost 80% of the appraised value of the property, which the Fifth Circuit and Texas courts have held is not grossly inadequate. A grossly inadequate price is a price so low that it would "shock a correct mind," Martins, 722 F.3d at 256; generally, a foreclosure price above 50% of the appraised value is not grossly inadequate. Water Dynamics, Ltd. v. HSBC Bank USA, Nat'l Assoc., 509 F. App'x 367, 369 (5th Cir. 2013). Therefore, the district court held that the wrongful foreclosure claim should be dismissed as there was neither a defect in the foreclosure proceedings nor a grossly inadequate sale price. Next, the court addressed the remaining three claims (violations of TOCA, RESPA, and CARES), finding they should also be dismissed. "When a plaintiff fails to defend a claim in response to a motion to dismiss or summary judgment motion, the claim is deemed abandoned." Windsor v. Olsen, No. 3:16-cv-934-L, 2019 WL 2080021, 2019 U.S. Dist. LEXIS 79755 (N.D. Tex. May 10, 2019). The borrower did not address the bank's arguments regarding any of these three claims, so they were deemed abandoned by the court and dismissed.

By Kristin Meurer krmeurer@ttu.edu
Edited By Ashley Boyce ashboyce@ttu.edu
Edited By Hayden Mariott hayden.mariott@ttu.edu

Failing to Put Out a Fire: Lender Inaction Leads to Mortgage Extinguishment [1ST CIR]

The borrower and the co-signer signed a mortgage agreement for their home. The borrower alone signed the promissory note attached to the mortgage. The borrower began to default, but the lender did not foreclose. The borrower also failed to pay property taxes, and a third party bought the property in a tax sale. The third party received a court decree foreclosing the property and granting the title to the third party. The borrower and the lender were notified of the tax sale and foreclosure proceedings, but neither party appeared at nor contested the proceedings. The third party sold the property to an LLC whose shares were exclusively held in the borrower's family trust. The lender sued the borrower and the co-signer, claiming that the mortgage agreement was an enforceable contract against both parties. The borrower and his parents

died, leaving the shares exclusively to the co-signer. The district court granted the co-signer's motion for summary judgment, ruling that the court decree had extinguished the mortgage agreement. The lender appealed, claiming an enforceable contract against the co-signer, constructive-trust, equitable-lien, and unjust enrichment.

In Deutsche Bank Nat'l Trust Co. v. Wilson, 116 F.4th 12 (1st Cir. 2024), the 1st Circuit Court of Appeals ruled that the motion for summary judgment was properly granted. The court found that the lender could not enforce the promissory note against the cosigner because she had not signed it. Additionally, the lender could not initiate foreclosure proceedings because the mortgage agreement was extinguished by the court decree, granting the property to a third party. Because of the explicit difference in obligations between the borrower and the cosigner, the court held that the ordinary meaning of the terms suggested that the cosigner was exempt from covenants applicable to the borrower. Furthermore, the agreement expressly stated that the co-signer did not guarantee the borrower's debt. Next, the court found that there was no fiduciary relationship between the lender and. the cosigner or the LLC. Thus, there was no breach of fiduciary duties, a required element of a constructive-trust claim. Also, because the lender sat idly on its known rights, there would be no equitable relief. The court held the unjust enrichment claim invalid because the lender's actions while the property was changing hands did not enrich the co-signer or the LLC. Thus, the court ruled that the lender had not sufficiently argued a claim against the co-signer, so the motion for summary judgment was properly granted,

By Joel Durham joedurha@ttu.edu
Edited By Nura Elhentaty nelhenta@ttu.edu
Edited By Ashley Boyce ashboyce@ttu.edu
Edited by Hayden Mariott hayden.mariott@ttu.edu

INTEREST RATE PREEMPTION

The Meaning of Made [D CO]

Multiple national banks challenged a state's opt-out from the Federal Interest Rate Preemption under 12 U.S.C. § 1831d. The state's law limits the interest rates charged on loans that are "made in" the state. While this limit imposed by the state is statutorily allowed, the definition of "made" is unclear. The state considers loans to be "made" in the state if a loan is made to a resident of the state instead of the traditional understanding that focuses on where the originating bank is located. The banks argued that the state's interpretation exceeded its statutory authority and sought a preliminary injunction to prevent the state from enforcing these limits against out-of-state lenders. The court must determine the meaning of the word "made" in the statute before considering the injunction.

In **National Ass'n of Industrial Bankers v. Weiser**, No. 1:24-cv-00812-DDD-KAS, 2024 WL3169735, 2024 U.S. Dist. LEXIS 114890 (D. Co. June 18, 2024) (opinion not yet released for publication) the court ruled that loans are only considered to be "made" when originated by a bank. The court's analysis focused on the plain meaning of the statutory language in 12 U.S.C. § 1831d and the broader context of federal banking laws. It emphasized that the statute uses the term "made" to describe the lender's act of creating a loan rather than the borrower's act of receiving it. The court found that Congress consistently used "make" and "made" throughout Title 12 to refer to actions by lenders, while borrowers are described as "receiving" or "obtaining" loans. The court reasoned that if Congress intended to focus on the borrower's location, it could have explicitly stated that loans "made to borrowers in" a state were subject to state caps. It concluded that the proper determination of where a loan is "made" hinges on the location where the lender performs key loan-making functions, such as loan approval and disbursement, rather than the harrower's residence.

By Maycee Redfearn.
Edited by Ashley Boyce ashboyce@ttu.edu.
Edited by Hayden Mariott hayden.mariott@ttu.edu

POWER OF ATTORNEY

Power of Attorney Unenforceable [D DC]

The customer of the bank filed suit against the bank for disregarding his Power of Attorney (POA). The customer executed the POA, which appointed an agent and granted him power over his bank-related business "in the event of mental or physical disability of the Principal." The customer alleged that the agent presented the POA to a teller at a bank branch. However, the teller did not allow the agent to withdraw from the customer's account unless he had a certified statement from the Veterans Administration (VA) Hospital "describing and certifying" the customer's medical condition. The customer then went to the VA Hospital and acquired a statement from a nurse who cared for the customer. The statement stated that the customer was unable to perform certain activities and had experienced memory loss; however, the letter did not include her position with the AV. The agent brought this statement back to the bank, but again, it declined the requests to allow himself access the customer's account because there was no physician's statement, office letterhead, or prescription pad. The customer subsequently filed suit against the Consumer Financial Protection Bureau (CFPB) for the bank's failure to accept his appointed POA. Several months later, the customer provided the bank with a statement from his attorney as an attempted "certification as to the validity of the POA," which stated that the customer was "physically and mentally disabled." Additionally, the letter requested that the bank

allow the agent to conduct the customer's financial affairs. The agent then showed this letter to the bank when attempting to withdraw from the customer's account, and the bank again denied the request. After the bank denied his agent access to his accounts, the customer filed suit and alleged ten causes of caution based on various discriminatory violations. He alleged violations of the (1) D.C. Uniform Power of Attorney Act, (2) violations of Title II of the Civil Rights Act of 1964 based on his: veteran status, race, sex, age, and reprisal, (3) violations of the Americans with Disabilities Act (ADA), (4) violations of the DC Human Rights Act, (5) retaliation, and (6) breach of contract. The bank filed a motion to dismiss the customer's complaint for failing to state a claim upon which relief could be granted.

In **Delk v. PNC Bank N.A.**, No. 23-1365 (ABJ), 2024 WL 4280827, 2021 US. Dist. LEXIS 2772803 (D.D.C. Sep. .9, 2024), the court granted the bank's motion to dismiss on all claims. The court looked first at the POA under the D.C. Code sect. 21-2601.09(a), 21-2601.02(5)(a)-(b), stating a POA that is effective in the event of the principal's incapacity is only effective if attested to by either a physician or an attorney, judge, or appropriate government official. Here, the customer failed to present evidence of either a physician or appropriate legal entity verifying his incapacity. Thus, the court held that the bank acted within the capacity of the law and correctly identified the customer's failure to make his own POA effective. Therefore, the claim that there had been a violation of the D.C. Code was dismissed. Second, the court examined the alleged Title II violations of the Civil Rights Act. The court first affirmed the bank's argument that discrimination based on veteran status' sex, age, and reprisal are not covered under the plain text of Title II and promptly dismissed the claims. The remaining claim, then, was racial discrimination under Title II. The court again noted that the bank's position on requiring appropriate medical affirmation of the POA was appropriate and legal. Next, it explained that the customer failed to allege any facts that indicated that the bank denied his requests based on race. Further, the court stated that the customer could not point to any facts about how the bank treated people of other races differently. The court held that the customer failed to allege racial prejudice. Therefore, the claim could not survive the bank's 12(b)(6) motion, and the claims were dismissed. Third, the court turned to the alleged violation of the ADA. The court, for purposes of evaluating the bank's 12(b)(6) motion, assumed that the customer was disabled and that the bank was a place of public accommodation but found no evidence that the bank discriminated against the customer so as not to allow him full and equal opportunity to enjoy their services. With the absence of allegations of fact for this claim, the court dismissed the ADA violation claim. Next, the court turned to the alleged D.C. Human Rights Act and retaliation claims. It cited the aforementioned factual finding that the bank acted within the scope of the law in denying the customer's request and reiterated the ineffectiveness of the customer's POA; thus, there had been no violation, and the claims were dismissed. Lastly, the court addressed the customer's breach of contract claim. The court held that no material breach of the contract had occurred because the customer could not point to a provision that stated the bank had to recognize a POA despite statutorily necessary verification. Accordingly, the court dismissed the breach of contract claim. Overall, the court repeatedly emphasized that if the POA were ineffective, the bank acted within the bounds as statutorily required of it, and the court noted that the bank had acted according to its duty to "be vigilant" in protecting. their customer's money. With all claims dismissed, the court granted the defendant's motion to dismiss and denied the plaintiffs motion for partial summary judgment.

By Gavvy Lott galott@ttu.edu
Edited By Callighan Ard caard@ttu.edu
Edited By Ashley Boyce ashboyce@ttu.edu
Edited By Hayden Mariott hayden.mariott@ttu.edu

SECURITY INTERESTS

Fraudulent Transfers Lead to Unsecured Interests [SD NY]

An art dealer purchased a painting worth millions of dollars (the 'Painting") through his company, and also obtained contributions for the purchase price from an art investment company (the "investor"). The art dealer sent the investor an invoice for the amount agreed upon to purchase the painting for "a '66% share in' the Painting." However, the art dealer had misled the investor about the seller's identity; and the price paid for the Painting. The art dealer also negotiated with an art gallery director to purchase the same painting. The art dealer sent a fraudulent invoice that gave a 12.5% interest to the director in exchange for-over $2.5 million. Subsequently, a limited liability corporation (the "LLC"), that the art dealer owned, received a loan from another company (the "lender") that was secured by the Painting, and the Painting was transferred to the· lender's possession. The art dealer defaulted on the loan and the lender notified the art dealer. In a separate proceeding, the art dealer pled guilty to various criminal charges and admitted to making "material misrepresentations about the ownership of the painting." The lender filed this in rem proceeding seeking to foreclose on and sell the Painting. It asserted three claims: (1) the art dealer had legal title to the painting, (2) the art dealer then transferred the title to the LLC, (3) the art dealer was a secured lender with absolute rights to sell, transfer, and apply the sale proceeds to the loan's balance. Shortly after, the investor and the art gallery director joined the lawsuit, asserting an interest in the painting. The investor, art gallery director, and lender all filed a

motion for summary judgment and declarations of interest in the painting.

In Athena Art Fin Corp. v. Humidity, No. 20-CV-04669 (GBD) (VF), 2024 U.S. Dist. LEXIS 179994 (S.D.N.Y. Oct. 2, 2024) (opinion not yet released for publication). The court granted the investor's motion for summary judgment after it found that there were no genuine issues of material fact to be decided based on the lender's claims. It first analyzed whether the lender possessed a perfected security interest in the Painting according to Article 9 of the UCC and found that it did not. It explained that a debtor cannot attach a security interest to property if that debtor "does not have either the rights in the collateral or the power to transfer rights in the collateral to a secured party." Simply, a debtor cannot give away an interest he does not have. Here, the art dealer's guilty plea met the clear and convincing evidence standard to prove a fraudulent transfer had taken place. Because the transaction between the art dealer, and the LLC had been fraudulent, it had to be set aside. Therefore, the LLC did not have legal title to transfer the painting to the lender, thus, the lender did not have a security interest in the Painting. The court then declared that the investor had legal title to the Painting and stated that the lender failed to point to anything in the record to contradict or undermine the investment company's title. Additionally, the court noted that neither the LLC nor the lender obtained title "in the ordinary course", therefore, the exception of the "entrustment doctrine" did not apply. The second possible exception to the "in ordinary course" rule is the voidable title doctrine, providing that the party with "voidable title" has the power to transfer "good title" to a good faith purchaser for value. However, the LLC was not a good faith purchaser for value; thus, the exception did not apply. Next, the court denied the lender's request that the investor be estopped from disputing its interest in the Painting. In response, the lender attempted to raise the affirmative defense of equitable estoppel. Nevertheless, the attempted defense failed because the investor and art gallery director "were simply silent on their ownership interest in the paintings," and the lender failed to identify a false representation that the investor or art gallery director had made while being aware of true facts with an intent that the lender would rely on those representations. Therefore, the court denied. all the lender's motions and requests. Then, it granted the art gallery director's motion to declare that the lender had no rights in the painting, however, it denied the request to declare a 12% ownership interest in the Painting to the director. Lastly, it granted the investor's motion for summary judgment d recommended the investor be declared to be the full owner of the Painting's legal title.

By Callighan Ard caard@ttu.edu
Edited By Ashley Boyce ashboyce@ttu.edu
Edited by Hayden Mariott hayden.mariott@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.