NORTH DAKOTA BANKERS ASSOCIATION

LEGAL UPDATE

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ARBITRATION

Ignorance Fails to Protect Against Mandatory Arbitration [WD TX]

A debtor entered into a vehicle loan agreement with a creditor. Later, the debtor brought a complaint against the creditor for violating the Truth in Lending Act, alleging the creditor included illegal hidden fees within the loan. The contract in issue included a mandatory arbitration clause that the debtor denied knowing was in the contract. The debtor admitted to signing the documentation granting a lien on the vehicle but denied signing any other contract relating to the transaction. The creditor disputed this by providing a signed copy of the security agreement and another signed contract with a matching signature. The creditor also provided a certificate indicating that the debtor signed the contract through DocuSign. In addition to an easy-to-understand arbitration clause, the contract contained a reference to the arbitration clause at the top of the document and a provision notifying the debtor of the debtor's right to opt out of the arbitration clause by notifying the creditor. Because the contract contained the mandatory arbitration clause, the creditor moved to dismiss and compel arbitration.

In *Green v. TMX Finance of Texas, Inc.*, No. 1:23-CV-1006-DII, 2024 WL 409734, 2024 U.S. Dist. LEXIS 18448 (W.D. Tex. 2024) (opinion not yet released for publication), the court partially granted the creditor's motion to dismiss, granting a stay pending arbitration. The court had to determine whether (1) the parties had entered into an arbitration agreement; and (2) if the claims brought by the debtor would fall under any existing arbitration agreement. By examining the DocuSign certificate, the court first found that the debtor signed the contract containing the arbitration provision and failed to opt out of that provision. After determining the contract's validity, the court next examined whether the arbitration agreement covered the Truth in Lending claims. Turning to the contract's language, the court found that the debtor's claim was a dispute subject to arbitration under the agreement because the contract specifically included a provision that disputes over hidden fees would be subject to arbitration. Thus, the court granted the creditor's motion to compel arbitration.

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BANKRUPTCY

Bankruptcy Court May Dismiss a Chapter 11 Bankruptcy Based on the Debtor Filing in Bad Faith [BNK WD TX]

A skeleton corporation that produced income solely from patent litigation lost several suits, resulting in multiple judgments against it. Though the corporation had no employees and little yearly income, it filed for Chapter 11 bankruptcy, which stayed the judgment creditor's claims. Shortly after, the corporation filed an incoherent and late reorganization plan, leading the judgment creditors to move to dismiss the corporation's bankruptcy case, claiming bad faith. The judgment creditors argued that the corporation had filed for bankruptcy to prevent them from recovering on their claims while the corporation waited for a decision on their appeal.

In *In re Traxcell Techs., LLC*, No. 23-60482-MMP, 2024 WL 332860, 2024 Bankr. LEXIS 216 (Bankr. W.D. Tex. Jan. 29, 2024) (opinion not yet released for publication), the court dismissed the corporation's bankruptcy case based on bad faith under sections 1112(b), 1112(b)(4)(A), and 305(a)(1) of Chapter 11 of the United States Code. First, the court found for dismissal based on bad faith under section § 1112(b). The following factors indicate bad faith: (1) the corporation had no employees other than its principles, (2) the corporation had no cash flow for several years, (3) the corporation did not have income to make a reorganization plan, because its claims of potential income were not credible, (4) the case was essentially a two-party dispute, with the corporation seeking bankruptcy protection against its one primary creditor (the judgment

creditor), and (5) the corporation filed this case hoping to prevent the transfer to a receiver of its key asset, several patents, and thus was attempting to relitigate the prior issue. Second, the court found bad faith under § 1112(b)(4)(A) because (1) continuation of the bankruptcy case would drain any remaining money from the corporation and generate attorney's fees, and (2) the corporation had no reasonable prospect of generating future income. Third, the court found for dismissal under the heavy burden of 305(a)(1), based on the following factors: (1) the corporation's assets were already being transferred by the receivership order; (2) the receivership would result in more efficient distribution for all creditors and the corporation; and (3) as noted above, the corporation was seeking bankruptcy to avoid a two-party dispute.

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Debt Was Nondischargeable Due to Fraud [BKR ND TX]

The creditors founded a ranch to provide support for their family in their later years. After becoming physically and cognitively impaired, they appointed the debtor, a family member, to manage the ranch. The debtor began mismanaging and neglecting the ranch, committing fraud, and diverting the revenue intended for the creditors to himself. The creditors then filed a petition and an emergency application for a temporary restraining order (TRO) against the debtor. The state court granted the TRO, issued a temporary injunction, and appointed a guardian *ad litem* to serve on behalf of the creditors, given their mental status. The state court entered final judgment for the creditors, including a declaratory judgment voiding several ranch transactions and agreements, a permanent injunction prohibiting the debtor from engaging in activities related to the ranch and awarded damages and attorney's fees to the creditors. The state court found that the debtor had fraudulently amended the LLC's documents to eliminate other members' rights, diverted revenue directly to his business, and made many false representations to the creditors. The debtor then filed a Chapter 7 bankruptcy case, and the creditors filed a complaint seeking a declaratory judgment rendering the prior judgment debt nondischargeable under 11 U.S.C. §§ 523(a)(4) and 523(a)(2)(A). The bankruptcy court needed to decide whether the state court's damage award was nondischargeable by examining if all elements of § 523(a)(2)(A) and § 523 (a)(4) were met, whether the requirements of collateral estoppel were met, and then if the attorney's fees were also nondischargeable.

In *Happy Hollow Ranch, LP v. Howley (In re Howley)*, No. 23-31029-sgj7, Adversary No. 23-03068-sgj, 2024 WL 409126, 2024 Bankr. LEXIS 260 (Bankr. N.D. Tex. Feb. 2, 2024) (opinion not yet released for publication), the court held that the elements for both claims were met for the damages award to be nondischargeable. Under § 523(a)(2)(A), the prior judgment needed to satisfy each element of one of the three methods of proving the claim: a debt obtained by false pretenses, a false representation, or actual fraud. The elements for a false representation claim were met by the debtor's express knowledge of their falsity in multiple instances and through false representation to both creditors.

Next, the court considered § 523(a)(4), which exempts from discharge any debts for fraud while acting in a fiduciary capacity, embezzlement, or larceny. The court analyzed whether the state court's judgment was supported by evidence proving a qualifying fiduciary duty existed and was subsequently breached through fraud. The court found enough evidence to meet the elements of this claim; the debtor was hired as a manager, thus creating an agency relationship under Texas law, and then the debtor fraudulently amended documentation to give himself a higher position in the company. The court also applied the doctrine of "unclean hands," which estopped the debtor from claiming that he owed no fiduciary duty because the duty arose from a fraudulent amendment to official certification documents. The court then decided that collateral estoppel applies because the issues were fully litigated previously, identical to the issues at hand, and the issue of fraud was essential in the state court's final judgment of awarding damages. Lastly, the court held that the attorney's fees were nondischargeable because "all debts arising from fraud are nondischargeable, including attorney's fees."

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Focusing on the Wrong Rate [8TH CIR]

The debtor filed for Chapter 12 bankruptcy as a "family farmer." The creditor had financed part of the debtor's farm and filed a claim as a secured creditor (notably, the creditor's claim was over-secured). After the creditor rejected the debtor's proposed repayment plan, the debtor resorted to the cramdown option under the statute. Although the parties agreed to a 2% risk adjustment rate on payments that would not be made upon confirmation of the plan, the parties disagreed on what initial interest rate to use in "determining the present value of future payments." The debtor had proposed starting with the twenty-year treasury bond rate, which was 1.87%, whereas the creditor wanted the national prime rate of 3.25%. The disagreement concerned only the proper risk-free starting point: either the treasury rate or the prime rate. The bankruptcy judge sided with the debtor and, after adding the 2% risk adjustment rate to the 1.87% figure, rounded up to a 4% rate in confirming the plan. The creditor appealed to the district court, which affirmed the decision of the bankruptcy judge. The

creditor appealed again, this time to the United States Court of Appeals for the Eighth Circuit.

In *Farm Credit Servs. Of Am. V. Topp (In re Topp)*, 75 F.4th 959 (8th Cir. 2023), the United States Court of Appeals for the Eighth Circuit affirmed the holding of the district court because the rate it had chosen satisfied would give the creditor the present value of his claim even though he was to be paid over time. The court explained the purpose of the rate is to guarantee that the sum of the debtor's future payments to the creditor would equate to the present value of the creditor's claim. The parties each offered a case to justify the initial rate each party had chosen. Finding neither case to be entirely on point, the circuit court emphasized that "the ultimate discount rate, not the starting point, is what matters." The court labeled the creditor's quibbling over the starting rate as a "red herring." The court found the bankruptcy court had appropriately considered the relevant factors in reaching the 4%rate; therefore, the bankruptcy court had committed no error. Furthermore, the court noted that, during oral argument, the creditor had avoided answering the question of whether the creditor would have appealed had the bankruptcy court calculated its 4% figure by adding a modest risk adjustment of 0.75% to the prime rate of 3.25%.

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CFPB

Motion to Stay Requires Clear Case of Hardship or Inequity [SD FL]

The Consumer Financial Protection Bureau (CFPB) sued a mortgage corporation. However, the mortgage corporation filed a motion to stay because the Supreme Court had granted certiorari to decide the constitutionality of the DVPB's funding structure after the Fifth Circuit held it to be unconstitutional. The corporation argued that because the Supreme Court may uphold the Fifth Circuit's ruling, the court should grant the motion to stay to promote judicial economy and avoid "having to redo any of its efforts" in the suit. The DVPB responded by pointing out the Supreme Court may not release its decision for several more months. Additionally, the DVPB argued granting the motion to stay "would be contrary to the public interest" because it would delay the enforcement of current federal consumer financial laws. Lastly, the CFPB asserted that even if the Supreme Court held its funding structure was unconstitutional, the corporation had not proven that it would result in a dismissal of the instant case.

In *Consumer Fin. Prot. Bureau v. Freedom Mortg. Corp.,* No. 23-cv-81373, 2024 WL 158393, 2024 U.S. Dist. LEXIS 9686 (S.D. Fla. Jan. 12, 2024) (opinion not yet released for publication), the court looked to the relevant rule stated in Ladis v. N. Am. Co., 299 U.S. 248 (1936), requiring "the party requesting a stay [to] make out a clear case of hardship or inequity." Here, the court held that the corporation had failed to present evidence showing hardship or inequity. Additionally, the court agreed with the CFPB's arguments. The court stated: "an adverse ruling regarding the funding structure will [not] necessarily result in the dismissal of this case," and "the public has a strong interest in the vigorous enforcement of consumer protection laws." The court ended by noting that challenges to mortgage corporations like this one serve to champion "transparency" and best "lending practices" for the general public. Thus, the court denied the motion to stay.

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EMPLOYMENT LAW

Summary Judgment Granted on Employee's Claims of Discrimination and Retaliation [5TH CIR]

Before her resignation, an African-American employee made several reports to her employer's Human Resources (HR) department of race-based and sex-based discrimination as well as retaliation. During this time, the employer began an investigation into inappropriate sexual remarks allegedly made by the employee. A second investigation opened soon after the first with the employer examining the employee's leadership skills. Following these investigations, the employer temporarily suspended and transferred the employee to a new position. The employee resigned soon after the transfer. She then filed an EEOC charge against the employer, and subsequently filed suit in federal district court. The employee asserted claims of "(1) race and sex discrimination under Title VII and § 1981; (2) retaliation under Title VII; and (3) retaliation under the [Family Medical Leave Act (FMLA)]." However, during her deposition, the employee failed to restate her demotion and constructive discharge as part of her discrimination claim. The district court determined that the employee's failure to mention these alleged adverse employment actions during the deposition effectively "narrowed" her discrimination claim. The district court granted summary judgment to the employer on the "narrowed" claims. The employee appealed to the Fifth Circuit.

In Harper v. Lockheed Martin Corp., No. 22-10787, 2024 WL 361313, 2024 U.S. App. LEXIS 2159 (5th Cir. Jan. 31, 2024) (unpublished opinion), the Fifth Circuit affirmed the district court's grant of summary judgment in favor of the employer. First, the employee argued that the district court had incorrectly narrowed her claim based on her omission during the deposition. Regardless of the correctness of the district court's decision,

the employee had failed to address the narrowing in a timely manner before the district court and subsequently lost her ability to contest it on appeal. Thus, the employee had forfeited her claims of race and sex discrimination. Regarding her claim of retaliation under Title VII, the record showed that the employee failed to establish her employer had subjected her to adverse action or treated her differently than those not in her protected class. Accordingly, she could not establish a prima facie case of Title VII retaliation. Finally, the employee had forfeited her retaliation claim under the FMLA by failing to provide "any supporting arguments" in her brief.

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FINANCIAL CRIMES

The Annunzio-Wylie Act Protects Banks That Report Suspected Financial Crimes from Suit by the Reported Party [BKR ED TX]

The debtor served as a company's manager and obtained a loan from the bank on the company's behalf by using security equipment and cattle as collateral. The company experienced financial difficulties, and the debtor approached the bank about altering the repayment plan. The bank conducted a collateral investigation but could not find most of the debtor's collateral. The debtor admitted he had sold most of the cattle, and some of the equipment offered as collateral was missing. Following the bank's investigation, the debtor filed for Chapter 7 bankruptcy. The bank later contacted a Texas Special Ranger to investigate the debtor for potential illegal action the debtor partook in regarding his collateral. After completing his investigation, the ranger arrested the debtor for hindering a secured creditor, a crime in which a person creates a lien on property and, "with intent to hinder enforcement of that interest or lien, … destroys, removes, conceals, encumbers, or otherwise harms or reduces the value of the property." The debtor later sued the bank for violating the automatic stay under 11 U.S.C. § 362(a), which prevents creditors from initiating or continuing debt collection efforts following a debtor filing for bankruptcy, and for violating the debtor's bankruptcy discharge under 11 U.S.C. § 524(a). The bank subsequently filed a motion for summary judgment, arguing that its reporting of the debtor to the ranger fell within the § 362(b)(1) exception to the automatic stay and that the Annunzio-Wylie Act, 31 U.S.C. § 5318(g), protects banks from liability for violations of § 362(a) and § 524(a).

In *Kerns v. First State Bank of Ben Wheeler (In re Kerns),* 654 B.R. 425 (Bankr. E.D. Tex. 2023), the court held that, under the Annunzio-Wylie Act's safe harbor provision, the bank was exempt from suits against it for violating 11 U.S.C. § 362(a) and § 524(a). The Annunzio-Wylie Act's safe harbor provision, the bank was exempt from suits against it for violating 11 U.S.C. § 362(a) and § 524(a). The Annunzio-Wylie Act's safe harbor provision exempts any financial institution or agent thereof who voluntarily reports a suspected financial crime to a government agency or "any other authority" from suit from the person they report. The debtor argued that the safe harbor provision applied only to disclosures made in a Suspicious Activity Report (SAR), that the safe harbor provision did not apply to state law, and that the lender's disclosure to the ranger was not to a government agency or other authority contemplated by the Annunzio-Wylie Act. First, regarding the debtor's SAR argument, the court noted that the language of the safe harbor provision explicitly includes "all reports of suspected or known criminal violations and suspicious activity," suggesting that the statute is broad and encompasses reports made in a manner other than SAR. Second, the safe harbor provision states that "disclosure of any possible violation of law" is exempted, which indicates state law crimes are covered. Third, the court held that the safe harbor provision covered disclosures made to special rangers because the statute's text included disclosures to government agencies or "any other authority." Finally, the court held that while cattle investigation special rangers are an "unusual quirk of Texas Law," the special rangers meet the same requirements and have the same authority as other peace officers. Thus, the bank could report a suspected financial crime to a state ranger and receive protection under the safe harbor provision.

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LENDING

Is a Reassignment of Mortgage Subject to Lack of Standing? [OH APP]

The debtor executed a promissory note to a lender. The debtor secured the note by a mortgage and lender's nominee held the note. The lender's nominee reassigned the mortgage to the lender. The debtor failed to pay on the note and the lender filed a complaint for foreclosure. The debtor replied with a motion to dismiss for lack of subject matter jurisdiction, arguing that the lender did not have standing because it was not a real party in interest because the mortgage had been reassigned. The trial court denied the motion, so the debtor filed a counterclaim alleging wrongful foreclosure and other legal violations. The lender moved to dismiss the counterclaim for failure to state a claim upon which relief could be granted and filed a motion for summary judgment, both of which the trial court granted. The debtor filed a pro se appeal, alleging that the trial court

"presumed jurisdiction without proper legal basis." In addition, the debtor claimed the trial court erred in dismissing the debtor's counterclaim and granting summary judgment to the lender.

In Huntington Nat'l Bank v. Bossart, No. 2023CA00 115, 2024 WL 397362, 2024 Ohio App. LEXIS 374 (Ohio Ct. App. Feb. 1, 2024) (opinion not yet released for publication), the court affirmed the trial court's findings in its entirety. The court decided to review the appeal in the interest of justice, despite the pro se applicant's failure to follow the same procedural rules required of retained counsel. The court explained that in order to successfully file a motion for summary judgment in a foreclosure proceeding, the plaintiff must establish: "(l) the plaintiff is the holder of the note and mortgage or is a party entitled to enforce either; (2) if the plaintiff is not the original mortgagee, the chain of assignments and transfers; (3) the mortgagor is in default; (4) all conditions precedent have been satisfied; and (5) the amount of principal and interest due." The lender provided the court with the note and mortgage that contained the debtor's signatures, the mortgage assignment, the notice of intention to accelerate and foreclose, and the customer account activity. The court held a genuine issue of material fact did not exist because the debtor had agreed to the terms of the mortgage by signing produced documentation. The court rejected the debtor's argument that the evidence was incomplete because the lender had failed to provide a cancelled check that proved the loan's receipt and assignment. Furthermore, the court noted that the debtor's claims were not corroborated by any evidence sufficient to establish a material fact. The court affirmed that the lender was the real party in interest and had standing. Finally, the court rejected the debtor's new arguments made in his appellate brief, because the issues had not been raised during trial, and had been waived.

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SECURITY INTEREST

Too Late: Creditor Missed the Five-Year Deadline to Renew Financing Statement and Forfeits Perfected Security Interest [WDOK]

In the summer of 2016, a debtor and a creditor entered into a security agreement. Later, the creditor filed a financing statement with the state of Oklahoma. At the end of 2018, the debtor merged with another company. On the first day of 2019, the creditor filed an amended financing statement to include the new company as the debtor with respect to the original security interest. In August 2022, the debtor brought suit seeking to interplead its funds and sought to prevent unsecured creditors from obtaining any of those funds. The debtor argued that the creditor was not a secured creditor because, after the 2019 amendment, the creditor did not file any continuances of its financing statements until 2023. The creditor argued that the 2019 amendment had been sufficient,
and it had met the effective time to file a continuance of the original financing statement (within 5 years).

In *Tri-State Elec. Contractors., LLC v. Consol. Elec. Distribs., Inc.*, No. CIV-22- 856-J, 2023 WL 6211989, 2023 U.S. Dist. LEXIS 174257 (W.D. Okla. Apr. 24, 2023) (unpublished opinion) the court held that while the creditor did create a perfected security interest with the new debtor company when it filed the amendment to the security agreement, the creditor lost the perfection of that interest for failing to timely file a renewal on the original financing statement. Oklahoma law states that a properly filed financing statement (such as the financing statement here) is effective to perfect a security interest for five years after it has been filed. In the six-month period before the expiration of the five years, a creditor must renew its filing to maintain a perfected security interest for the next five years. Importantly, the court held that an amendment to a financing statement (such as the 2019 document here) does not effectively renew or extend the five-year filing period. Thus, the court held that while the creditor did effectively include the new company as a debtor, the creditor lost its perfected security interest in 2021 when it failed to renew the original 2016 financing statement.

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WIRE TRANSFERS

A Bank May Be Sued for Negligent Recovery by Volunteering Assistance and Failing to Provide the Necessary Forms [WD KY]

A corporation initiated a wire transfer via a domestic bank's online banking app to an international bank (the international bank). The intended recipient of the funds did not receive the transfer. The domestic bank volunteered to assist the corporation in recovering the funds but ultimately failed to locate the funds. Additionally, despite the corporation's requests, the domestic bank did not provide information to assist the corporation, the international bank, legal counsel, and law enforcement in verifying the wire transfer and tracking down the funds. In particular, the bank failed to provide an MT-103, an internationally used wire transfer form, or any Society for Worldwide Interbank Financial Telecommunication (SWIFT) information. The corporation sued the bank, pleading three claims in the alternative: negligent execution of wire instructions,

negligent recovery, and negligence. The bank filed a motion to dismiss all claims.

In *Pirata P.S.C. v. Bank of Am., N.A.*, No. 3:22-CV-627-CHB, 2024 WL 25088, 2024 U.S. Dist. LEXIS 270 (W.D. Ky. Jan. 2, 2023) (opinion not yet released for publication), the court granted the bank's motion to dismiss as to the negligent execution of wire instructions and denied the bank's motion to dismiss as to the negligent recovery and negligence claims. Negligent execution of wire transfers is a common law tort. Kentucky's Uniform Commercial Code (the UCC) governs funds transfers in Kentucky and preempts common law torts in areas the UCC covers. Therefore, the UCC preempted the tort claim, and the court dismissed the corporation's first claim. The court then found the corporation's second and third claims concerned activity outside the funds transfer process, which were not preempted by the UCC. Concerning the negligent recovery charge, the bank argued it did not voluntarily assume the duty to assist the corporation in providing technical information, such as the MT-103, and the corporation did not meet the "precondition" showing it was a third party, as is required for assumption of duty claims. The court held that the corporation's pleading alleged the bank voluntarily assumed the duty to assist the corporation, and the "precondition" argued by the bank did not bar this claim. In addressing the negligence claim, the court relied on Ousley v. First Commonwealth Bank of Prestonburg, 8 S.W.3d 45, 46 (Ky. Ct. App. 1999), which held that banks have a duty to their customers to provide records of their accounts. The bank argued that the technical information requested by the corporation did not fall within the scope of account information covered by Ousley. However, the court held that the bank did not provide enough information to show that "at the pleadings stage, [the corporation's] claims [fell] outside of the Kentucky Court of Appeal's decision in Ousley."

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Bank Held to be Harmless in Wire Transfer Dispute [WD PA]

The account holder authorized a wire transfer to what he believed was the bank account of his title company. Soon after the account holder authorized the transfer, the account holder realized the wire transfer instructions he received had been fraudulent. After being notified, the bank contacted the fraudster's bank. At first, the fraudster's bank appeared to have recovered most of the account holder's funds. The receiving bank signed a "Hold Harmless and Indemnity" agreement and returned the recovered funds. However, the fraudster' s bank soon discovered an error. It had only recovered approximately half of the account holder's funds - not a majority of the amount, as it had originally believed. The fraudster's bank requested a return of the amount mistakenly transferred to the sender's bank. Following an investigation conducted by the bank's legal department, the transferor bank complied with the request. The account holder sued the bank in state court. Later, the parties removed the case to federal district court, which ultimately dismissed the case without prejudice. The account holder filed an amended complaint, asserting four claims. The bank moved to dismiss the amended complaint. The court granted the dismissal regarding the two-state law claims and narrowed the scope of the breach of contract claim. The bank then moved for summary judgment against the surviving claims of promissory estoppel and breach of duty of good faith.

In *Tracy v. PNC Bank, N.A.*, No. 2:20-CV- 1960, 2024 WL 665227, 2024 U.S. Dist. LEXIS 27151 (W.O. Pa. Feb. 16, 2024) (opinion not yet released for publication), the court granted the bank's motion for summary judgment on all counts. First, the court explained that "a promissory estoppel claim should be dismissed 'after the court definitively determines that a valid and enforceable contract controls.'" Here, the court held that the account holder's promissory estoppel claim failed because a valid contract (the account agreement) existed between the account holder and his bank. This account agreement explicitly enabled "each action [the bank] took" during interactions with the account holder. The account holder countered by claiming the agreement was silent on matters of fraudulent transfers and the bank's preventative measures. However, the court found that the account holder misconstrued the issue, and the record was devoid of any promise made by the bank to the account holder ton which he had detrimentally relied.

Further, the court found that the bank did not breach its contractual duty of good faith. The account agreement enabled each action the bank took. Specific language in the agreement even forewarned the account holder that the bank "would not be liable for any damages" arising from events like the one at hand; yet, the account holder argued that the bank did not properly communicate with him throughout the process and that the bank should have caught the fraud before the transfer went through. The court dismissed both arguments with ample evidence from the record showing that the bank had engaged in lengthy discussions with the account holder. The court also dismissed the argument that the bank should have prevented the fraud earlier during the case.

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UCC 4A Preempts Negligence Claims Premised Soley on Unauthorized Wire Transfers [SD FL]

A customer filed a negligence claim against a bank, alleging that the bank "fail[ed] to monitor its client's accounts and failed to have reasonable safeguards in place to prevent or detect the fraud that resulted in the customer's loss" of money due to an unauthorized charge. The bank filed a motion to dismiss for failure to state a claim, arguing that "the negligence claim must be dismissed because either it is l) barred by the Independent Tort Doctrine; or 2) preempted by article 4A of the UCC."

In *Nice Weather Corp. v. Bank of Am., Nat'l. Ass'n.*, No. 23-24893, 2024 U.S. Dist. LEXIS 20047 (S.D. Fla. Feb. 5, 2024) (opinion not yet released for publication), the court concluded that the Independent Tort Doctrine did not bar this claim, but Article 4A of the UCC did. The Independent Tort Doctrine bars tort actions if they are based solely on a breach of contract; thus, a tort must exist independent of the breach. Here, the customer did not only rely on a claim based on a contractual breach; instead, the customer additionally argued that the bank had independent duties "to establish fraud prevention measures" and take reasonable precautions in an error of cybercrime to protect the funds it holds on behalf of others." Thus, the Independent Tort Doctrine did not preempt the tort claim because the customer based the claim on more than breach of contract.

Next, the court explained that UCC Article 4A denies "negligence claims premised solely on [the] unauthorized transfer of funds" because litigation under UCC 4A, not tort law, is the exclusive remedy for types of actions. In this case, the court held that UCC 4A preempted the customer's negligence claim because the customer did not allege facts relating to the bank's lack of care outside of the wire transfers. Although the customer did allege that the bank acted in a "reckless and grossly negligent manner," all of the specific allegations related to the bank's mishandling of unauthorized wire transfers, which fall precisely within the duties outlined in UCC 4A. Therefore, the court held that UCC 4A preempted this negligence claim and granted the motion for summary judgment for failure to state a claim.

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Role of NDBA General Counsel

NDBA's general counsel serves as the attorney for the association. Although Tracy is pleased to be able to serve as a resource for NDBA members in responding to their questions, she is providing general information, not legal advice. Banks must obtain legal advice from counsel who has been retained by the bank to represent the bank's interests in a specific matter.

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