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## EMPLOYMENT LAW

### Beep, Beep, Here's Your Notice: How a Successful Fax Transmission Outran the Government's Motion to Dismiss [5TH CIR]

A U.S. Postal Service (USPS) vehicle struck a bicyclist. The bicyclist faxed the USPS his medical records and a signed Standard Form 95, which is the standard form to present claims against the U.S. under the Federal Tort Claims Act (FTCA). The bicyclist addressed the fax to a Louisiana District Tort Claims/Collections Specialist for the USPS and sent it to the correct fax number. The bicyclist received confirmation stating that the fax had been successfully transmitted. One year later, the bicyclist sued the U.S., alleging personal injury and property damage. The U.S. filed a motion to dismiss, arguing that it never received the form or any other form of written notice to satisfy the presentment requirement under the FTCA. The district court reasoned that evidence of a fax confirmation stating successful transmission to the correct party was not probative evidence of presentment and granted the motion to dismiss. The bicyclist appealed.

In *Spriggs v. U.S.*, 132 F.4th 376 (5th Cir. 2025), the Fifth Circuit vacated the district court's ruling and remanded the case. Under the FTCA, a plaintiff must first present his claim to the appropriate federal agency before filing suit, and presentment occurs only when the agency receives written notice of the claim. Because presentment is a jurisdictional prerequisite to the U.S.'s waiver of sovereign immunity, the requirement is strictly construed, although the presentment requirements of 28 U.S.C. § 2675 are minimal. The Fifth Circuit distinguished between an affidavit by a secretary stating that she sent a signed Standard Form 95 through untraceable first-class mail, and a fax confirmation sheet addressed to the correct fax machine. Specifically, the court observed that a fax confirmation sheet confirmed successful transmission and explained that it served as evidence that the two fax machines conducted an electronic

"handshake" and that one machine conveyed the data to the other. *Laouini v. CLM Freight Lines, Inc.*, (7th Cir. 2009). Other courts within the Fifth Circuit have held proof of a successful transmission of a piece of mail to a physical mailing address was probative evidence of an actual receipt. The court ultimately found that a fax confirmation sheet was analogous to USPS tracking because both convey the same information, a record of a successful transmission. The court noted, however, that a fax confirmation to the wrong fax number was not probative evidence of presentment. Therefore, the Fifth Circuit vacated and remanded for further proceedings.

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### No Comparator, No Case: Dismissal of Discrimination and Retaliation Claims [5THCIR]

A terminated employee had worked for six months as a probationary supervisor for the Department of Juvenile Services (DJS). About five months into her employment, she reported that she failed to properly document an incident. Shortly thereafter, the assistant director conducted a surprise overnight inspection and found multiple officers asleep, raising concerns about supervisory oversight. The director then extended the employee's probationary period, and the assistant director issued her the lowest possible performance evaluation, citing deficiencies in safety, communication, supervision, and management, as well as allegations that she regularly dozed during shifts. The employee admitted she occasionally "dozed" while remaining "alert" and acknowledged her failures in documentation and that she required coaching. Following a pre-disciplinary hearing, the employee emailed DJS leadership complaining that the director was disrespectful, especially toward women. Her probationary employment was terminated two days after the email was sent.

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The employee then brought claims against the DJS alleging sex and race discrimination and retaliation under Title VII and related state law. She also asserted a race discrimination claim under 42 U.S.C. § 1981 against the DJS and against the director and assistant director in their official capacities, which the district court dismissed. As the sole remaining defendant, the DJS then moved for summary judgment, which the district court granted, dismissing the employee's claims with prejudice. The employee appealed.

In *Wilkerson v. Parish*, No. 21-30716, 2025 WL 1420530, 2025 U.S. App. LEXIS 11962 (5th Cir. May 16, 2025) (opinion not yet released for publication), the Fifth Circuit affirmed the district court's dismissal because the terminated employee failed to establish a prima facie case of discrimination, failed to offer proper comparators, and failed to establish pretext. Applying the McDonnell Douglas framework, to establish a prima facie case of discrimination the terminated employee needed to show: (1) she was a member of a protected class; (2) she was qualified for the position; (3) she suffered an adverse employment action; and (4) she was replaced by someone outside the protected group or treated less favorably than a similarly situated employee outside the group. The "similarly situated employee" is referred to as a "comparator." If that showing is made, the burden shifts to the employer to provide a legitimate, nondiscriminatory reason for its decision. The burden then returns to the employee to prove that the employer's stated reason is not genuine but rather a pretext for discrimination. The terminated employee identified four coworkers outside her protected class as proposed comparators. The court concluded that none were similarly situated because they differed in material respects, including having higher performance evaluations or holding permanent, rather than probationary, employment status. The court stressed that probationary employees differ from permanent employees. In response to the employee's retaliation claim, the court explained that she had failed to offer pretext. Although the terminated employee established her protected class, the court explained that the DJS had offered legitimate nonretaliatory reasons for her termination, and she had failed to provide a reason to conclude the DJS's reasons for her termination were not genuine. Additionally, the court noted that the employee's arguments were largely speculative as to the director's motives, and such speculation was insufficient to allow a reasonable factfinder to determine that the termination would not have occurred but for her email.

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## MORTGAGES

### Circuit Court Affirms Reverse Redlining Judgment [2ND CIR]

Eight Black homeowners (the "borrowers") obtained "no income, no asset" loans from a bank (the "lender") beginning in 2004, each loan carrying high default interest rates and was structured around the borrowers' home equity rather than the borrowers' repayment capacity. After default and foreclosure proceedings, the borrowers brought "reverse redlining" claims under the Fair Housing Act, the Equal Credit Opportunity Act, and the New York City Human Rights Law, alleging that the lender disproportionately targeted minority communities with a lending program designed to generate profit through targeting borrowers likely to default. Because the loans had been issued between 2004 and 2009, and the suit was not filed until 2011 and 2014, the lender argued that the statutes of limitation barred the claims. The borrowers responded that the limitations periods were tolled under the doctrine of equitable tolling because the borrowers could not reasonably have discovered the alleged discriminatory scheme until learning of similar treatment of other minority borrowers. The district court agreed. The lender further argued that two of the claims were barred as a matter of law by a contractual release-of-claims provision in the modification agreement. A jury initially found the two claims to have been voluntarily waived; however, after the district court ordered a new trial, the jury awarded damages. On appeal, the lender challenged: (1) the district court's equitable tolling ruling, (2) the jury instructions on disparate impact and intentional discrimination, and (3) the enforceability of a release-of-claims provision contained in a loan modification agreement signed by two borrowers.

In *Saint-Jean v. Emigrant Mortg. Co.*, 129 F.4th 124 (2d Cir. 2025), the Second Circuit affirmed the judgment below, holding that the district court had not abused its discretion. When applying equitable tolling, the circuit court agreed with the district court's opinion that the relevant injury was the discriminatory targeting practice the lenders engaged in, rather than the unfavorable loan terms, and the borrowers could not reasonably have discovered the alleged systemic discrimination within the statutory period. The court further stated that extenuating circumstances prevented borrowers from being on notice, and even if the claims accrued at closing or at the time of default on the loans, the district court did not abuse its discretion in equitably tolling the statute of limitations until the borrowers knew, or had reason to know, of the lender's broader

discriminatory practices. In reviewing the jury pattern, the court concluded that the instructions on disparate impact and intentional discrimination, read as a whole, adequately conveyed the law. The court further concluded that the language used by the district court did not significantly differ from the language the circuit court uses, which almost exactly matched that in the federal jury pattern. Finally, the court held that the release-of-claims provision in the loan modification agreement was unenforceable because it went against federal and state public policy, which prohibits broad waivers in residential mortgage transactions. The court reasoned that 15 U.S.C. § 1639c(e)(3) clearly expresses the federal public policy against waiving claims of racial discrimination in mortgage agreements, and there was no indication that the current waiver should be an exception to the general rule. Accordingly, the judgment was affirmed.

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## NOTES

### Foreclosure Summary Judgment Vacated; Who Knows Where the Note is? [HI APP]

In April 2009, the note was assigned to the mortgagee. The mortgagee initiated a foreclosure action on the adjustable-rate note, which was secured by a mortgage on the mortgagor's real property. The lower court granted several motions, including granting a summary judgment motion in favor of the mortgagee. The mortgagor subsequently appealed those motions, arguing several points of error. On appeal, the court considered whether the mortgagee could enforce a lost note under Haw. Rev. Stat. § 490:3-309 and whether a foreclosing plaintiff has standing to pursue foreclosure when it cannot demonstrate entitlement to enforce the note.

In *U.S. Bank, N.A. v. Webb*, 566 P.3d 376 (Haw. Ct. App. 2025), the court vacated the lower court's summary judgment order and remanded the case for further proceedings. The court first analyzed the language of HRS § 490:3-309 and affidavits submitted by the mortgagee. The court analyzed the following relevant portions of the statute: (a)(i) "the person was in rightful possession of the instrument and entitled to enforce it when loss of possession occurred," and (b) "a person seeking enforcement of an instrument under subsection (a) must prove the terms of the instrument and the person's right to enforce the instrument." The affidavit submitted by the mortgagee chronicled the timeline of events; dating back to an earlier foreclosure attempt, as well as

the times the note and other collateral files had been exchanged between the mortgage or other possible holders of the note and the law firm representing the mortgagee or those other possible holders of the note at the time. A supplement to the affidavit stated that the bank's law firm believed the note and collateral files had been inadvertently shredded prior to this suit and had not been located. The court noted several problems with the assertions made in the affidavit. First, the record did not establish whether the note was lost because it was unclear whether it had been included in the collateral files. Second, the affidavit contained several inferences about a loan servicer's transmittal practices, that the mortgagee's prior counsel had made without any personal knowledge of the facts. Finally, the affidavit never established that the prior law firm of the mortgagee or its predecessors in interest had received the files, which allegedly included the note, on behalf of a mortgagee. The court noted this issue raised a genuine question of material fact as to whether the mortgagee was "in rightful possession of the instrument and entitled to enforce it when loss of possession occurred" as required by the Haw. Rev. Stat. § 490:3-309 and whether the note had been transmitted to the law firm at all. Although the mortgagee produced a release transmittal referring to the mortgagor as the borrower, the document did not mention the note. Because genuine questions of material fact remained regarding whether the note had been transmitted to the law firm and whether the mortgagee was in rightful possession of the note when it was allegedly lost or destroyed, those issues directly affected the mortgagee's standing to enforce the note. Accordingly, the court remanded the case for further proceedings.

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## REAL ESTATE

### Divorce Does Not Cut Ties on Property Encumbrances [IL APP]

The mortgagor and his wife owned their home as joint tenants. The mortgagor refinanced the home, signing an agreement with the mortgagee to obtain a loan. The wife also signed the mortgage agreement, but not the related promissory note. Under the wife's signature, handwritten language read "solely [sic] for the purpose of waiving homestead rights." The couple later divorced, and as part of the divorce settlement, the mortgagor quitclaimed his interest in the house to the now-ex-wife, making her the sole

owner of the property. Additionally, the ex-wife agreed to assume sole liability for “the mortgage, taxes, and insurance.” The ex-wife eventually defaulted on the loan. The mortgagee filed a suit to foreclose on the mortgage. In response, the ex-wife filed suit to quiet title to the property, claiming ownership free and clear of the mortgage because she did not know her ex-husband mortgagor had refinanced the property, she was not the one who had received the loan funds, and she lacked knowledge of the contents of the mortgage entered into by her ex-husband. Essentially, the property owner argued that, because she lacked knowledge of or receipt of funds, she was not a “borrower” under the mortgage. In the consolidated foreclosure action, the mortgagee claimed that the ex-wife had ratified the mortgage by making payments and was estopped from denying the validity of the lien because she accepted the benefit of the mortgage by living on the property. The trial court granted summary judgment in favor of the mortgagee, would not quiet title, and denied the ex-wife’s subsequent motion to reconsider the matter. On appeal, the issues concerned whether the property owner also qualified as a mortgagor, and, if not, whether she remained liable for the loan under the theories of unjust enrichment, equitable subrogation, or equitable lien.

In *Thomas v. U.S. Bank Trust, N.A.*, 258 N.E.3d 951 (Ill. App. Ct. 2025), the court reversed the lower court’s ruling on summary judgment and remanded for further proceedings. The court first explained that because the mortgagee’s answer had been verified and the property owner’s reply to the answer was unverified, the well-pleaded facts in the mortgagee’s verified answer were deemed admitted. As such, the court considered only the effect of the property owner’s signature on the mortgage with the handwritten qualifying language and the lack of her signature on the note. The court distinguished the joint tenancy here from a tenancy by the entirety in *Berg v. eHome Credit Corp.*, concluding that the mortgagor could mortgage solely his own interest in the property, rather than encumber the entire property with the mortgage. 848 F. Supp. 2d 841 (N.D. Ill. 2012). Additionally, the court found that, despite her signature on the mortgage agreement, the property owner was not a borrower due to the handwritten language beneath her signature and the absence of her signature from the promissory note. In reaching that conclusion, the court interpreted the language of the agreement as a whole, giving effect to each provision and not rendering any language meaningless. As such, the ex-husband mortgagor was the sole borrower, and his undivided half-interest in the property was the only part of the property encumbered by the mortgage. Based on that finding, the court then addressed whether it could affirm the trial court’s finding of liability on the part of the property owner from the record. The appellate court held that the unjust enrichment claim failed because the five-year statute of limitations had run. The court held that the equitable lien and equitable

subrogation claims also failed because the mortgagee sought “to enforce the latest agreement instead of reinstating the last valid agreement.” The appellate court also would not quiet title because of the encumbrance on the ex-husband’s undivided half-interest in the property under the mortgage. The court found that the conveyance of the home to the property owner as a part of the divorce judgment transferred the mortgagor’s encumbered interest in the property to the property owner. Accordingly, the court reversed and remanded to allow foreclosure on the encumbered half-interest in the property.

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## SECURITY INTERESTS

### Creditor’s Argument Falls Like Timber [6TH CIR]

In May and June 2016, a timber purchaser and a secured lender entered into separate agreements with a borrower. The timber purchaser contracted with the borrower to cut down trees on the borrower’s land. Around that time, the secured lender, on behalf of multiple lenders, extended a loan valued at approximately \$22 million to the borrower. As part of the loan agreement, the borrower granted the secured lender a security interest in the collateral, which included the same land and its standing timber. After the parties executed a revised contract in March 2017, the borrower breached the timber agreement by ousting the timber purchaser from the property and subsequently defaulted on the loan. The secured lender then obtained a judgment, against the borrower, declaring the borrower in default, and then registered that judgment in the Eastern District of Kentucky before initiating foreclosure proceedings against the collateral located there. The timber purchaser was joined as a defendant because it claimed an interest in the standing timber. The timber purchaser argued that it had superior title because (1) the timber contract constituted an authorized sale, (2) its interest was superior to the secured lender’s interest in the timber, and (3) it qualified as a buyer in the ordinary course of business. The district court granted summary judgment for the secured lender, and the timber purchaser appealed issues (1) and (3).

In *HBKY, LLC v. Elk River Exp., LLC*, 150 F.4th 480 (6th Cir. 2025), the court of appeals affirmed summary judgment for the secured lender. The court first held that the loan agreement granted the secured lender a continuing first-priority security interest in the timber. The timber purchaser argued that language in the loan agreement, the note purchase agreement, and royalty assignment showed that the timber could be sold unencumbered

of the secured lender's lien. However, the court rejected this argument because the language explicitly created an expectation that the sale of collateral would not impair the lender's security interest. Thus, the borrower could not extinguish the security interest through such a sale. The court then rejected the timber purchaser's argument that it was a buyer in the ordinary course of business. To qualify as such a purchaser, a party must purchase the goods in good faith, without knowledge that the goods were encumbered by another party's security interest, and from a seller in the business of selling goods of that kind. Ky. Rev. Stat. Ann. § 355.1-201(2)(i). Although the court recognized that the timber purchaser appeared to have acted in good faith and that standing timber qualified as a good under Kentucky law, the purchaser failed to present evidence that the borrower was in the business of selling timber or that the sale occurred in the normal course of business. Because the timber purchaser offered only a third-party contract to show that the borrower was in the business of selling timber and offered no other evidence at the summary judgment hearing, the court concluded that the defense had failed and affirmed summary judgment for the secured lender.

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## Motion for Summary Judgment and Professional Conduct [BKR SD IL]

The debtor, a personal injury law firm owned and operated by two member managers, voluntarily filed for Chapter 11 Subchapter V bankruptcy, in which the creditor potentially had a secured claim of \$2.4 million. The debt was marked as disputed but was scheduled by the debtor as secured by "inventory, chattel paper, accounts, equipment, general intangibles and fixtures." In August 2022, the debtor revised its operating agreement, adding a new member manager who paid \$2.4 million for a 1/3 ownership interest, financing the purchase with a loan from the creditor and personally guaranteeing the loan. In March 2024, the new member manager pled guilty to federal felony charges of bank fraud. Subsequently, the debtor terminated the new member manager's employment and terminated him as a member. The debtor then defaulted on the loan. The creditor attempted to collect the debt by sending notices to attorneys representing defendants in cases in which the debtor represented plaintiffs. The notices informed the attorneys that the debtor had assigned its accounts and general intangibles to the creditor and instructed the attorneys to send any current or future payments owed to the debtor directly to the creditor. In October 2024, the creditor sent a letter to the debtor threatening to contact its clients directly. In response, the debtor wrote a letter to the creditor, pointing out potential problems with the creditor's conduct. Therefore, the

creditor filed a lawsuit seeking a declaratory judgment that it was entitled to contact the debtor's clients directly. Ten hours later, the creditor also filed a temporary restraining order (TRO) against the debtor and issued subpoenas to attorneys involved in cases in which the debtor represented plaintiffs. To stop the creditor from continuing, the debtor filed for Chapter 11 bankruptcy. The debtor claimed the creditor, by attempting to recover on its security interests, had interfered with the debtor's ability to represent its clients; therefore, it filed a seven-count adversary proceeding complaint against the creditor. The first three counts challenged the creditor's claims and requested determinations of the amount, priority, validity, and any asserted secured status. Count IV was for "Libel and other Tortious Conduct." Count V sought equitable subordination of the creditor's claims due to the alleged misconduct. Count VI and VII sought declaratory judgments on the existence and validity of the creditor's claims and the value of the collateral securing those claims as of the petition date. The creditors then filed a motion for summary judgment.

In *LPB MHC, LLC v. Farmers State Bank of Alto Pass (In re LPB MHC, LLC)*, Nos. 24-40450, 25-04001, 2025 WL 1778767, 2025 Bankr. LEXIS 1527 (Bankr. S.D. Ill. June 26, 2025) (unpublished opinion), the court denied the creditor's motion for summary judgment. The creditor failed to establish that there were no genuine issues of material fact in dispute, nor did the creditor establish an entitlement to a judgment as a matter of law. The court emphasized that an important material disputed fact existed: whether two representatives of the debtor, the original two member managers of the firm, had actually signed the commercial security agreement. The creditor relied on an affidavit from its bank president, who claimed that the two representatives signed the agreement. However, one of the debtor's representatives testified that he did not recall signing the agreement and would not have signed it because he believed doing so would have been improper under the codes of ethics. The court concluded this was one of several unanswered relevant factual questions. Nevertheless, the creditor still argued that because it had a security interest in the debtor's accounts, it could take any collection actions without regard to other laws. The court rejected this argument and held that Illinois law governing contracts, the Illinois Rules of Professional Conduct, and Illinois settlement law, still govern the transaction because taking a security interest in a law firm's accounts receivable or general intangibles "is a much more nuanced transaction" than typical liens. Under the rules of professional conduct, the creditor's demand to the debtor to turn over certain documents could not be completed because some information in the documents was subject to privilege. Under Illinois settlement law, when the creditor issued notices to the debtor's clients, the creditor could not do so for the purpose of intimidation, without any legitimate belief that payment would

be forthcoming. Additionally, the creditor's attorneys could not interfere with the representation of the debtor's clients. Finally, the court analyzed Illinois law, which provides that there is an implied duty of good faith and fair dealing in every contract. The court held that the creditor had violated the implied duty by sending notices intended to intimidate the debtor. Although the creditor had relied on the security agreement, which allowed these notices, the agreement was not an absolute defense. The court also criticized the debtor by "throwing all allegations into every count" and concluded that "the complaint as a whole is seriously lacking." The creditor, in its response for summary judgment, had used case law that was not precedent, and due to other procedural rules, the court did not grant the motion. The list of alleged wrongful conduct by the creditor in Count V was both sufficient to state a claim and sufficient to avoid summary judgment. Therefore, the court denied the creditor's motion for summary judgment.

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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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