NORTH DAKOTA BANKERS ASSOCIATION

LEGAL UPDATE

A newsletter covering bank legal and compliance information.

Volume 24 • Issue 6

July 18, 2024

BANKING

Genuine Issue of Material Fact: A Low Bar for Summary Judgment [WI APP]

A bank, which was the current holder of the promissory note, initiated a foreclosure action against a borrower and his wife who had failed to make required payments. The bank moved for summary judgment and the defendants opposed the motion. The circuit court granted summary judgment and the defendants appealed. The defendants argued that the note produced by the bank in the complaint was not the original note, making the main issue on appeal whether there was a genuine issue of material fact as to the authenticity of the note. Specifically, one of the borrowers claimed she had never signed the promissory note.

In **Bank of N.Y. Mellon v Cano**, No. 2022APl596, 2024 WL 1328423, 2024 Wisc. App. LEXIS 278 (WI App. March 28, 2024), the court reversed the summary judgment because it determined there was a genuine issue of material fact regarding the authenticity of the promissory note produced by the parties. The bank alleged the note produced was a true and correct copy of the original note, but one borrower denied that she had signed the note produced by the bank. The bank did not address the disputed signature in its brief and the defendants continued to dispute it. The court decided that the issue of authenticity of the signature on the note constituted a genuine issue of material fact, making the granting of summary judgment improper.

By: The Editors

CFPB

Supreme Court Overturns Fifth Circuit Case Holding CFPB Funding Unconstitutional and Regulation Invalid [U.S.]

As a result of the financial crisis, Congress passed a law creating the Consumer Financial Protection Bureau (the "CFPB"). Funding for the CFPB was not to be from yearly appropriations, but rather the CFPB obtains its funding from the Federal Reserve System. More specifically, the CFPB may draw from the Federal Reserve an amount that the Director of the CFPB believes is "reasonably necessary" to carry out its duties, subject to an inflation adjusted cap of twelve percent of the Federal Reserve System's operating expenses as reported in 2009. 12 U.S.C. §§ 5497(a)(l), (2). Certain trade associations of payday lenders and credit-access lenders challenged a payday lending rule, arguing that the manner of funding of the CFPB was unconstitutional and therefore the rule was invalid. The plaintiffs argued that the funding violates the Appropriations Clause of the Constitution, which provides that "[no] Money shall be drawn from the Treasury but in Consequence of Appropriations made by Law." Art. I, § 9, cl. 7. The Fifth Circuit Court of Appeals agreed with the plaintiffs and held that because the funding was unconstitutional, the regulations at issue were invalid. Other courts in the Fifth Circuit applied this ruling, holding other regulations to be invalid. The CFPB sought certiorari from the Supreme Court.

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In **Consumer Fin. Prot. Bureau v. Cmty. Fin. Servs. Ass'n of Am., Ltd.**, 601 U.S. 416 (2024), the Supreme Court reversed the decision of the Fifth Circuit Court of Appeals. I t acknowledged that because excess funds of the Federal Reserve System would go to the Treasury, the funding of the CFPB was subject to the Appropriations Clause. To understand the Appropriations Clause, however, the court delved into the history of the Appropriations Clause, including the practices in England before the American Revolution and appropriates in the post-Revolutionary War period. It explained that the "funding mechanism fits comfortably with the First Congress' appropriations practice [and] is similar to the First Congress' lump-sum appropriations." The Court rejected the argument that because the CFPB determines how much it needs, it is not subject to the appropriations process. In rejecting this argument, the Court pointed to historical practice and the cap that Congress has imposed on the money the CFPB can seek from the Federal Reserve System. Second, the Court rejected the plaintiff's argument "that the Appropriations Clause requires both Chambers of Congress to periodically agree on an agency's funding, which ensures that each Chamber reserves the power to unilaterally block those funding measures through inaction." In this regard, it noted that the first appropriations for the post office and the customs service were not time limited. Moreover, the Court noted, the Constitution only requires that appropriations for the army not be for more than two years and places no other specific limitation on the time-period for appropriations. Accordingly, the plaintiffs could not convince the Court that its comparisons to the post office and the customs service were inappropriate. Third, the plaintiffs argued that if the funding of the CFPB were appropriate, Congress would have no checks on agencies running amuck, but the Court rejected this argument, noting that there were many ways in which Congress could control agency actions.

Justice Jackson and Justice Kagan 9(joined by Justices Sotomayor, Kavanaugh and Barret) filed separate concurring opinions. Justices Alita and Gorsuch dissented.

By: The Editors

EFTA

Banks Have No Obligation to Reimburse Customers for Fraudulent Transactions the Bank's Customer Authorized [CD CA]

The customer was a customer of the bank. Scammers, posing as prospective employers, tricked the customer into sending the scammers money via Zelle, a money transaction app. Rather than use the money to buy work equipment for the customer, as promised, the scammers kept the money for themselves. The customer informed the bank of this issue and requested that the bank reimburse her for the money the scammers stole from her, but the bank refused. The customer sued the bank asserting six claims: false advertising, both under California's Unfair Competition Law ("UCL") and False Advertising Law ("FAL"), breach of contract, negligence, unjust enrichment, and violation of The Electronic Fund Transfer Act ("EFTA").

In **Sanchez v. Navy Fed. Credit Union**, No. EDCV23285JGBKKX, 2023 WL 6370235, 2023 U.S. Dist. LEXIS 142817 (C.D. Cal. Aug. 14, 2023) (opinion not yet released for publication), the court dismissed all the customer's claims. Regarding the false advertising claims, the customer claimed that the bank's advertising that Zelle transactions were "backed by the banks" falsely suggested that the bank would reimburse the customer for fraudulent transactions the customer made on Zelle. The customer also claimed that the bank's claims that Zelle was "safe and secure" misled the customer into believing that Zelle was relatively free of scammers. Additionally, she alleged that the bank falsely advertised by failing to disclose the massive risk of fraud on Zelle. However, both these claims failed to make a claim for fraudulent advertising as a matter of law, the court concluded. The phrase "backed by the banks" meant that the service was supported or upheld by the banks. To believe that such a statement suggested that the bank would reimburse the customer was unreasonable as a matter of law. Regarding "safe and secure transactions," the service worked as advertised: the customer safely and securely transferred money to the intended recipient. That the customer was deceived into sending money does not mean that the service was unsafe or unsecure. On the contrary, Zelle stressed that it was to be used only to transfer money to people the recipient knows. The customer's improper use of the service did not mean that the bank misled the customer by advertising Zelle to be safe and secure.

Regarding the breach of contract claims, the customer argued that her contract with the bank included a provision in which the bank would reimburse the customer for "fraud losses incurred on debit-card linked Zelle transactions." However, the contract only provided that the bank would reimburse the customer for "unauthorized" transactions. While the scammers had deceived the customer into authorizing the transaction, the customer did authorize the transaction.

Regarding the negligence claims, the court held that the customer could not recover due to the economic loss rule, under which courts bar claims for economic loss unaccompanied by physical injury. As the customer claims were purely economic in nature, she must sue using a contract claim, not a tort claim. The one negligence claim the customer made that may not have been included as a contract claim was a claim that the bank negligently failed to protect the customer's information, which

was dismissed due to a lack of evidence. The plaintiff also alleged the bank had been negligent under the EFTA, UCL, and FAL, but because the customer's EFTA, UCL, and FAL claims failed, she could not recover under negligence under the aforementioned statutes.

Regarding the unjust enrichment claim, the court dismissed the claims for two reasons. One reason was that the customer claimed unjust enrichment under the EFTA. Because the customer's EFTA claim failed, so did the customer's unjust enrichment claim under the EFTA. Additionally, unjust enrichment causes of action are only valid in situations in which there is no valid contract between the parties. Because the customer and the bank had a valid contract, the customer could not recover under unjust enrichment.

Last, the customer's EFTA claim was dismissed because the EFTA "imposes a general duty on financial institutions to take certain actions when a consumer reports an "error."" An "error" under the EFTA refers to "incorrect" or "unauthorized" transactions. A transaction is incorrect when the amount sent or the recipient is wrong, while a transaction is unauthorized if it is performed without the account owner's knowledge or consent. Because the customer's transaction was to the intended recipient, in the intended amount, with the customer's knowledge and consent, the transaction was neither incorrect or unauthorized.

By: The Editors

Customer's May Sue Financial Institutions for Failure to Properly Disclose Their Overdraft Policies [ED VA]

The customers were customers of the credit union. The credit union calculated a customer's balance for overdraft purposes using the "available balance" method. Credit and debit card transactions involve two steps: authorization and settlement. Authorization occurs when a customer makes a payment with a credit card, while settlement, which may occur several days after the authorization, occurs when a financial institution pays the merchant the amount of the purchase. Under the available balance method, a card holder's balance is reduced after authorizing a payment, before the financial institution settles the payment. The credit union charged customers overdraft fees for payments that did not exceed the customer's balance at the time of authorization but did exceed the customer's balance at settlement. For example, if a customer had a $100 balance and spent $75, the customer, at the time of purchase, did not exceed his or her balance. However, if the customer then spent $30 before the financial institution authorized the $75 payment, the credit union would charge the customer an overdraft fee because, at the time the credit union settled the $75 purchase, the customer's available balance was negative. The customers sued the credit union to challenge the overdraft fees the credit union had charged the customers for transactions that did not exceed the customers' balances at the time of purchase. The credit union responded with a motion to dismiss.

In **Va. Is for Movers, LLC v. Apple Fed. Credit Union**, No. 1:23cv576, 2024 WL 1091786, 2024 U.S. Dist. LEXIS 45281 (E.D. Va. Mar. 13, 2024) (opinion not yet released for publication), the court denied the credit union's motion to dismiss. The customers sued the credit union for both breach of the credit union's membership agreement, and for violating the Consumer Financial Protection Bureau's (the "CFPB") Opt-In Rule, promulgated as part of Regulation E in accordance with the CFPB's authority to pass rules to carry out the Electronic Fund Transfer Act (the "EFTA"). The Opt-In Rule requires financial institutions that charge overdraft fees to provide their customers with written notice of their overdraft policies, as well as requiring them to provide their customers with "a reasonable opportunity" to "affirmatively consent." Regarding the breach of contract, the court explained that a contractual term is ambiguous when it "can reasonably carry "two or more meanings, [be] understood in more than one way, or [refer] to two or more things at the same time." When a contract is ambiguous, courts must "resort to parol evidence to ascertain the intention of the parties." Here, the customer's contract with the credit union (the "Contract") stated that if a customer's "available balance is not sufficient to pay the full amount of a . . . [transaction] that is posted to [the customer's] account, [the credit union] may return the item or pay it, as described below." The Contract further explained that the credit union may determine if a customer's account 1s insufficient "at any time between presentation and [the credit union's] midnight deadline." Because the terms "account balance," "posted," and "presentation" are ambiguous, and determining the meaning of the terms is "unsuitable for resolution under a motion to dismiss," the court denied the credit union's motion to dismiss the customers' breach of contract claims.

Regarding the Opt-In-Rule, the credit union argued that the customers' lacked a cause of action under the EFTA, because the Opt-In Rule was promulgated under the CFPB's Regulation E, which did not provide a cause of action for violations thereof. However, the EFTA provides a cause of action for violations of any provision of the EFTA. The EFTA includes a provision that "[t]he terms and conditions of a consumer's account shall be disclosed at the time the consumer contracts for an electronic fund transfer service, in accordance with regulations of the [CFPB]." While overdraft fees are not electronic fund transfers, they are terms and conditions of electronic fund transfers. Accordingly, a claim that the credit union failed to properly explain its overdraft policy is a valid claim under the EFTA.

By: The Editors

FCRA

The United States Department of Agriculture Not Immune Under FCRA [US]

A borrower secured a loan from a division of the United States Department of Agriculture (USDA) and repaid the loan. Despite having repaid the loan, the USDA informed a credit reporting agency that his account was past due and in turn, damaged his credit score. The borrower alerted the credit reporting agency and the USDA to the error but the USDA failed to take any action. The borrower then filed suit against the USDA under the Fair Credit Reporting Act (FCRA) and sought damages consistent with the FCRA. The USDA moved to dismiss the complaint, claiming that the agency benefits from sovereign immunity from suits for money damages. The district court found for the USDA but the Third Circuit reversed. The USDA then filed a writ of certiorari.

In **Dep't of Agric. Rural Dev. Rural Hous. Serv. v. Kirtz**, 601 U.S. 42 (2024), the Supreme Court held that the FCRA effects a clear waiver of sovereign immunity and affirmed the holding of the Third Circuit. The Court began by analyzing the text of the FCRA to determine if there had been a waiver of sovereign immunity. The Court held the FCRA's term "person" includes the government in each section unless otherwise noted. The Court then addressed the government's arguments individually. The government first argued that a cause of action must include a separate waiver of sovereign immunity. The Court held that the cause of action need not have a separate waiver. The government then argued that in order for a provision to waive sovereign immunity, it must not play another role in the statute. The Court held this notion has never been endorsed by the Court and refused to do so in this instance. Next, the government argued that the waiver cannot be a result of reading separate provisions in combination, but the Court quickly noted that the waiver must be "clearly discernible from the total sum of its work." The government also argued that the definition of "person" cannot be applied from one section to another in FCRA but the Court held that it can. Finally, the government argued the Privacy Act of 1974 covers some of the same ground that the FCRA does. The Court concluded by reasoning there is presumption of harmony when federal statutes touch on the same subject and the government has not met the high burden of proving otherwise. Therefore, the Supreme Court held that "a consumer may sue "any" federal agency for defying the law's terms."

By: The Editors

FDCPA

A Breach of the Peace During a Car Repossession [D FL]

A purchaser bought a car that was financed through a loan. The purchaser fell behind on payments, causing the lender to proceed with repossession of the vehicle. During the repossession, the purchaser made a payment to the lender, told the repo person to stop repossessing the car, sat in the car on the street, and made several objections to the repossession before and after the payment. The vehicle was ultimately repossessed. The purchaser brough suit against the lender and the subcontractors who did the repossessing, alleging violations of the Fair Debt Collection Practices Act (FDCPA) and unlawful possession under a state statute. The lender and subcontractors filed a motion to dismiss.

In **Byrd v. Hyundai Motor Fin.**, No. 8:23-cv-1254-CEH-SPF, 2023 WL 8543709, 2023 U.S. Dist. LEXIS 219642 (M.D. Fla. December 11, 2023), the court denied the motion to dismiss. The court began by discussing the violation of the FDCPA and the state statute, which prohibits a debt collector from using unfair or unreasonable means to collect a debt and requires the debt collector to proceed in a way that does not involve a breach of peace. While there is no definition in Florida for "breach of the peace" courts apply a two-prong test. The first prong was inapplicable here: "whether there was entry by the creditor upon the debtor's premises." However, a breach of peace can also occur on a public street, if there is an objection to the repossession by the debtor. The court decided the purchaser's objections and actions of sitting in the car while making a payment during the repossession were enough to state a breach of the peace under state and federal law and denied the motions to dismiss.

By: The Editors

LENDING

Circuit Court Limits Debtor's Ability to Modify Home Mortgage [11th CIR]

Although most secured claims can be modified in bankruptcy, claims "secured only by a security interest in property that is the debtor's principal residence" cannot be modified in individual cases in Chapter 13 and in many Chapter 11 cases. Moreover, these claims may only be modified in subchapter V of Chapter 11 if the loan was used "primarily in connection with the small business of the debtor" and was not used to purchase the property. For that reason, determining whether the claim is secured by "the debtor's principal residence" is an extremely important determination. "Principal residence" is defined in the Bankruptcy Code to mean "a residential structure if used

as the principal residence by the debtor, including incidental property, without regard to whether that structure is attached to real property." 11 U.S.C. § 101(13A)(A). "Incidental property" is defined in section 101(27B) of the Bankruptcy Code to mean "with respect to a debtor's principal residence-

> (A) Property commonly conveyed with a principal residence in the area where the real property is located;
>
> (B) all easements, rights, appurtenances, fixtures, rents, royalties, mineral rights, oil or gas rights or profits, water rights, escrow funds, or insurance proceeds, and
>
> (C) all replacements or additions.

Here, the court was asked to construe 11 U.S.C. § 1123(b)(5), which applies to individual Chapter 11 debtors whose case is not under subchapter V. The debtor, a Georgia resident, had one large 43-acre parcel of property. The debtor's principal residence was a small house on two and onehalf acres of the property. However, the debtor leased the rest of the property to a farming company that had consistently farmed the land. The debtor sought to modify the mortgage on the property. Both the bankruptcy court and the district court held that the mortgage could not be modified and that the automatic stay could be lifted to allow the lender to foreclose on the property.

In **Lee v. United States Bank Nat'l Ass'n**, 102 F.4th 1177 (11th Cir. 2024), the Eleventh Circuit Court of Appeals affirmed the orders of the lower court in a decision that is favorable to lenders. Disagreeing with other courts, the Eleventh Circuit focused on the word "is" and held that because the property "is" the debtor's principal residence, the mortgage could not be modified. It noted that the Bankruptcy Code includes "incidental property in the definition of "principal residence" and held that the farmland came within that definition. The court set forth its test: " ' [f] irst, the security interest must be in real property; second, the real property must be the only security for the debt; and third, the real property must be the debtor's principal residence." In re Wages, 508 B.R. 161, 165 (B.A.P. 9th Cir. 2014). Because the mortgage [the bank] held on "... Lee's real property met these three requirements, the bankruptcy court did not err in concluding that the anti-modification provision applied to the bank's secured claim."

One judge dissented, disagreeing with the court's interpretation of the word is and focusing on the definition of "principal residence."

By: The Editors

TRUSTS

An Attempt to Obtain All of the Trust Property Gone Wrong [7TH CIR]

A settlor created a trust dividing real property evenly among four beneficiaries. One of the beneficiaries convinced the settlor to amend her trust, resulting in that beneficiary becoming the sole beneficiary of the real property and the sole trustee. The remaining beneficiaries sued the sole beneficiary for undue influence and interference with expectation. After a bench trial, the court entered a money judgment for the remaining beneficiaries and enjoined the sole beneficiary from encumbering the property. The order was then vacated because the court held it could not issue equitable remedies on legal claims. The sole beneficiary attempted to obtain a mortgage loan on the property while an appeal was pending but failed because of the court decision against her. However, the bank indicated it would approve a loan if the sole beneficiary transferred ownership of the property to her daughter. The daughter then conveyed a mortgage and secured a loan. The appellate court then affirmed the money damages award against the sole beneficiary and held that a constructive trust on the property was the appropriate remedy. The appellate court also ordered the sole beneficiary and her daughter to convey all interests in the property to the remaining beneficiaries. As a result of a judge's deed, the remaining three beneficiaries became tenants in common each holding a 1/3 shares. Those beneficiaries then sued the bank/mortgagee for slander of title and unjust enrichment based on the bank's mortgage on the property. The district court dismissed two amended complaints of the remaining beneficiaries, and the beneficiaries appealed.

In **Guerrero v. Howard Bank**, 74 F.4th 816 (7th Cir. 2023), the court affirmed the ruling and held that the bank did not publish a falsity nor continue to publish one, defeating both the slander of title and unjust enrichment claims. The court began with the slander of title claim and addressed the remaining beneficiaries' allegations that the mortgage lien was a false publication made by the bank. The court held that because the trustee's deed conveyance to the sole beneficiary's daughter was valid and the mortgage then recorded by the bank was also valid, the bank did not record a false publication. Additionally, the bank did not act with malice as it had a reasonable belief the sole beneficiary's daughter could convey a valid mortgage. The court then addressed the continuing publication theory and found no support for it. Next, the court discussed the unjust enrichment claim first by addressing the remaining beneficiaries' claim that the bank's refusal to release the mortgage once it learned of the circumstances was unjust. Once again, the court emphasized that the mortgage was valid so the bank did not unjustly retain the mortgage. The court affirmed the trial court's ruling to dismiss both claims.

By: The Editors

WIRE TRANSFERS

Describe or Get Dismissed: Failure to State a Claim [6TH CIR]

A sender wired money to an account at a bank, thinking it belonged to the intended receiver. The account instead belonged to hackers who had pretended to be employees of the intended receiver. The sender filed suit against the bank, claiming that the bank should have screened its customers more carefully. The district court dismissed the suit for failure to state a claim and the sender appealed.

In **Kent Grp. Partners, LLC v. Citizens Bank, NA.**, No. 23-3743, 2024 WL 945239, 2024 U.S. App. LEXIS 5537 (6th Cir. March 5, 2024), the court affirmed the judgment of the district court, holding that the sender had failed to state a claim. The court first addressed the sender's first claim under the UCC §4A-207, which addresses when there is a discrepancy between an account number and the intended beneficiary. The court held that the sender never alleged particular facts supporting the allegation that the bank knew of the fraud. The evidence proffered by the sender included mere conclusory statements. The court then addressed the civil conspiracy claim, which once again requires knowledge of the fraud as well as a malicious combination between the hackers and the bank. The sender failed to bring evidence that shows the bank conspired with the hackers. Finally, the court addressed the sender's final argument that the district court erring in dismissing the case with prejudice. The sender did not amend the complaint and did not file a proposed amendment, resulting in a dismissal with prejudice for failure to state a claim.

By: The Editors

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.

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