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LEGAL UPDATE

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ARBITRATION

Reading the Fine Print: Trouble with an Obscure Arbitration Clause [9TH CIR]

The clients had stored various valuable items in a safety deposit box at the bank since 2000. In 2013, the bank asked the clients to move to a new slot after it had difficulty opening their safety deposit box. The clients consented to the move and signed a one-page "Consumer Safe Deposit Box Contract." In 2021, the clients were made aware that their safe deposit box had been "drilled" and noticed that many of their valuables in the safe deposit box had gone missing. The clients filed suit against the bank in a federal district court, where the case was promptly dismissed due to the court granting the motion made by the bank to compel arbitration. The bank claimed the arbitration clause was referred to within the Consumer Safe Deposit Box Contract the clients signed. The clients appealed the decision to the U.S. Court of Appeals for the Ninth Circuit.

In **Fong v. U.S. Bancorp**, No. 23-16186, 2024 WL 3439584, 2024 U.S. App. LEXIS 17533, (9th Cir. July 17, 2024) (opinion not yet released for publication), the U.S. Court of Appeals for the Ninth Circuit vacated the district court's decision and remanded the case. First, the court noted that the bank, as the party attempting to enforce an arbitration clause, "bears 'the burden of proving the existence of an agreement to arbitrate by a preponderance of the evidence.'" Knutson V. SiriusXM Radio, Inc., 771 F.3d 559,565 (9th Cir. 2014). The bank argued that the agreement to arbitrate was included in the Safe Deposit Box Contract through a reference to a separate document, the "Safe Deposit Box Lease Agreement." The court stated that it would "not have been clear to a reasonable consumer under the circumstances" that the Safety Deposit Box Contract was an entirely new agreement. Due to the clients' prior dealings with the bank and the fact that their safe deposit box was only getting a new slot, it was reasonable to assume that the Safe Deposit Box Contract referred to the initial agreement made by the clients when they opened their safe deposit box in 2000. Second, the court addressed whether there was a "genuine dispute of material fact" that the bank had ever provided the clients with the Safe Deposit Box Lease Agreement. The bank employee who had dealt with the clients in 2013 had no memory of assisting them, and the clients claimed they had not been given the Safe Deposit Box Lease. The court held that the issue of whether the clients received the separate document must be resolved before it could be properly determined whether the arbitration agreement was enforceable. Thus, the court vacated the order compelling arbitration and remanded the case to the district court for further proceedings.

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Some Arbitration Required: When Bankruptcy Can Wait [BKR ED LA]

Six affiliated corporations (the "debtors") filed for chapter 11 bankruptcy. The corporations were holding companies for various residential real estate properties. Under the confirmed bankruptcy plan, the liquidating trustee sold the physical assets of the debtors. The proceeds of the sale, remaining causes of action, and insurance claims were held in a liquidating trust, which would be distributed in accordance with the chapter 11 plan. Before the plan had been confirmed, the debtors had sued their insurers "seeking coverage under a commercial property insurance policy and asserting statelaw claims associated with damage resulting from Hurricane Ida including breach of contract and bad faith." The commercial property insurance policy contained an arbitration clause. The insurers moved to compel arbitration and to stay or, alternatively, dismiss the proceedings, arguing that the arbitration clause had to be enforced. The liquidating trust opposed the motion and claimed that arbitration would interfere with the liquidation proceedings.

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In **In re Westbank Holdings**, 58 B.R. 879 (Bankr. E.D. La. 2024), the court granted the insurers' motion to compel arbitration. First, the court stated that generally, federal courts will uphold arbitration clauses "unless the party opposing arbitration can show that its position is supported by a congressional command that supersedes the direction of the Federal Arbitration Act (FAA)." In re Mirant Corp., 316 B.R. 234; 237 (Bankr. N.D. Tex. 2004). Notably, "fulfilling the purpose of the Bankruptcy Code" is such a congressional command when the claims are considered "core" under 28 U.S.C. § 157(b). A "core" claim "invokes a substantive right provided by title 11 or... could arise only in the context of a bankruptcy case." Wood v. Wood (In re Wood), 825 F.2d 90; 97 (5th Cir. 1987). Here, the court found that the debtor's claims were not "core" claims because its causes of action originated before the bankruptcy case and, thus, would have arisen without the bankruptcy proceedings. The fact that the claims were significant to the creditors does not make them "core." Second, under equitable estoppel, the court held that the liquidating trustee must arbitrate all claims alleged in the initial petition with the insurers in a single arbitration proceeding and that the current proceeding would be stayed until the arbitration was completed. The court reasoned that all claims made were "inextricably tied" by identical language in all documents, so separate arbitration proceedings would waste resources and potentially render inconsistent results.

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BANK ROBBERY

Near Minimum Punishment for Repeat Bank Robber Found "Reasonable" [11TH CIR]

A man ("the appellant") entered a bank holding a cardboard box and a note that said, "pay me 20,000 NOW Hurry I got a bomb." He passed the note to the teller, who placed cash, bait bills, and a GPS tracker into the box. The appellant left the bank and was pursued by law enforcement using the GPS. During the arrest, the cardboard box was found in his car. Subsequently, he was charged with bank robbery and was found guilty. The advisory guidelines ranged from 57 to 71 months for this charge, and the defense requested the minimum. The government requested a sentence upward of 94 months based on the endangerment of law enforcement during the car chase and the fact that the appellant had a prior armed robbery conviction. However, the district court rejected both proposals and sentenced the man to 60 months imprisonment. The district court emphasized that the present robbery was distinguishable from his past robbery because he had neither used violence or been armed, and therefore, a less severe punishment was justified.

In **United States v. Everett**, No. 23-11532, 2024 WL 3027885, 2024 U.S. App. LEXIS 14661 (11th Cir. June 17, 2024) (opinion not yet released for publication), the United States Court of Appeals for the Eleventh Circuit upheld the 60-month sentence for a repeat-offender convicted of bank robbery. The appellant argued that the district court's sentence was substantially unreasonable. The appellant's argument relied primarily on his circumstances he was "relatively young" and was a caretaker for two minor children and his grandmother. He suggested that the financial stress of his circumstances caused him to resort to robbery, calling his actions "a hasty, just impulsive, horrible, poor decision." The Eleventh Circuit noted that the sentencing court must weigh the "nature and circumstances of the offense and the history and characteristics of the defendant, as well as the sentences available, [and] the applicable Guidelines range." However, the district court had the discretion to attach different weights to different factors, such as adding weight to the appellant's criminal history: Additionally, the district court did not have any duty to list and analyze each factor and how it factored into their sentencing. Functionally, this means that the district court owed little explanation and had broad discretion in dealing with sentencing matters; it needed only to acknowledge what it considered to be a mitigating factor. The district court complied with this requirement by noting that circumstances, including the appellant's arguments and his previous criminal record, were considered when making the sentence. Further, the Eleventh Circuit emphasized that due to the discretion given to district courts, ordinarily, a sentence within the advisory guidelines is presumed reasonable. Therefore, given the statutory maximum penalty of 20 years for such an offense, a 60-month sentence was a dispositive indicator of "reasonableness." Ultimately, the court affirmed the appellant's 60-month sentence because the sentencing court's decision was reasonable, and it complied with all requirements to justify the sentence.

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BANKING REGULATIONS

SCOTUS Breathes Life into a Challenge to the Fed's Debit Card Fees Final Rule [6TH CIR]

The corporation operated a pizza establishment that allowed customers to make payments using debit cards. Linney's Pizza, LLC v. Bd. of Governors of the Fed. Rs. Sys., No. 3:22-cv-00071-GFVT, 2023 WL 6050569, 2023 U.S. Dist. LEXIS 164203, at *1, *2 (E.D. Ky. Sept. 15, 2023).

The corporation was required to pay a percentage of each transaction to the debit card issuers. Id. Under the Durbin Amendment to the Dodd-Frank Act, the fees were "limited... to an amount 'reasonable and proportional' to the issuer's 'incremental costs' from processing debit payments." Id. at *2-3 (citing 15 U.S.C. §§1693o-2(a)(2)). The Board of Governors of the Federal Reserve System (the Board) issued a final rule that allowed debit card issuers to "receive interchange fees that do not exceed the sum of the permissible base component and the permissible ad valorem component... [t]he standard's base amount per transaction is 21 cents [t]he ad valorem amount is five basis points of the transaction's value "Id. at *3-4 (quoting 76 Fed. Reg. 43.396). The corporation challenged the final rule arguing that it "exceeds the Board's authority, is contrary to law, and is arbitrary and capricious." Id. at *4. However, before reaching the merits of the claim, the district court granted the Board's motion to dismiss because the proceeding allegedly had not commenced before the statute of limitations barred the claim. Id. at *1-2. All parties agreed that under 28 U.S.C. § 2401(a), the challenge to the final rule was "restricted by a six-year statute of limitations." Id. at *5. However, the parties disagreed as to whether the statute of limitations begins to run at the date of injury or the date the rule was promulgated. Id. Ultimately, the district court concluded that the corporation's "claim is untimely because it is bringing a facial challenge more than six years after the publication of the regulation at issue." Id. At *10. Additionally, the court rejected the corporation's equitable tolling argument because it "did not diligently pursue its rights." Id.. at *12; Therefore, the court dismissed the corporation's claims with prejudice. Id. at *13. The corporation appealed the dismissal after a recent Supreme Court case had clarified when the statute of limitations begins to run for final rule challenges.

In **Linney's Pizza, LLC v. Bd. Of Governors of the Fed. Rsrv. Sys.**, No. 23-5993, 2024 WL 4129195, 2024 U.S. App. LEXIS 22727 (6th Cir. Sept. 5, 2024) (opinion not yet released for publication), the Sixth Circuit vacated the district court's holding and remanded the case. The court noted that the Supreme Court had recently held that the statute of limitations for challenging regulations "begins to run on the date of injury, not when the challenged regulation issues." Corner Post, Inc. v: Bd. Of Governors of the Fed. Rsrv. Sys., 144 S.Ct. 2440, 2460 (2024). Therefore, the district court's dismissal had to be vacated and the case remanded to determine whether the corporation's claim was barred under the "date of injury" standard.

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BANKRUPTCY

A Broad Reading of the Anti-Modification Principal Residence Rule [11TH CIR]

The mortgagor obtained a mortgage on her property in exchange for a security deed, which required her to "occupy, establish, and use the property as her principal residence." Additionally, the security deed gave the bank the power to foreclose if the mortgagor defaulted. Afterward, the mortgagor defaulted and filed for Chapter 11 bankruptcy. Thus, under 11 U.S.C. § 362(a), an automatic stay was triggered, preventing creditors from enforcing debts owed. The bank requested relief from the automatic stay to foreclose on the mortgagor's property. The bank argued that the mortgagor's reorganization plan could not be confirmed because of the anti-modification provision of 11 U.S.C. § 1123(b)(5), which provides that a reorganization plan may not modify "a claim secured only by a security interest in real property that is the debtor's principal residence." Case law establishes that "the security interest must be in real property... the real property [must] be the only security for the debt. [and] the real property must be the debtor's principal residence." In re Wages, 508 B.R. 161, 165 (B.A.P. 9th Cir. 2014). The mortgagor argued that this provision was inapplicable because the property was "primarily farmland," and their residence only took up a minute section of the property. However, the bankruptcy court concluded that 11 U.S.C. § 1123(b)(5) did not require the mortgagor to use the entire property as her principal residence. The mortgagor appealed to the district court, arguing that the bank should not have been granted relief from the automatic stay because "the anti-modification provision 'does not apply to mixed-use properties where the debtor resides in part of the property and derives business income from other parts of the property.'" The district court affirmed the bankruptcy court's decision, and the mortgagor appealed to the United States Court of Appeals for the Eleventh Circuit. The court had to determine whether the anti-modification provision applied to the bank's security interest.

In **Lee v. United States Bank N.A.**, 102 F.4th 1177 (11th Cir. 2024), the appellate court affirmed the district court's ruling. The court found that the anti-modification provision was applicable because the bank's interest was secured in the mortgagor's property, there was no additional security, and the property was the mortgagor's principal residence. 11 U.S.C. § 1123(b)(5). The mortgagor advanced two alternative approaches

that would have rendered the provision inapplicable. First, the court rejected what has been referred to as the "Scarborough" approach (which required that property be used exclusively as a primary residence, nothing else) adopted by some other courts. Instead, it adopted a plain-meaning interpretation of the statute. It determined that an ordinary reader would not understand the word "is" to mean "only or exclusively" when used in the phrase "real property that is the debtor's principal residence." 11 U.S.C. § 1123(b)(5). Further, the court reasoned that "is" is a conjugated form of "be," which means "to belong to any given class or group, or to have exhibited a given quality or characteristic." Webster's II New Riverside Dictionary 159. The court also reasoned that having an "equal meaning or identity does not mean the thing being described only or exclusively has that meaning or identity and no other." Furthermore, the court cited amendments by Congress defining "'debtor's principal residence to include 'incidental property,'" which rejects the Scarborough exclusivity approach. Second, the court rejected a totality-of-the-circumstances approach, which looks to the "'predominant character of the transaction and what the lender bargained within the scope of its lien' so that the court may classify property as 'commercial property' or 'real property' used as the debtor's residence."' The court found that the approach was not "grounded in the language of 11 U.S.C. § 1123(b)(5)." Ultimately, the court concluded that the requirements were met for the anti modification provision to apply and affirmed the lower court's decision to grant the bank relief from the automatic stay.

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Right to Royalty: Unjust Enrichment Issue Remanded to Bankruptcy Court [3RD CIR]

The debtor, an "extractor and seller of oil and gas," leased property to operate its wells. After the debtor filed for bankruptcy, the owners of the properties the debtor leased (the "lessors") sued the debtor's estate for eight years of unpaid royalties. As their remedy, the lessors sought the establishment of constructive trusts to hold their proceeds and exclude them from the debtor's estate before the bankruptcy court resolved the matter. The bankruptcy court held that because the lessors' unpaid royalties were part of the debtor's estate, the lessors' claims were "unsecured" and "non-priority," and the district court affirmed. The lessors then appealed to the Third Circuit to determine whether they had a right to the unpaid royalties and, if so, what remedy was appropriate.

In **In Re USRA Operating Co., LLC**, No. 22-1729, 2024 WL 277457, 2024 U.S. App. LEXIS 1777 (3rd Cir. January 25, 2024) (unpublished opinion), the court vacated the lower court's decision and remanded the matter. First, the court considered whether the royalties were a part of the debtor's estate. The Bankruptcy Code states that "[i]f a debtor holds only legal title to but not an equitable interest in property, that property will not become part of the debtor's bankruptcy estate." 11 U.S.C. § 541(d). Additionally, Colorado law provided that when the debtor leased the land, the lessors received a "real property interest" in the royalties. Thus, the debtor has property "that equitably belongs to another," and the Bankruptcy Code "provides that such property should not be disbursed to creditors along with the debtor's own." Second, the court considered whether a constructive trust was an appropriate remedy for the lessors. The court applied Colorado law because the royalties were not subject to federal statutes or agency oversight. With that determination, the court ruled that the legal remedy of a constructive trust was obtainable as a remedial measure to prevent unjust enrichment of the debtor if the debtor were allowed to benefit from the lessors' property. However, the court placed the burden of finding and tracing trust property on the lessors. Based on that reasoning, the court vacated the district court's decision and remanded the case to the bankruptcy court for further proceedings to determine whether each lessor could be awarded the remedy of a constructive trust.

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EFTA

The Electronic Transfer Funds Act's Relationship with Financial Institutions [6TH CIR]

A scam called "SIM Swap" victimized a telephone company, enabling scammers to access the data of numerous subscribers of the telephone company, including the subscribers' bank details. The scammers used these bank details to make unauthorized financial transactions. As a result, the subscribers then contacted their banks to challenge the unauthorized charges. Under the Electronic Funds Transfer Act (EFTA), the bank had to reimburse numerous customers for unauthorized electronic fund transfers due to the SIM Swap scam. The bank filed a suit against the telephone company, claiming that it was entitled to indemnification and contribution from the telephone company, which had failed to safeguard its subscribers from the scam. In response, the telephone company moved to dismiss the claims, arguing that (1) neither indemnification nor contribution is permitted under the EFTA; (2) the Michigan Electronic Funds Transfer Act (MEFTA) is

"expressly preempt[ed] by the EFTA; and (3) state common-law claims for indemnification or contribution are preempted by the EFTA. The district court granted the telephone company's motion to dismiss. The bank appealed to the Sixth Circuit.

In **Mich. First Credit Union v. T-Mobile USA, Inc.**, 108 F.4th 421 (6th Cir. 2024), the Sixth Circuit affirmed the district court's dismissal. The court reasoned that by looking at the plain language and purpose of the EFTA, it was clear that the EFTA does not contain an express or implied right to indemnification or contribution. Congress passed the EFTA to benefit and "protect individual consumer rights," not financial institutions. Additionally, the court found no basis in federal common law to provide for an indemnification or contribution claim in an EFTA action. Next, the Consumer Financial Protection Bureau (CFPB), the entity responsible for making EFTA preemption determinations, already recognized that the EFTA preempts the provisions of the MEFTA that may impose liability on negligent customers for unauthorized transactions. Therefore, the bank was not liable for failing to comply with MEFTA due to the preemption. The court noted that this defeated the bank's claims since, under state law, a plaintiff has no right to indemnification or contribution if it is not liable in the underlying action. Finally, the court recognized that federal law preempts state law, and allowing the bank to pursue a state-law claim for liability suffered under federal law contradicted the EFTA's purpose and its existing comprehensive scheme.

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FRAUDULENT TRANSFER

Court Rejects Motion for Judgment on Pleadings: Good Faith Must be Investigated Through Discovery [BKR SD NY]

The principal was the "sole member and manager of the [d] ebtor." The principal entered into a lease agreement for an apartment with two corporations in his individual capacity. After discovering that the principal had misappropriated client funds, the creditors sought to put the debtor into an involuntary Chapter 7 bankruptcy. Additionally, the principal had pled guilty to the misappropriation of funds. The court appointed a trustee who sued the principal and one of the corporations to recover allegedly fraudulent transfers made between the debtor and the corporations. The corporations moved to dismiss and filed a motion for judgment on the pleadings "based on defenses including holder in due course, good faith, fair consideration, and in pari delicto."

In **Togut v. Roe Le Triomphe Assocs. LLC (In re Kossoff PLLC)**, No. 21-10699 (DSJ), 2024 WL 1715011, 2024 Bankr. LEXIS 945 (Bankr. S.D. N.Y. April 19, 2024) (opinion not yet released for publication), the court denied the corporations' motion to dismiss except for the trustee's unjust enrichment claim. First, the court addressed whether the corporations were holders in due course. Under New York law, the corporations were required to demonstrate that they had received the disputed funds without notice of the wrongdoing and in good faith. N.Y.U.C.C. § 3-302. The court found that whether the corporations had actual knowledge of wrongdoing was unknown, and additional fact-finding was necessary; therefore, the holder in due course argument must be denied. Second, the court applied similar reasoning in denying the movants' good faith defense, claiming discovery was needed to determine if the movants were unaware of wrongdoing. Third, the court addressed whether the defense of fair consideration was sufficient to dismiss some of the trustee's claims. The court reasoned that the lack of good faith on the part of the movants served as the basis for denying their fair consideration argument. Under statutory and case law, good faith is an element required for fair consideration, and "showing an absence of one element is sufficient to survive a motion to dismiss." Because the trustee "adequately plead[] a lack of fair equivalent value," the court declined to dismiss the trustee's claims under the defense of fair consideration. Finally, the court considered the trustee's unjust enrichment claim. The corporations assert several defenses, including that the claim was timebarred, the Wagoner rule, and the in pari delicto defense. The court found that the applicable statute of limitations was only three years, which time-barred a substantial amount of the claims. In addition, the court dismissed the unjust enrichment claim, citing the Wagoner rule, which provides that "a trustee, who stands in the shoes of the debtor, lacks standing to recover for a wrong that the debtor participated in." In re Bernard L. Madoff Inv. Sec. LLC., 721 F.3d 54, 63 (2d Cir. 2013). Therefore, the principal's misconduct was imputed to the debtor and prevented the trustee from seeking to recover from the corporations. The court also justified the dismissal under the doctrine of in pari delicto, which bars a wrongdoer from recovering "from another party whose equal or lesser fault contributed to the loss" if the damages are a "result of its own intentional wrongdoing." Picard v. HSBC Bank PLC, 454 B.R. 25, 29 (S.D.N.Y. 2011). Ultimately, the court held that only the unjust enrichment claim could be dismissed at this stage.

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LENDING

Contract Interpretation Allows Debtor to Escape Accelerated Collection from Junior Trustee [TX APP]

The debtor was a corporation that operated an assisted living facility firm. The debtor borrowed $44 million from the earnings of four bond sales to finance the construction of an assisted living facility. The debtor's owner and president personally guaranteed the payments. Periodic payments for the loan were due on the first of June and December until the bonds reached maturity. Bank 1 was the Master Trustee of the loan, and Bank 2 became the Noteholder Representative (the trustees). The loan documents between the debtor and the trustees defined multiple conditions as "events of default" that would require the debt to be paid immediately. A payment dispute arose between the debtor and the construction firm it had hired to build the facility. The construction firm alleged that the debtor owed $1 million more than was agreed upon, resulting in the construction firm filing a lien against the debtor in March 2019. This event led Banks 1 and 2 to send a letter to the debtor stating that the construction lien constituted an event of default and that if the debtor failed to pay the lien within 30 days, an accelerated debt collection would occur. After 30 days, the banks notified the debtor that the amount due had been sent to collections and that Bank 1 would resign as trustee, appointing Banks 3 and 4 as co-trustees in its stead. The co trustees sought to sell the property at a foreclosure sale, and the debtor sued to prevent the sale. The co-trustees counterclaimed, and Bank 2 filed a separate lawsuit against the debtor and its owner, which the court consolidated into one case. The trial court granted summary judgment for the co-trustees and Bank 2 and imposed damages on the debtor and its owner. On appeal, the court addressed (1) whether the appointment of the co-trustees was proper, (2) if Bank 2 had the capacity to sue, (3) if Bank 2 could enforce the guarantee contract, (4) whether Bank 2 had properly accelerated the debt, (5) whether the debtor's claims were validly dismissed under Tex. R. Civ. P. 166(g), and finally (6) attorney's fees.

In **Senior Care Living VI, LLC v. Preston Hollow Cap., LLC**, 695 S.W.3d 778 (Tex. App.-Houston [1st Dist.] 2024), the appellate court affirmed the trial court's decision that the appointment of the new cotrustees was valid under the loan documents and that Bank 2 had standing to sue. Additionally, the appellate court reversed the decision to approve an accelerated collection of debt after concluding that the debtor did not receive adequate notice. The court's approach in deciding the issues was grounded in its construction of the terms within the multiple loan documents signed between the debtor and its trustees. First, the court held_ that Bank 3 and 4 were properly appointed as co-trustees because the loan documents specifically allowed Bank 1 to resign and select a new trustee, even without the debtor's consent. Second, the court affirmed that Bank 2 had the capacity to bring suit on behalf of itself and junior bondholders according to the loan documents and Bank 2's pleadings. The debtor argued that Bank 2 had failed to meet the condition precedent of "provid[ing] written notice to the Master Trustee that it would exercise the rights" in the loan documents. However, the court found that no such condition precedent existed, and Bank 2 complied with the requirements of the loan document. In addition, the court found nothing in the loan documents that limited Bank 2 from suing only on behalf of senior bondholders. Thus, Bank 2 had standing to sue on behalf of the junior bondholders. Third, the court held that Bank 2 could not enforce the guaranty contract against the debtor's owner because it was not a "[g]uaranteed party" under the contract terms. The court noted that such a contract "may not be extended beyond its precise terms by construction or implication." Reece v. First State Bank of Denton, 566 S.W.2d 296, 297 (Tex. 1978). Next, the court held that the debt had not been properly accelerated. Its decision rested on the fact that the notices sent to the debtor were too ambiguous. Furthermore, the court emphasized that except in cases where the notice sent is "clear and unequivocal," it would construe any notice of acceleration of debt in a manner to avoid the acceleration of debt. Schuhardt Consulting Profit Sharing Plan v. Double Knobs Mt. Ranch, Inc., 468 S.W.3d 557, 571 (Tex. App.--San Antonio 2014, pet. denied). The court also found that the lower court properly dismissed the debtor's claims for "conversion and money had and received" under Rule 166(g) because the debtor could not raise a fact issue on any of its claims. Finally, the court vacated the award of attorney's fees to Banks 2,3,4.

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REPOSSESSION

Conflict with a Repossession Agent? File a FCDPA and Torts Claims [ND TX]

The debtor purchased a vehicle and financed it through a financing agreement with the lender. Fuller v. CIG Fin., LLC, 2022 WL 4071964, 2022 LEXIS 159469, at *2 (N.D. Tex. Sept. 2, 2022). In October 2019, the debtor agreed to pay his monthly payment at the end of the month due to personal

circumstances. Id. The debtor received two notices that he must continue making monthly payments in order to remain compliant with the financing agreement. Id. The notices provided that if he failed to make payments, the lender would proceed under the financing agreement as if the debtor had defaulted. Id. He received the first notice in November and made that month's payment on November 30th. Id. The debtor received the second notice on December 30th. Id. On December 31st, an agent from a repossession company hired by the lender attempted to repossess the vehicle. Id. The debtor objected to the attempted repossession several times over several hours and even physically attempted to stop the repossession. Id. During the attempt, the debtor alleges that the agent's actions caused the debtor to become injured as a result of the vehicle's movement. Id. The debtor brought claims under the Fair Debt Collection Practices Act (FDCPA) and related Texas law against the lender. The debtor also claimed negligent hiring, retention, and supervision for willful, wanton behavior, battery, and intentional infliction of emotional distress ("IIED"). The lender moved to dismiss the claims under Fed. R. Civ. P. 12(b)(6) for failure to state a claim for which relief could be granted and alternatively under Rule 12(e) for a more definite statement as to the debtor's battery claim.

In **Fuller v. CIG Fin., LLC**, No. 3:22-CV- 1289-D, 2023 WL 146251, 2023 U.S. Dist. LEXIS 4045 (N.D. Tex. Jan. 10, 2023) (unpublished opinion), the court granted in part and denied in part the lender's motion to dismiss and denied the lender's alternative motion. First, the court found that the debtor plausibly pled FDCPA and related Texas law claims and denied the lender's motion to dismiss these claims. The FDCPA is violated when a debt collector takes or threatens to take "nonjudicial action to effect dispossession or disablement of property" when there is "no present right to possession of the property claimed as collateral through an enforceable security interest." 15 U.S.C. § 1692f(6)(A). Whether there is a present right to possession of the property is determined by relevant state law. Under Texas law, the present right to possession exists after a default, and a secured party may take possession without the court's involvement so long as it does not breach the peace. Tex. Bus. & Com. Code Ann. § 9.609. Ifa debt collector breaches the peace while attempting to repossess property, the collector no longer has a right to repossess under FDCPA. Whether there was a breach of the peace may be determined by whether a confrontation occurred between the debtor and the repossession agent and whether the debtor objected before the agent removed the vehicle. The court found that, accepting the factual allegations as true, because the debtor objected and the agent continued to attempt repossession, the peace was breached, meaning there was no longer a present right to possession by the agent. Therefore, the debtor had a plausible claim that the FDCPA had been violated. Second, the court denied the lender's motion to dismiss the debtor's negligent hiring, retention, and supervision claims for "willful, and wonton behavior." In Texas, a party can be liable for the negligent hiring of an independent contractor. Long v. Assocs. Commercial Corp., 744 S.W.2d 209, 213 (Tex. App.-Texarkana 1987, writ denied). In order to prevail on this claim, Texas law requires that the debtor have suffered "some damages from the foreseeable misconduct of an employee hired pursuant to the [lender]'s negligent practices." Wansey v. Hole, 379 S.W.3d 246,247 (Tex. 2012). The court found that the debtor plausibly pled that the lender should have known that the repossession company it hired had a history of "objectionable repossession practices" because a simple inquiry into the company would have revealed such practices due to the several public complaints made. Additionally, the court noted that an employee of the lender was on the phone with either the debtor or an agent for the majority of the time during the attempted repossession, strengthening the lender's connection with the independent contractor. The court then denied the lender's motion to dismiss the debtor's battery claims. In order to prevail on a battery claim, the offending party does not have to intend to injure, but simply intend bodily contact, City of Watauga v. Gordon, 434 S.w.3d 586, 592 (Tex. 2014). Additionally, an employer may be vicariously liable for a battery when the battery is "committed in the accomplishment of a duty entrusted to [an] employee." G.T. Mgmt. Inc. v. Gonzalez, 106 S.W.3d 880,884 (Tex. App.-Dallas 2003, no pet.). The court found that the debtor plausibly pled a battery claim by alleging that the repossession agent intended to move the vehicle in a manner that caused contact between it and the debtor's body. Additionally, the court found that the debtor plausibly pled an agency relationship between the lender and the repossession agent. Next, the court granted the lender's motion to dismiss the debtor's IIED claims. The court reasoned that "'[w]here the gravamen of [a party]'s complaint is really another tort, intentional infliction of emotional distress should not be available.'" Hoffman-La Roche, Inc. v. Zeltwanger, 144 S.W.3d 438,447 (Tex. 2004). Here, the court found that the debtor failed to allege any additional or separate acts that were not pled for his other claims. Finally, the court denied the lender's Rule 12(e) motion as to the battery claim, holding that the debtor's battery claim included adequate detail and was "not so vague that [the lender could not] reasonably be required to frame a responsive pleading."

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SECURITY INTEREST

Run, Don't Walk to Perfect Your Security Interest [BKR ND IL]

The creditor entered into an agreement with the debtor for the sale of goods which afforded it a security interest in the debtor's property. The creditor then sued the debtor in state court and received a judgment against the debtor in the form of an Asset Freeze Order. The debtor filed for chapter 11 bankruptcy, seeking relief from multiple creditors. The creditor then sought to pursue its security interest in the debtor's assets. The creditor had not perfected its security interest by filing a financing statement with the Illinois Secretary of State before the debtor had filed for bankruptcy. The debtor filed a complaint in a bankruptcy adversary proceeding to determine the validity, priority, and extent of the creditor's interest. The creditor claimed the issue of perfection was not within the purview of the debtor's complaint and argued that the state court's judgment should have perfected its security interest. The creditor also argued that the state court's judgment should have provided a basis for creating an equitable lien. Lastly, the creditor argued that the Rooker-Feldman doctrine precluded the court from reviewing the state court's holdings.

In **IYS Ventures, LLC v. Itria Ventures, LLC (In re IYS Ventures, LLC)**, No. 23 B 6782, 2024 WL 3548245, 2024 Bankr. LEXIS 1727 (Bankr. N.D. Ill. July 25, 2024) (opinion not yet released for publication), the court entered judgment for the debtor and held that the creditor had an unperfected security interest and was subordinate to the debtor's status as a hypothetical lien creditor. First, the court noted that it was necessary to identify whether the creditor's claim was perfected to establish its priority among the multiple creditors. Because the creditor had not filed a financing statement, it had not perfected its security interest. Additionally, the debtor was considered a debtor-in-possession and had the "rights and powers of a trustee." 11 U.S.C. § 1107(a). Therefore, the debtor "can defeat an unperfected lien interest... due to its status as a hypothetical lien creditor." This meant unsecured interests were subordinate to the debtor's status, and they could avoid the unperfected interests. Second, the court rejected the creditor's argument that the state complaint or Asset Freeze Order was a substitute for filing a financing statement. Next, the court declined to create an equitable lien because the creditor had not attempted to perfect its interest using available methods. Regardless, even if the court had created an equitable lien. it would be unperfected and subordinate to the rights of the debtor-in possession. 11 U.S.C. § 544. Finally, the court held that the Rooker-Feldman doctrine was inapplicable. The doctrine would prevent the debtor from "seeking to have a state-court judgment declared void." Schmid v. Bank of America, NA. (In re Schmid), 494 B.R. 737, 746 (Bankr. W.D. Wisc. 2013). Because the debtor was not seeking to set aside the state court's judgment but instead was seeking a determination of the validity, priority, or extent of the creditor's interest, the claim could not be barred under the doctrine. Therefore, the court concluded that the creditor's lien was not perfected, its debt was unsecured, and was subordinate to the debtor's status as a hypothetical lien creditor.

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Who's Entitled to the Title? [OH APP]

The creditor entered obtained a secured promissory note from the debtors. The security agreement established that the promissory note was secured by the debtor's current motor vehicles and any after-acquired motor vehicles. The debtors, which were four related parties, failed to pay the creditor a total of $180,000. The court ruled that the creditor was entitled to all the collateral, including the vehicle. Subsequently, the creditor moved for an order directing the county clerk of courts to issue a motor vehicle title identifying the creditor as the legal owner. The motion also included an affidavit that stated the creditor had repossessed the vehicle and a Virginia certificate of the title that seemed to show that the vehicle was titled to one of the debtors. The trial court denied the motion, stating that the collateral agreement was invalid because the debtors did not have legal ownership of the vehicle at the time of the agreement.

In **Kasha Foods, LLC v. Diamantopoulos**, No. 13-24-04, 2024 WL 3651679, 2024 Ohio App. LEXIS 2791 (Ohio Ct. App. Aug. 5, 2019) (opinion not yet released for publication), the appellate court affirmed the trial court's denial of the creditor's motion to order the issuance of a certificate of title in the truck but disagreed with its reasoning. The court noted that under Ohio law, it was permissible for a collateral agreement to include property not yet owned by the creditor. Thus, the trial court's holding that the collateral provision was unenforceable was erroneous. However, the court found that the creditor had not shown entitlement to relief. The court stated that R.C. 4505.10 provided the appropriate means for obtaining a certificate of title. First, the creditor could surrender the previous certificate of title to the court or provide "satisfactory proof to the clerk of ownership and rights of possession to the motor vehicle." Id. Alternatively, if the clerk finds the information insufficient, the creditor could have submitted

its evidence to the registrar of motor vehicles for approval. Id. Then, if a certificate has still not been issued, the creditor has the right to petition the court directly. Id. Here, the creditor failed to comply with R.C. 4505.10(A). There was no evidence that the creditor had been declined a certificate by the clerk or the registrar of motor vehicles, which is • a prerequisite to. petitioning the court. Therefore, the initial court did not err in denying the motion, and the court affirmed the judgment.

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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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