NORTH DAKOTA BANKERS ASSOCIATION

LEGAL UPDATE

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BANKRUPTCY

From Supersedeas to Suspicion: A Father's Loan Fails the Bankruptcy Test [BKRD UT]

After a state court judgment was entered against the debtor, he arranged for a surety, his father, to fund a supersedeas bond to stay collection efforts while the debtor appealed the judgment. The surety agreed to post the bond in exchange for the debtor's promise to repay the bond and an alleged previous personal debt. The debtor and surety executed a loan and. security agreement granting the surety a security interest in the debtor's personal property. The debtor lost his appeal, and the surety was ordered to pay the state court judgment. The debtor later filed for Chapter 7 bankruptcy: The surety filed a proof of claim, asserting a secured claim arising from the supersedeas bond, the alleged personal debt and interest on that debt, and attorney's fees. The trustee filed a motion for summary judgment seeking that the claim be disallowed. The surety filed a motion for summary judgment seeking a ruling that the loan agreement was enforceable and that his claim was secured.

In **Thompson v. Short (In re Short)**, 669 B.R. 81 (Bankr. D. Utah 2025), the bankruptcy court allowed the surety's claim for his payment of the supersedeas bond as a secured claim and disallowed all others. The parties do not dispute that the loan and security agreement was valid and created a legally enforceable debt regarding the supersedeas bond. However, the surety's claim as to the alleged personal debt, the interest on that debt, and attorney's fees failed to comply with Bankruptcy Rule 3001, which requires that a claimant attach supporting documentation to a proof of claim. Fed. R. Bankr. P. 3001(c)(l), (c)(2)(A), (d). The court found no evidence that supported the alleged personal debt, noting that the debt had been seemingly undocumented before the loan and security agreement relating to the supersedeas bond. Therefore, since the surety failed to provide the required documentation for the proof of claim, the burden of proof to establish all portions of the claim shifted to the surety. The surety failed to provide proof of: (1) the existence of the previous debt; (2) that he actually loaned such funds for the debtor's benefit; (3) that the debtor ever made payments on the previous debt; or (4) that he had ever sought to collect on this previous debt. Due to this, the surety did not meet the burden of proof required to claim on the alleged personal debt. The claim for interest was also denied because the loan and security agreement contained no interest provision. The surety and debtor claimed oral modifications had been made. However, the court held that the alleged oral modifications were self-serving and conclusory and, therefore, did not make the claim for interest allowable. Finally, the court found that most of the surety's legal expenses had been incurred after the bankruptcy petition was filed, meaning the claim for attorney's fees was also disallowed. The court also found that the surety could have avoided some legal fees had he not been held in contempt of court for refusing to pay after the debtor lost his appeal. In addition, there was no express indemnification provision in the loan and security agreement, and the court refused to infer one. Therefore, the court granted in part and denied in part both summary judgment motions, finding that the bond loan agreement was valid and the surety held a perfected security interest as of the petition date in the amount of the supersedeas bond, but all other claims by the surety were disallowed.

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Lies Do Not Get Loans That Can Be Discharged [BKR CD IL]

The debtor operated a farming business. The creditor extended two loans to the debtor, allegedly based on the debtor's written statements regarding ownership and the existence of farm equipment. The first loan was secured by equipment that was later determined not to exist, and the second loan was secured by existing equipment. Later, the debtor filed for bankruptcy

under Subchapter V. The debtor then filed a motion to convert his bankruptcy case to Chapter 7, but the creditor filed a complaint to determine the dischargeability of the two debts. The first count "sought a determination that the debts owed to it be excepted from the debtor's discharge under § 523(a)(6) for willful and malicious injury by the [d]ebtor." The second count "sought a determination that the debts be excepted from discharge under § 523(a)(2)(B) as obtained using false statements in writing respecting the [d]ebtor's financial condition." The creditor argued the loans had been obtained based on "materially false written statements" relating to the existence and value of the collateral, and that by providing the false documents that the creditor relied on in providing the loan, the debtor had willfully and maliciously injured the creditor. The debtor admitted he was indebted to the creditors but disputed the amount of debt he owed and denied responsibility for the false information submitted to the creditor. The debtor claimed to have relied on one of the creditor's employees who assisted him with the loan applications.

In **Farm Credit Servs. of Am., PCA v. Woodrum (In re Woodrum)**, No. 23-70583, Adv. No. 23-07036, 2025 WL 601718, 2025 Bankr. LEXIS 400 (Bankr. C.D. Ill. Feb. 24, 2025) (opinion not yet released for publication), the bankruptcy court held that the first debt was excepted from discharge under § 523(a)(2)(B), but the second debt was not excepted from discharge under either § 523(a)(2)(B) or§ 523(a)(6). As for the first loan, the court found that the debtor made materially false statements in the first loan application. Specifically, the equipment listed as collateral did not exist. The court noted, as threshold matters to § 523(a)(2)(B), that the false statements were made in writing and respected the debtor's financial condition. The court emphasized that it was not relevant whether the debtor prepared the documents containing the false statements or signed the writing because he adopted the false statements when he caused the documents to be submitted to the creditor on his behalf. Additionally, statements about "the existence or value of an individual asset 'bears on a debtor's overall financial condition'" and therefore are statements respecting the debtor's financial ·condition. Lamar, Archer & Cofrin, LLPv. Appling, 584 U.S. 709 (2018). Next, the court found that the false statements were material by applying the "but for" test. An employee of the bank testified that the first loan would not have been made but for the debtor's representation that he owned the equipment in which the creditor could obtain a security interest to fully secure the debt. The court then determined that the creditor reasonably relied on the false statements because it had required proof of the equipment before it decided to make the loan. Further, the court inferred that the debtor had a clear intent to deceive because the creditor had a reckless disregard for the accuracy of the information provided to the creditor. In fact, the debtor ignored concerns raised as to the authenticity of the documents submitted. Therefore, the first debt met all elements and was excepted from discharge under § 523(a)(2)(B) as one "obtained by the use of false statements in writing respecting the [d]ebtor's financial condition." Regarding the second loan, the court found no evidence that the creditor relied on any false statements, since the second loan was secured by entirely separate collateral that existed and was unrelated to the earlier loan. The false statements made in connection with the first loan were not connected to the second loan; therefore, the court held the second loan was not excepted from discharge under § 523(a)(2)(B). The court also found that for both debts the creditor failed to prove the necessary elements under § 523(a)(6). Specifically, the creditor failed to show that the debtor acted in a manner that was "willful" or, in other words, with the intent to cause injury to the creditor. Therefore, the court ultimately held that the first debt was excepted from discharge under § 523(a)(2)(B), but the second debt was not excepted from discharge.

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CONTRACTS

Title Fight: No Conveyance Even with Good Faith [TN APP]

The owner of a vehicle delivered his car to a repairman for service, thereby creating a bailment through the transfer of possession. Under this arrangement, the bailee assumed possession of the vehicle but did not acquire ownership or title. After a dispute over payment for the repairs, the bailee obtained a certificate of title via unknown channels and then sold the vehicle to a dealer. The dealer purchased in good faith in reliance on the facial validity of the title document and used the document to assert rightful ownership. The owner, when the dealer requested proof, could not produce sufficient evidence of ownership. After this, the owner sued the dealer and the bailee. The trial court permitted the dealer to retain ownership because it had purchased the vehicle in good faith. The trial court further held that the bailee obtained a voidable title and, thus, could convey ownership under Tennessee's adoption of the UCC. The owner appealed the grant of summary judgment for the dealer.

In **Relliford v. Burks**, No. W2022-00997-COA-R3-CV, 2025 WL 26106, 2025 Tenn. App. LEXIS 3 (Tenn. Ct. App. Jan. 3, 2025) (opinion not yet released for publication), the court reversed and remanded the decision of the district court. First, it identified the initial transaction between the owner and repairman as a

bailment, not a purchase. The Tennessee UCC defined a purchase as the "taking by sale, lease, discount, negotiation, mortgage, pledge, lien, security interest, issue or reissue, gift, or any other voluntary transaction creating an interest in the property." Tenn. Code. Ann. § 41-1-201(b)(29). From that definition, the court found that the transfer from the owner to the bailee did not amount to a "purchase" due to a lack of intent to permanently relinquish title and based on UCC § 2-403, Official Comment 2, which classified bailments as entrustment of goods rather than a broad type of purchase. Thus, the bailee held rightful possession for a limited purpose only, not ownership. Second, under the Tenn. Code. Ann. § 47-2-403(1), the court held that only a purchaser with a voidable title can pass a good title to another good-faith purchaser. Because the bailee never acquired ownership, his title was void, and he could not legally convey it to the dealer. The dealer argued that the bailee acquired title through a garage-keeper's lien, rendering him a purchaser. The court found that the facts did not establish how the bailee acquired title, so it dismissed the § 47-2-403(1) claim as speculation not entitled to judgment as a matter of law. Third, the court declined to apply an entrustment provision, § 47-2-403(2), because the delivery had been for repair, and without facts showing the regular sale or lease of cars, did not establish the bailee as a "merchant who deals in goods of that kind." Thus, the dealer did not show entitlement to summary judgment. Accordingly, the court reversed the grant of summary judgment and remanded the case for reconsideration of the owner's leave to amend motion, vacating its denial on the grounds of mootness.

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DEBIT CARD TRANSACTIONS

Everybody Wants a Slice: Court Rejects Intervenors for Redundancy [ED KY]

A Kentucky merchant filed suit challenging a Federal Reserve regulation (the "regulation") that caps the interchange fees banks may charge on debit card transactions. The case was initially dismissed on the ground that the merchant's filing had been untimely, but following a Supreme Court decision clarifying when claims accrue for purposes of the statute of limitations, the court of appeals vacated the dismissal and remanded the case for further proceedings. After remand, several trade associations representing banks moved to intervene to defend the regulation, citing their members' financial interest in the current interchange fee structure. The prospective intervenors argued that their inclusion was necessary to protect those interests, which could be threatened if the rule were invalidated, and sought intervention both as of right and by permission under Fed. R. Civ. P. 24(a) and 24(b), respectively.

In **Linney's Pizza, LLC v. Bd. of Governors of the Fed. Reserve Sys.**, No. 3:22-cv-00071-GFVT, 2025 WL 1260807, 2025 U.S. Dist. LEXIS 82764 (E.D. Ky. May 1, 2025), (unpublished opinion), the court denied the motion for intervention but ordered the clerk of court to file the proposed intervenors memorandum of law that had been filed with the court as an amicus brief in support of Federal Reserve's cross-motion for summary judgment in the on-going matter. The court first addressed the proposed intervenors' request for intervention as of right under Rule 24(a). Rule 24(a) provides that a "non-party is entitled to intervention of right" when the proposed intervenors demonstrate "(1) the motion to intervene is timely; (2) the proposed intervenors have a significant legal interest in the subject matter of the pending litigation; (3) the disposition of the action may impair or impede the proposed intervenors' ability to protect their legal interest; and (4) the parties to the litigation cannot adequately protect the proposed intervenors' interest." The court applied a test to determine the timeliness of the motion to intervene, as directed by the Sixth Circuit, which consisted of the five following factors: "1) the point to which the suit has progressed; 2) the purpose for which intervention is sought; 3) the length of time preceding the application during which the proposed intervenors knew or should have known of their interest in the case; 4) the prejudice to the original parties due to the proposed intervenors' failure to promptly intervene after they knew or reasonably should have known of their interest in the case; and 5) the existence of unusual circumstances militating against or in favor of intervention." Applying the five-part test, the court concluded that the motion had been timely. Additionally, the court found that the proposed intervenors had a financial interest that could be impaired if the regulation were invalidated. However, the court found that the intervenors failed to show that the Federal Reserve would inadequately represent their interests to the required extent. The court found that both parties sought an identical outcome, defending the validity of the rule, and that minute differences in litigation strategy or focus were insufficient to establish inadequate representation. Second on request for permissive intervention under Rule 24(b), the court again denied relief and held that intervention would duplicate arguments already advanced by the Federal Reserve and would undermine judicial economy. Finally, the court permitted the proposed intervenors to participate as amici curiae, concluding that this mechanism allowed them to present their views and interests without complicating the litigation unnecessarily. Thus, the court denied redundant intervention but ordered the clerk of court to file the proposed intervenors' memorandum of law filed with the court as an amicus brief in support of the Federal Reserve Board.

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EXEMPTIONS

Louisiana or Oklahoma? Property Exemptions Based on Domicile [BKR ED OK]

The trustee objected to the debtor's claimed bankruptcy property exemptions under Oklahoma law. The trustee argued that Oklahoma law did not apply to the debtor's exemption claims because the debtor was not domiciled in Oklahoma during the relevant period under 11 U.S.C. § 522(b)(3)(A). The debtor had filed for bankruptcy on August 15, 2024, and had lived in both Oklahoma and Louisiana in the 730-day period prior to filing. In this case, the court had to determine whether Oklahoma or Louisiana bankruptcy exemptions applied to the debtor's claims.

In **In Re Stevens**, No. 24-80636-PRT, 2025 WL 438625, 2025 Bankr. LEXIS 273 (Bankr. E.D. Okla. Feb. 7, 2025) (opinion not yet released for publication), the court deemed the debtor's exemptions under Oklahoma law improper and granted the trustee's objection. First, the court noted that a debtor's exemption claim is presumed valid, placing the initial burden on the trustee to prove the exemption claim is improper. Fed. R. Bankr. P. 4003. If the trustee meets the burden, the burden then shifts back to the debtor to prove the validity of her exemption. The court applied 11 U.S.C. § 522(b)(3)(A), providing that the state law that applies is the state where a debtor was domiciled for 730 days before filing for bankruptcy. If a debtor was domiciled in multiple states during that period, the court then looks to where the debtor was domiciled for the 180-day period immediately preceding the 730-day period. The court found the debtor lived in Oklahoma at the time she filed for bankruptcy, but that she had also lived in Louisiana during the 730-day period prior to filing. Therefore, the court looked to where the debtor was domiciled in the 180 days preceding that period and determined she had lived in Louisiana. Thus, the court held that the Louisiana bankruptcy law controlled the debtor's exemption claims. Under the Louisiana law, a debtor may apply exemption claims to protect property located in another state; however, the debtor asserted her claims only under Oklahoma law. Therefore, the court found these exemptions were improper, disallowed the exemptions, and granted the trustee's objection to the debtor's claims for property exemption.

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FDIC

A Misleading Statement is not a False Statement Under U.S. Law [US]

The debtor took out three loans for a total of $219,000. After the bank from which he took the loans failed, an agent from the FDIC told him he owed $269,120.58. The debtor protested that he did not know where that number came from and stated he had borrowed $110,000. He repeated the substance of the statement to other FDIC employees. Later, he was charged with violating 11 U.S.C. § 1014, which prohibits "knowingly making a false statement to influence the FDIC's action of a loan." A jury found him guilty under the statute, and he moved for acquittal, arguing that the statute did not criminalize his behavior.

In **Thompson v. United States**, 604 U.S. 408 (2025), the Supreme Court agreed. There is a difference, the Court reasoned, between false and misleading statements. In fact, the defendant had borrowed $110,000. He had also, however, taken another loan from the bank. The statement that he had borrowed $110,000 was misleading, but not necessarily false. Moreover, the context of the statute did not support the argument that a misleading statement was criminal. Therefore, the court remanded the case to allow a jury to have the opportunity, after considering all the facts, to determine if the statement had been false.

By: The Editorial Staff

Large Bank Has Huge Liability: Interpreting the Rule on FDIC Assessments [D DC]

The Federal Deposit Insurance Corporation (FDIC) brought an action against the bank for unpaid assessments to the FDIC based on improperly reported counterparty data used to calculate risk premiums. In 2011, the FDIC amended 12 C.F.R. § 327.9, which covered the calculation of risk premiums paid by highly complex institutions (HCI), such as the bank. The rule "defined 'counterparty exposure' as 'the sum of Exposure at Default (EAD) associated with derivatives trading and Securities Financing Transactions (SFTs) and the gross lending exposure (including all unfunded commitments) for each counterparty or borrower at the consolidated entity level.'" The top twenty counterparty exposures at the consolidated entity level formed an important factor in the assessment calculation. An FDIC audit discovered that from Ql 2012 through Q4 2014, the bank did not consolidate counterparties completely in its reporting by failing to account for exposures from entity subsidiaries or "other members of the counterparty's corporate family." The unconsolidated

report produced lower counterparty risk concentration scores in the risk analysis, thereby reducing the calculated premiums. The FDIC requested that the bank pay the difference in calculated premiums totaling over a billion dollars. The bank challenged both the rule's creation and the definition of "consolidated entity level." Moreover, the bank also challenged the timeliness of the FDIC's request for the alleged unpaid assessment for Q1 2012 through Ql 2013 under the statute of limitations. The FDIC sought ui5'gorgemeilt of profit on a theory of unjust enrichment from the unpaid assessment.

In **FDIC v. Bank of Am., N.A.**, 783 F. Supp. 3d 1 (D.D.C. 2025), the court held that the FDIC properly promulgated the amendment to the rule 12 C.F.R. § 327.9. In light of Loper Bright Enterprises v. Raimondo, 603 U.S. 369 (2024), the court independently interpreted the Federal Deposit Insurance Act (FDIA) and found the amended rule (1) consistent with the FDIA; and (2) neither arbitrary, capnc1ous, nor procedurally flawed. The court agreed that the FDIC possessed broad statutory authority to design risk-based scorecards. Moreover, the FDIC had used "reasoned decision making" in compliance with the Administrative Procedures Act, and, at the time of its creation, identified a rational connection between its mandate and determining the risk of financial and systemic loss. As its basis for that holding, the court adopted the Fourth Circuit finding that the FDIA "expressly gives the FDIC considerable discretion by allowing the FDIC to consider 'any other facts the FDIC determines are relevant' in calculating an institution's semiannual assessment." Doolin Sec. Sav. Bank, F.S.B. v. FDIC, 53 F.3d 1395 (4th Cir. 1995). The court ruled that the FDIC also demonstrated the robust nature of models stemming from the rule and provided sufficient notice of the rule and its methodology. Additionally, the court determined that the FDIC complied with the "logical outgrowth doctrine" because its final rule provided a logical outgrowth of the proposed rule. With the rule declared valid, the court then interpreted the phrase "consolidated entity level" to determine whether the bank had violated the rule. The court found the meaning within 12 C.F.R. § 327.9 unambiguous as requiring consolidation "up to the ultimate parent level on the counterparty side of the ledger." The court relied on financial, legal, and accounting dictionaries to support the plain meaning of "consolidated entity level" and affirmed its interpretation by reference to the term's use in the rule and in context. The court then rejected the bank's fair notice defense to its liability for noncompliance, finding that the bank could have simply read the rules unambiguously. Additionally, testimony revealed that the bank may not have read the amended rules and never sought guidance from the FDIC, despite the ability to do so. Once the issue of liability was settled, the court considered remedies. The court permitted recovery for the FDIC's timely complaints for quarters of Q2 2013 through Q4 2014 but denied its remaining claims. The court held that no exceptions, tolling, or reset applied to the three-year statute of limitations for the claims from Q1 2012 through Q1 2013, thereby reducing the assessment for those quarters. Lastly, the court found no statutory support in 12 U.S.C.S. 1817(h)'s savings clause for the FDIC seeking to recover additional amounts to the assessment based on disgorgement, which the court referred to as an "extraordinary remedy." The court ruled against granting equitable relief where the plaintiff already possessed an available remedy. Lastly, the court rejected the bank's equitable defenses of acquiescence, estoppel, and waiver. It acknowledged that the bank could raise these defenses against the FDIC; however, the court did not find any misconduct "so 'egregious'" as to make them applicable here. In conclusion, the court granted the motions in part and denied the motions in part, finding in favor of the FDIC and holding the bank liable for "the underpaid assessments from 2Q 2013 through 4Q 2014, plus pre- and post-judgment interest."

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FEDERAL RESERVE

Banking on Discretion: The Federal Reserve's Authority to Terminate Accounts [SD NY]

The bank maintained a master account with the Federal Reserve Bank of New York (FRBNY). The FRBNY terminated the bank's master account after a suspension and review of compliance risks. The bank responded by filing suit against FRBNY and the Board of Governors of the Federal Reserve System (the "Board"), but its initial claims were dismissed without prejudice. The bank sought to amend its complaint by adding new claims against the FRBNY. The proposed new claims alleged that the FRBNY violated the Federal Reserve Act (FRA), 12 U.S.C. § 248a, by issuing guidelines for evaluating accounts without statutory authority, and, therefore, also violated the Administrative Procedure Act (APA), 5 U.S.C. § 706 by "act[ing] arbitrarily, capriciously, and abus[ing] its discretion." Additionally, the bank claimed that the FRBNY discriminated against it on the basis of its national origin, in violation of the Due Process Clause of the Fifth Amendment.

In **Banco San Juan Internacional, Inc. v. FRB of N.Y.**, 23-cv-6414 (JGK), 2025 WL 753768, 2025 U.S. Dist. LEXIS 42134 (S.D.N.Y. Mar. 9, 2025) (opinion not yet released for publication), the court denied the bank the ability to amend its complaint and found that the bank failed to state a claim for relief on both of

the additional counts. First, the court found that the bank's FRA and APA claims were "futile." The court had previously held that the FRBNY has discretion to close master accounts, Banco San Juan Internacional, Inc. v. Fed. Rsrv. Bank of N.Y. 762 F. Supp. 3d 247, 267 (S.D.N.Y. 2025) and the bank "has failed to identify cogent and compelling reasons justifying a departure from the rulings." Further, the bank's arbitrary and capricious argument relied on a "flawed interpretation" that FRA § 248a entitled the bank to a master account. The bank's amendment failed to "cure the deficiencies" of the original complaint. Second, the court held that the bank's Fifth Amendment claims were futile. The court found that the bank "failed to invoke a valid cause of action... and fail[ed] to allege plausibly any violation of [its] purported equal protection rights." Additionally, it stated that an action with a disproportionate impact, standing alone, is not unconstitutional; rather, there must be a discriminatory purpose. The facts show that the FRBNY terminated the bank's master account only after an account suspension, noncompliance, and review of further compliance risks. Thus, the court found both claims to be futile and dismissed the case with prejudice.

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LOAN CONTRACTS

No Ambiguity, No Parol Evidence: The Court Enforced a Plain Contract Language [MN APP]

The debtor borrowed from the bank to finance the purchase of equipment. The debtor granted the bank a security interest in the purchased equipment, but the bank mistakenly filed the financing statement in the wrong state. Therefore, the security interest was not perfected, and a previous lender was able to enforce its security interest on the debtor's equipment after the debtor had stopped paying it. Then, the debtor sued the bank that failed to timely perfect its security interest timely, arguing that the bank had promised to protect its equipment with a first-priority security interest. The bank filed a counterclaim based on the debtor's default. The district court found the loan agreement was "unequivocally ambiguous" on whether the bank was contractually required to timely perfect the security interest on the debtor's collateral. As a result, the district court allowed the use of parol evidence and found that the bank had "breached the loan agreement by not timely perfecting its security interest." The bank appealed.

In N. **Country Cont., LLC v. Citizens All. Bank**, No. A24-1l 71, 2025 WL 1217996, 2025 Minn. App. Unpub. LEXIS 277 (Minn. Ct. App. Apr. 28, 2025) (unpublished opinion), the appellate court reversed the district court's holding. The court focused on many arguments made by the bank, including: (1) the fact that the district court erred in determining that the loan agreement had been ambiguous and that parol evidence was necessary to interpret the loan agreement, and (2) "the district court erred by finding that the bank breached the loan agreement by not timely perfecting its security interest." The court had to interpret the loan agreement and attempt to enforce the intent of each party. It relied on case law, which determined that language in a contract is ambiguous "if, judged by its language alone and without resort to parol evidence, it is reasonably susceptible of more than one· meaning." Metro Office Parks Co. v. Control Data Corp., 205 N.W.2d 121, 123 (Minn. 1973). The bank pointed to three contractual provisions in the loan agreement that plainly stated the bank "is not contractually required to perfect its security interest." The court explained that contractual provisions must be harmonized by giving precedence to more specific language over general language. Additionally, a court must analyze the language of a contract with the presumption that it intended to have an effect and should avoid an interpretation that makes a provision meaningless. Finally, a court should harmonize provisions of a contract based on the language in nearby or related provisions. Applying these concepts, the court concluded that the district court erred in imposing contractual duties on the lender, even though under the "Default" paragraph, the loan agreement relieved the lender of "all commitments and obligations." The court found that the loan agreement, when looked at as a whole, was unambiguous and that the bank had no contractual duty to perfect its security interest in the debtor's collateral. Thus, the district court erred by admitting parol evidence and by relying on it to interpret the loan agreement. Therefore, the appellate court reversed the district court's holding.

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MORTGAGES

Standing to Foreclosure [HI APP]

The borrower appealed a judgment from a Hawaii circuit court granting the bank's motion for summary judgment, which sought a decree of foreclosure and an order of sale of the home. The bank had been assigned the mortgage. The borrower contended that the state circuit court had errored in its judgment because (1) the bank lacked standing; (2) the mortgage had not been validly assigned to the bank because the assignor was in bankruptcy at the time of the purported assignment; and (3) the borrower's liability was discharged in his earlier personal bankruptcy case and for that reason the bank was "deprived [ ] of standing to foreclose."

In **Deutsche Bank Nat'l Trust Co. v. Kozma**, 562 P.3d 968 (Haw. Ct. App. 2025), the state appellate court affirmed the circuit court. The court applied Hawaii Revised Statute (HRS) § 409:3-301 to resolve whether the bank had standing. It explained that § 409:3-301 provides that a foreclosing party must establish they are the party entitled to enforce the note at the time of filing a foreclosure complaint. A party is "entitled to enforce an instrument" when it is the holder of the instrument, such as by being in possession (i.e., the bearer) of a note indorsed in blank. HRS § 490:3-301; Bank of Am., NA. v. Reyes-Toledo, 390. P.3d 1248 (2017). Therefore, a party has standing if the evidence shows that it had possession of a note indorsed in blank and "'the blank indorsement occurred before the initiation of the suit.'" Id. An employee of the bank testified that the note was indorsed in blank and that the bank had possession of the note and mortgage before the filing date of the complaint. Therefore, the court found the bank had standing to foreclose on the home. Next, the court found that the borrower did not present evidence that the note and mortgage had been part of the bankruptcy estate in the assignor's bankruptcy case. Finally, the court found that the borrower's earlier personal bankruptcy did not affect the bank's ability to foreclose because the order of discharge provided that "a creditor with a lien may enforce a claim against the debtors' property subject to that lien... for example, a creditor may have the right to foreclose a home mortgage."

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PRESIDENTIAL POWER

Presidential Authority and the Independence of Financial Regulators [US]

The President removed a member of the National Labor Relations Board (NLRB) and a member of the Merit Systems Protection Board (MSPB) without cause. The members challenged their removals because 29 U.S.C. §153(a) and 5 U.S.C. §1202(d) permit the president to remove these officers only for cause. After finding in the members' favor, the district court enjoined the president's removal of these members. The government appealed the injunctions to the D.C. Circuit Court of Appeals. The government also filed an emergency application for a stay pending the D.C. Circuit's decision and any potential certiorari petition.

In **Trump v. Wilcox**, 145 S. Ct. 1415 (2025), the Supreme Court granted the stay, emphasizing that Article II of the Constitution vests the executive power in the President, which includes broad authority to remove executive officers who act on his behalf. Seila Law LLC v. Consumer Financial Protection Bureau, 591 U.S. 197, 215-218 (2020). The Court reasoned that the Government would face greater harm if removed officers continued to exercise executive power during litigation than the officers would face from being unable to serve. The Court noted that both the NLRB and the MSPB likely wield "considerable executive power" but declined to resolve whether they were "executive officers" that could be removed without cause by the President under Art. II, §1, cl. 1. Finally, the Court noted that the for-cause removal protections for members of the Federal Reserve's Board of Governors and Federal Open Market Committee were not implicated because "[t]he Federal Reserve is a uniquely structured, quasi-private entity that follows in the distinct historical tradition of the First and Second Banks of the United States."

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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.

To contact Tracy Kennedy, NDBA General Counsel, call 701.772.8111 or email at tracy@dakotalawgroup.com.