NORTH DAKOTA BANKERS ASSOCIATION

LEGAL UPDATE

A newsletter covering bank legal and compliance information.

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BANKRUPTCY

Appointment of Examiner is Mandatory Under 11 U.S.C § 1104(c) [3D CIR]

A company suffered a catastrophic decline in value, leading the owner to appoint a replacement CEO. The new CEO caused the company to file a Chapter 11 bankruptcy case. A criminal investigation exposed evidence of rampant fraud and embezzlement. The new CEO reported that the company's amount of cash when filing for bankruptcy was unknown due to a complete lack of "appropriate corporate governance" and numerous "cash management failures." The new CEO was able to locate and secure only a fraction of the digital assets, and the company was responsible for misappropriating close to $10 billion in customer assets. Afterward, the United States Trustee argued that under 11 U.S.C § 1104(c), the bankruptcy court was required to appoint an examiner to investigate the company's misconduct. Section l104(c) provides: "on request of a party in interest or the United States trustee, and after notice of a hearing, the court shall order the appointment of an examiner to conduct such an investigation of the debtor as is appropriate…" The statute requires that the appointment either be (l) in the interest of creditors; or (2) when "the debtor's the debtor's fixed, liquidated, unsecured debts, other than debts for goods, services, or taxes, or owing to an insider, exceed $5,000,000." The United States Bankruptcy Court for the District of Delaware denied the United States Trustee's motion, based on its interpretation that the phrase "as is appropriate," granted it discretion to deny the motion despite the statutory requirements having been met. The U.S. Trustee appealed the bankruptcy court's decision.

In In re FTX Trading Ltd., 91 F.4th 148 (3rd Cir. 2024), the United States Court of Appeals for the Third Circuit held that under §1104(c)(2), a court must grant a U.S. Trustee's motion to appoint an examiner if the minimum statutory requirements are met. Looking at the statute's plain language, Congress's use of the word "shall," referring to the appointment of an examiner, "creates an obligation impervious to judicial discretion." Thus, "shall" is interpreted as "must," which compels the court to follow the statute's directive regardless of its opinion. Next, the court interpreted the phrase "as is appropriate" under the last antecedent rule, which dictates that the qualifying words are applied to the phrase that immediately follows. Therefore, "as is appropriate" gives the court discretion to dictate the extent of the examiner's investigation but not discretion on whether to appoint an examiner. Furthermore, the court determined that because Congress used "as is appropriate" and not "if appropriate," that further solidified that the phrase was meant to apply to what immediately follows. In reviewing the congressional records, the court found that subsection 1104(c)(2) was "enacted to protect the public interest in larger bankruptcy cases" and refusal to "give effect to the mandatory language" regarding the appointment of an examiner would result in "a failure to give effect to the legislative intention." Finally, the court dismissed the company's argument that an examiner's investigation would be "duplicative and wasteful." The court distinguished the investigation conducted by the new CEO and the investigation an examiner appointed under subsection 1104(c)(2) would conduct. The appointed examiner would be "disinterested," and the findings would be made public. This, the circuit court reasoned, is crucial to protect the public's interest as well as the creditors and debtors impacted by the bankruptcy. Here, there remained concerns of conflicts of interest within the company's leadership, and the company's leadership was not obligated to publicize the results of their investigation.

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Colorado Oil and Gas Royalties in the Possession of a Debtor Are the Real Property of Their Claimants and Never Enter the Bankruptcy Estate [3D CIR]

Claimants of Colorado oil and gas royalties sued a debtor in bankruptcy. The claimants contended that the debtor owed them unpaid royalties and (1) that were not unsecured creditors, but rather they had a real property interest in these proceeds, and (2) there should be a constructive trust to hold the unpaid royalties. The bankruptcy court and district court both found that the royalties were property of the debtor's estate, and thus, the claimants were simply unsecured debtors.

In In re Ursa Operating Co., LLC, No. 22-1729, 2023 WL 8295931, 2023 U.S. App. LEXIS 31759 (3d Cir. Dec. 1, 2023) (unpublished opinion), the court reversed and found that the royalties were not part of the debtor's estate and thus the royalties should be placed in a constructive trust for the claimants. Colorado statutory law provides that when an individual reserves a royalty interest in minerals, as the claimants did here, they obtain a real property interest and maintain equitable title in the interest. Further, if the person holding legal title to property would be unjustly enriched by being permitted to keep the property, a constructive trust can be imposed. The court remanded the case so the claimants could have the opportunity to identify the claimed funds. Lastly, in response to the debtor arguing that a Debtor-in-Possession Financing Order previously entered in the case precluded the claimants from challenging the bankruptcy estate, the court reasoned that the Order did not apply because this property was never part of the estate.

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CFPB

District Court Grants Nationwide Injunction of the CFPB's Small Business Lending Rule Under the Equal Credit Opportunity Act [SD TX]

The Consumer Financial Protection Bureau (the Bureau) issued the Small Business Lending Rule Under the Equal Opportunity Act (the Final Rule), which required covered financial institutions to collect and report data on credit applications for small businesses to the Bureau. Covered financial institutions sought to set aside the final rule in light of the Fifth Circuit's recent decision that had held that the Bureau's funding structure was unconstitutional and vacating a rule. Multiple financial institutions intervened and requested a nationwide preliminary injunction staying the final rule without limitation, pending the U.S. Supreme Court's review of the Fifth Circuit's recent decision.

In Tex. Bankers Ass'n v. Consumer Fin. Prot. Bureau, No. 7:23-CV-00144, 2023 WL 8480105, 2023 U.S. Dist. LEXIS 222243 (S.D. Tex. Oct. 26, 2023) (unpublished opinion), the court granted the motion for a nationwide preliminary injunction. The court first assessed whether the preliminary injunction should extend to the intervenors. The Bureau argued the intervenors had failed to prove the "substantial threat of irreparable injury" prong of injunctive relief. However, the court determined that the financial institutions had provided evidence of both their expectations of the costs incurred in complying with the final rule and of compliance costs already incurred, which were more than de minimus and unrecoverable. Thus, the financial institution intervenors proved irreparable harm and showed their entitlement to preliminary injunctive relief. Next, the court determined whether it should extend the preliminary injunction nationwide. The court identified two circumstances in which a nationwide injunction would be justified: (1) "a constitutional command for uniform laws" and (2) a "concern that patchwork rulings would undermine an injunction limited to certain jurisdictions." The court found that a statutory command for uniformity with constitutional implications existed because the statute underlying the final rule was designed for equal application of lending laws to all credit applicants to avoid disparate outcomes. Stated differently, the statutory framework presumes uniform application to all covered financial institutions. The court found that these circumstances justified extending the preliminary injunctive relief to all financial institutions covered by the final rule. The court stated that limiting the injunction would both undermine the goals of preventing inequality in lending and harm the constitutional structure currently pending U.S. Supreme Court review. The court ordered the Bureau to cease implementing and enforcing the final rule against the covered financial institutions pending the Supreme Court's decision.

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The Consumer Financial Protection Bureau Cannot Include Disparate-Impact Discrimination as an Unfair, Deceptive, or Abusive Act or Practice [ED TX]

Discrimination as an Unfair, Deceptive, or Abusive Act or Practice [ED TX]

The Dodd-Frank Act (the Act) prohibits companies from engaging in unfair, deceptive, or abusive acts or practices (UDAAP). The Act also tasked the Consumer Financial Protection Bureau (the CFPB) with enforcing this law. The Bureau determined that companies discriminating against protected classes counted as having engaged in UDAAP. Accordingly, on March 2022 it updated the UDAAP portion of its supervision and examination manual to include examination for UDAAP. Several trade associations sued the Bureau, claiming that (1) compliance with the UDAAP provisions would inflict significant costs, (2) the rule was invalid because the agency's funding violated the Appropriations Clause, (3) the UDAAP provisions exceeded the Bureau's statutory authority, (4) the actions of the CFPB had been arbitrary and capricious, and (5) CFBP had failed to comply with the notice and comment requirements of the Administrative Procedures Act. In response, the CFPB moved for summary judgment, arguing that (1) the CFPB had sovereign immunity from suit, (2) the trade associations lacked standing, and venue was improper, and (3) that the trade associations' non-constitutional claims were invalid.

In Chamber of Commerce of United States of Am. v. Consumer Fin. Prot. Bureau, No. 6:22-CV-00381, 2023 WL 5835951, 2023 U.S. Dist. LEXIS 159398 (E.D. Tex. Sept. 8, 2023) (opinion not yet released for publication), the court granted summary judgment for the trade associations and held that the CFPB's discrimination rule was invalid. First, the court found that the CFPB did not have federal sovereign immunity because this rule was a final agency action. Thus, it fits within an Administrative Procedure Act immunity waiver of sovereign immunity. Second, the court found that because the trade associations had identifiable members who were harmed by this rule, they had standing to bring suit. Additionally, the venue was proper because a trade association member was an Eastern District of Texas resident. Third, with no discussion, but based on the CFPB's concession, the court found that the agency's funding violated the Appropriations Clause of the United States Constitution. Fourth, the court determined that the CFPB had exceeded its authority under the Dodd-Frank Act in amending its supervision requirements. The court noted that Congress rarely prohibits disparate-impact discrimination, and that had Congress granted the CFPB this authority, that grant of authority would have sweeping state and federal impacts. Additionally, the major questions canon applied, which dictates that sweeping grants of power in legislation should be clear. Here, Congress did not clearly grant this authority. Accordingly, the court enjoined the Bureau from enforcing this rule against the trade associations.

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ECOA

Specific Explanation Needed Under Equal Credit Opportunity Act [MD TN]

A bank filed a motion to dismiss a loan applicant's (the applicant) suit against it, in which the applicant had alleged the bank had violated the federal Equal Credit Opportunity Act (ECOA), 15 U.S.C. § 169l(d). The applicant applied for and was denied a loan from the bank after the bank's loan officer (the officer) became aware that the applicant had recently been defrauded out of a large sum of money. The officer called the applicant to inform him that the bank would not be approving the loan application but did not provide the applicant with any explanation. The applicant received an Adverse Action Notice (the notice), which stated that the reason for the denial was that the bank did "not grant credit under [the] terms and conditions requested." The applicant's complaint alleged that the notice did not provide "specific reasons for the adverse action taken," as required by the ECOA. Further, the applicant argued that the bank violated the ECOA by attempting to rely on the oral reasons it claimed to have provided to the applicant. In the motion to dismiss, the bank argued (1) the complaint failed to state a claim for discrimination under the ECOA; (2) because of the reason for denial, the bank was not required to give notice under the ECOA; and (3) if notice were required, the notice it provided to the applicant was sufficient. The applicant's response argued that (1) the claim was that the bank violated the Section 1691(d) notice provision, which did not require the applicant to assert a discrimination claim; (2) the argument that notice is not required relies on facts not alleged in the complaint; and (3) the notice provided by the bank was not informative or specific enough to be sufficient.

In Copple v. S. Bank of Tenn., No. 3:22-cv-00692, 2023 WL 2531728, 2023 U.S. Dist. LEXIS 43488 (M.D. Tenn. Mar. 15, 2023) (opinion not released for publication), the U.S. District Court for the Middle District of Tennessee denied the bank's motion to dismiss. The court noted that the ECOA notice obligation serves to prevent discrimination by creating

accountability; however, it also serves to allow applicants to see deficiencies in their credit status. As such, a claim for violating the notice provision does not require a showing that the denial was discriminatory. Addressing the last of the bank's arguments, the court found that because the complaint alleged the denial was because the applicant had recently been defrauded, and the notice did not note that as the reason for denial, the notice was insufficient. The bank's failure to state the real reason on the notice had stripped the applicant of the opportunity to challenge or explain it. In addition, the court noted that the plaintiff had standing, although the parties had not raised the issue.

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EMPLOYMENT LAW

Discrimination Claims Require More Than a Scintilla of Evidence [5TH CIR]

An employee began work for her employer as a salesperson in January 2018. In 2019, the employer entered into an exclusive contract with the Texas Education Agency to provide certain services statewide. The employee claimed she played a crucial role in securing this contract. Under the employer's commission incentive, the employee claimed she was entitled to significantly more money than she had been paid. The employee brought her grievance to the employer's vice president, who told the employee that following the incentive plan would result in paying the employee more than the company's leadership. In 2020, the employer terminated the employee. The employee then brought this action, claiming violations of the Equal Pay Act, sex discrimination, and retaliation. The district court granted summary judgment in favor of the employer, and the employee appealed.

In Traudt v. Data Recognition Corp., No. 23-10498, 2024 WL 366168, 2024 U.S. App. LEXIS 2165 (5th Cir. Jan. 31, 2024) (unpublished opinion), the court affirmed the district court. First, the court stated that to establish a prima facie case of wage discrimination, the employee "must show that (1) her employer is subject to the Act; (2) she performed work in a position requiring equal skill, effort, and responsibility under similar working conditions; and (3) she was paid less than the employee of the opposite sex providing the basis of comparison." The court found that the employee failed to establish the second element because although she identified male employees with the same job title, the employee failed to show that her work was of the exact nature as the male counterpart. Second, the court assumed the employee had shown a prima facie case of discrimination but noted the employer had advanced a nondiscriminatory reason for discharging the employee: a widescale workforce reduction due to the COVID-19 pandemic. This shifted the burden back to the employee to offer "substantial evidence" to show the employer's reason was "merely pretextual." The employee offered evidence that the employer created a position to replace her following her discharge; however, the court held that the employee failed to meet her burden because the employer had hired a woman to fill this replacement position. Finally, the court noted that to establish a retaliation claim, the employee "must show (1) she engaged in protected activity, (2) she suffered an adverse employment action, and (3) a causal connection exists between the protected activity and the adverse employment action." The court held that the employee also failed to establish this claim. The employee's recounting of events showed that her confrontations with the vice president gave no indication of an inequity problem based on sex. The court held that the only reasonable interpretation of the employee's conversation with the vice president was that the company might not allow a sales representative to earn more than the vice president rather than that the pay difference was attributable to the plaintiff's sex. Accordingly, the court held that the employer was entitled to summary judgment on all claims.

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$366 Million Discrimination Verdict Reduced To $248,619.57 [5TH CIR]

A white employer disciplined an African American employee on three separate occasions before firing the employee. After each individual disciplinary incident, the employee filed internal complaints. The first complaint alleged discrimination, and the later complaints alleged retaliation for the discrimination complaint. The employee sued the employer sixteen months after being fired. The employment contract contained a limitations provision which required that any potential suit be brought within six months of the event complained of. The suit proceeded to district court, where the employee brought claims of discrimination and retaliation under 42 U.S.C. § 1981 and Title VII. The employer moved for summary judgment because the filing occurred outside the contractual sixmonth period, but the district court denied the motion for summary judgment and allowed the case to proceed. The employee called a human resource expert and presented evidence regarding discrimination and retaliation. The jury found for the employee and awarded a total of approximately $366 million. The employer appealed, alleging five separate claims: (1) the limitations provision barred

the § 1981 claims; (2) the employee did not sufficiently prove her retaliation claim; (3) compensatory damages should be limited; (4) the employee had not presented sufficient evidence for a finding of punitive damages, and therefore the punitive damage award should be limited; (5) the employer is entitled to a new trial based on erroneously admitted expert testimony.

In Harris v. FedEx Corp. Servs., 92 F.4th 286 (5th Cir. 2024) the court held in favor of the employer and held that the six-month limitation provision in the employment contract barred the § 198l claims. Furthermore, the court limited compensatory damages and found the employee had failed to present evidence sufficient for punitive damages. However, granting deference to the decision of the jury, the court held in favor of the employee and held that she sufficiently had proven the retaliation claim and denied the employer a new trial. Because the court held that the employee's § 1981 claims were barred by the limitation provisions in the employment contract, the only remaining claim was the Title VII claim, which has a statutory recovery limit of $300,000. The court stated that a reasonable jury could find in favor of the employee's retaliation claims based upon the evidence presented. The court held that the employee was entitled to some compensatory damages, but damages would be severely limited from the initial $366 million. After reviewing similar cases, the court reasoned that $100,000 would be an appropriate base for damages, and then used the maximum recovery rule to increase the $100,000 figure by 150% and adjusted that number for inflation. Thus, total compensatory damages were limited to $248,619.57. Next, the court considered punitive damages. It held that for punitive damages to be awarded, the employee would need to show malice or reckless indifference on the employer's part, which the employee did not establish. Finally, the court determined that while the testimony of the human resource expert had been admitted improperly (due to lack of foundation), the error was not so prejudicial to the employer's case as to warrant a new trial.

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GENERAL BANKING

Liable for Theft When False Payees Alter Checks [SD TX]

A customer (the maker) of the bank wrote and mailed several checks to various obligors. However, the maker's intended payees did not receive the checks. Four checks were intercepted, altered to have different amounts and new payees (the false payees). The false payees deposited the altered checks in a second bank and warranted that the checks had not been altered. The false payees claimed authorization to negotiate the checks and that the checks had been properly endorsed, so the original bank paid out the amounts to the depositary bank. After discovering the fraud, the maker's bank asserted several claims against each of the false payees, including: (1) the individuals conspired to commit bank fraud and should therefore be liable for punitive damages; (2) the individuals committed fraud; and (3) the individuals violated the Texas Theft Liability Act (TTLA). Each of the false payees failed to file an answer; therefore, the bank moved for default judgment against each false payee.

In Origin Bank v. Castallano, No. 4:21-CV-02173, 2024 WL 169664, 2024 U.S. Dist. LEXIS 8146 (S.D. Tex. Jan. 12, 2024) (unpublished opinion), the court granted the bank's motion for default judgment against each false payee after finding (1) the false payees liable for theft; (2) liability under a theory of common-law fraud; and (3) no issues of material fact. First, the court looked to the TTLA which provides that a person commits theft "if he unlawfully appropriates property with intent to deprive the owner of the property." Further, the court explained that electric transfers between bank accounts constitute an appropriation for purposes of theft. The court found that the false payees intended to deprive the bank of its property without effective consent when they deceptively and intentionally altered the maker's checks and deceptively induced the electric transfer, making the false payees liable to the bank for theft under the TTLA and entitling the bank to attorney's fees. Second, the court noted that the false payees would have also been liable under a theory of common law fraud, but they did not consider the merits of the remaining causes of action because it was unnecessary. Finally, the court explained that no disputes of material fact existed because the false payees failed to file any responsive pleadings or participate in the litigation. Further, the continuance of their failure to defend would have prejudiced the bank. Therefore, the court found that a default judgment was not unduly harsh.

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Court Dismisses Only Some Claims Against Bank Arising from Fraudster [WD VA]

A customer at a bank was defrauded of her life savings by a telephone scammer (the fraudster). When the fraudster called the customer, he misrepresented himself to her as an agent of the bank, (ironically posing as an employee of the bank's fraud department) and claimed that her information was compromised. The fraudster told her that she needed to move her money to a secure account and then into a new account with the bank. He also told her that she needed to set up online banking with the bank, which he then proceeded to do for her with the information she provided. During the following months, the fraudster transferred the customer's money online from her account to his. Additionally, the fraudster convinced her to wire money herself and obtain and forward a cash advance from her credit card. After losing a significant amount of her life savings, allegedly $727,957, the customer sued the bank. The customer asserted the claims that the bank breached the duty it owed her when it allowed the transactions, the bank's authorization and verification procedures lacked commercial reasonability under the circumstances, and the bank knew or should have known of the fraud. The bank moved to dismiss her claim and countered with the following arguments: the customer assisted the fraudster with authorizing the online transfers by giving him her information; the customer visited a branch of the bank in person and authorized the wire transfers; the allegation regarding the credit card advance was insufficient; and the cash advance did not qualify as a funds transfer.

In Carter v. Wells Fargo Bank, Nat'/. Ass'n., No. 1:23-cv-00007, 2023 WL 4002533, 2023 U.S.Dist. LEXIS 153326 (W.D. Va. Aug. 30, 2023) (opinion not yet released for publication), the court found that the customer had failed to state a claim under the UCC and Va. Code § 8.4A-202 and had failed to state a common law negligence claim. The court denied the motion to dismiss the online banking part of the claim while granting the motion to dismiss the in-person transactions and cash advance parts of the claim. The court analyzed the plausibility of each part of the claims according to Rule 12(b)(6) and relevant case law. The court also reasoned that according to Va. Code §§ 8.4A-202, 8.4A-203, and 8.4A-204, the customer was responsible for fraudulent transfers if she "authorized" the transactions or if the transactions were "effective" regardless of authorization. The court held that the online transactions were neither authorized nor effective because the customer neither intended nor understood what the fraudster would initiate them on her behalf, and the bank did not challenge the ineffectiveness. Even though the fraudster induced the customer to transfer her money to him, something contrary to her intentions, her acts of going to the bank and providing a new destination account showed the court that she did authorize the transactions. Moreover, because the customer's only allegation was that the fraudster took cash advances on her credit card, and she did not allege that it was neither authorized nor effective, she failed to support the plausibility of her allegation.

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GENERAL BANKING

Lender Entitled to Exercise Its Contractual Rights [BKR WD TX]

A debtor in default on a loan secured by property entered into a contract to sell the property with the would-be-buyer. The two parties had agreed to a purchase price of nearly four million dollars (the purchase price). However, when the debtor requested a payoff amount for the note on the property from its original lender (the lender), the lender sought extra fees and added additional conditions to release its lien on the property. As a result, the contract between the wouldbe-buyer and the debtor fell through. The lender later began foreclosure proceedings on the property but was stayed when the debtor filed for bankruptcy. Later that year, the bankruptcy court approved the property sale to a different buyer for a little over five million dollars (the foreclosure price). The would-be-buyer brought a claim alleging that the lender had tortiously interfered with the contract between the would-be-buyer and the debtor by imposing more conditions and fees on the payoff and release of the lien. The would-be-buyer sought the difference between the contract's purchase price and the foreclosure price in damages. However, the lender raised an affirmative defense of justification, arguing it was simply exercising its contractual rights of foreclosure, and moved for summary judgment.

In 639 Lanark, LLC v. Alamo Lanark, LLC (In re WC Alamo Indus. Ctr., LP), No. 22-10226-cgb, 2024 WL 40821, 2024 Bankr. LEXIS 29 (Bankr. W.D. Tex. Jan. 3, 2024) (opinion not yet released for publication), the court ruled the lender had a justification defense as a matter of law and granted the lender's motion for summary judgment. The court held that the lender was entitled to exercise its contractual rights regarding the property in default, meaning the lender was within its rights to condition the note's payoff and foreclose on the property as

it saw fit because the debtor was in default. In its decision, the court first discussed the elements of a tortious interference with contract claim, holding that a contract is only interfered with when the defendant's interference caused actual damages or loss to the contracting party. The court then discussed the justification defense, holding that the affirmative defense applies "when the acts that the plaintiff complains of as tortious interference are merely the defendant's exercise of its own contractual rights." Here, viewing the facts in the light most favorable to the would-be-buyer, the court found that the lender was merely acting within its contractual rights to impose conditions and fees on the payoff of the note and release of its lien.

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No Supporting Information? No Bankruptcy Claim [BKR SD NY]

The mortgagors executed a promissory note in favor of the debtor, secured by a mortgage. The debtor and its affiliates filed petitions for relief under Chapter 11 of the Bankruptcy Code. The bankruptcy court appointed a Consumer Claims Trustee (the trustee), which had the exclusive authority to object to Consumer Creditor Claims. The mortgagors asserted unsecured claims against the debtor but provided "no narrative explaining the nature and basis of the claims." The trustee objected to the allegations, asserting they contained insufficient information to establish their underlying claims. The mortgagors responded by arguing that their claim should not be dismissed because the debtor conducted excessive and abusive debt collection practices, did not provide mortgage information, failed to issue required debt validation, inaccurately transferred records, imposed improper fees, and did not report payment history to major credit bureaus. However, the mortgagors' response lacked narrative or supporting documents. Following the response, the trustee asserted that the mortgagors' claims should be dismissed for failure to state a claim under the Fair Debt Collection Practices Act (FDCPA), Florida Consumer Collection Practices Act (FCCPA), Real Estate Settlement Procedures Act (RESPA), and the Fair Credit Reporting Act (FCRA).

In In re Ditech Holding Corp., No. 19-10412 (JLG), 2024 WL 313300, 2024 Bankr. LEXIS 185 (Bankr. S.D. N.Y. Jan. 26, 2024) (unpublished opinion), the court dismissed the mortgagors' claims. First, the court held that the mortgagors failed to state a claim under the FDCPA or FCCPA because they did not allege facts demonstrating an essential element of the cause of action: the debtor was a debt collector or excessive and abusive debt collection practices by the debtor. Second, the court analyzed the mortgagors' claims under RESPA, including service transfer issues, improper fees, and failure to notify the mortgagors of mortgage information. The court found that the mortgagors did not have a claim for service transfer issues because they failed to "allege any specific inaccuracies, identify the transferred records, or name the servicer to whom these inaccurate records were apparently transferred." The court held that the improper fees were not pleaded plausibly because the mortgagors did not assert the amount or when the fees were assessed. Next, the court decided there was no claim for the debtor's failure to notify because the mortgagors did not allege facts demonstrating they had made an official request for information from the debtor, nor did they specify what information the debtor failed to provide. Finally, the court held that the mortgagors did not allege that the debtor reported inaccurate information to any credit reporting agencies, nor did the mortgagors claim to have disputed the reporting; therefore, they failed to state a claim under the FCRA.

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SECURITY INTEREST

Dragnet Clause Unenforceable Given Later Agreements [BKR WD OK]

The debtors executed a promissory note in favor of the bank to obtain a loan to construct a home. To secure the promissory note, the debtors contemporaneously executed a mortgage on the property on which the debtors were to construct their residence, which secured the property as collateral for the promissory note. The mortgage included a "dragnet clause," also known as a crosscollateralization clause, which made the real estate collateral for subsequent debts from the debtors to the bank. The debtors subsequently executed eight promissory notes with the bank, each of which included a "Limitations on Cross-collateralization" provision ("limitations clause") stating that "The Cross-collateralization clause on any existing or future loan is void and ineffective... as to this Loan." Five years later, the debtors obtained court approval to sell their residence, but there remained a question as to who would keep the proceeds of the sale of the residence. The bank argued that the dragnet clause entitled them to a portion of the proceeds to pay for the eight subsequent promissory notes, while the debtors argued that the limitations on the cross collateralization prov1s1on rendered the dragnet clause void as to the subsequent promissory notes.

In In re Walters, No. 23-10335-JDL, 2023 WL 7287942, 2023 Bankr. LEXIS 2689 (Bankr. W.D. Okla. Nov. 3, 2023) (opinion not yet released for publication), the United States Bankruptcy Court for the Western District of Oklahoma held that the limitations clauses on the eight promissory notes rendered the mortgage's dragnet clause void as to the subsequent promissory notes. While dragnet clauses are enforceable in Oklahoma, they are construed narrowly against the mortgagee due to their complexity and implications that mortgagors may not be aware of. Additionally, the court considered the parties' relationship and the surrounding circumstances in determining how to construe a dragnet clause. Here, the surrounding circumstance is the limitations clauses. The limitations clauses unambiguously state that the debts incurred in the promissory notes "would not be secured (collateralized) by any property other than the property identified in the Security Agreement itself, i.e., the debt would not be secured by the real property described in the existing Mortgage loan." Because the dragnet clause in the mortgage stated that the property would be collateral for later obligations the debtors owed the bank, the limitations clauses and the dragnet clause were incompatible. To determine whether the dragnet clause or the limitations clauses should prevail, the court followed the rule that, when confronted with two contracts about the same subject that contain incompatible terms, the terms of the contract signed later should prevail. Following this rule, along with the principle that a court should narrowly construe dragnet clauses against the mortgagee, the court held that the limitations clauses negated the mortgage's dragnet clause, the debtors' property was not collateral for the subsequent promissory notes, and the debtors did not have to pay the bank any proceeds from the sale of their home to pay for the eight promissory notes.

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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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