NORTH DAKOTA BANKERS ASSOCIATION

LEGAL UPDATE

A newsletter covering bank legal and compliance information.

Volume 25 • Issue 7

July 24, 2025

BANKRUPTCY

No Ride-Throughs Allowed for Bad Faith "Chapter 20" Filings [BKR ND TX]

The debtor purchased a car from the seller and signed a sales contract, which granted the seller a purchase-money security interest (PMSI) in the car to secure financing. The sales contract also contained an ipso facto clause. The seller later assigned its PMSI to the creditor. The debtor filed for Chapter 7 bankruptcy and during that case stated that she intended to reaffirm her debt to the creditor. However, the creditor did not receive the signed reaffirmation agreement before the debtor's § 341 meeting, and the agreement was never filed with the court as required by § 524(c). Later, the debtor received a discharge in her Chapter 7 case. Within one week, the debtor filed for bankruptcy again, this time under Chapter 13. The debtor listed the car as a secured claim in her Chapter 13 plan. The creditor objected and filed a motion to lift the automatic stay, arguing that under § 521(a), the debtor had no right to retain the car because it was subject to the creditor's PMSI, and the debtor had failed to reaffirm or redeem the debt. The debtor argued that § 521(a) only applied to Chapter 7 debtors because the statute does not have "language [that] would preclude a Chapter 13 debtor that was previously in a Chapter 7 from retaining such collateral if the debtor failed to reaffirm or redeem."

Additionally, the debtor argued that § 362(c), which removes protections of the automatic stay, was only intended to apply to debtors who had their Chapter 7 case dismissed, rather than completed with a discharge. Next, the debtor argued that Congress did not intend to categorically preclude so-called "Chapter 20 filings," which refer to filing a Chapter 13 case shortly after receiving a Chapter 7 discharge. She cited Johnson v. Home State Bank, 501 U.S. 78, 87 (1991), in support of her position. The creditor countered and argued that the debtor acted in bad faith and attempted to "circumvent[] the requirements of her Chapter 7 case… [and] to avoid the consequences of failing to redeem or reaffirm the debt." Therefore, the creditor filed a motion arguing that the debtor's bad faith was grounds to lift the automatic stay.

In ***In re Rashidi,*** Case No. 24-32587-mvl13, 2025 WL 73067, 2025 Bankr. LEXIS 40 (Bankr. N.D. Tex. Jan. 10, 2025) (opinion not yet released for publication), the court granted the creditor relief from the automatic stay due to the debtor's bad faith Chapter 13 filing. The court had to determine whether the debtor, who had failed to reaffirm or redeem her debt, could rely on the protections of the automatic stay to keep her car and "cram down the secured creditor." First, the court addressed whether the debtor's failure to reaffirm or redeem within the statutory 45-day deadline violated § 521(a)(6). Specifically, the question was whether the debtor could "ride-through" and keep her car while making payments without complying with the bankruptcy code. Under § 52l(a)(6), "a debtor in Chapter 7 has three options for dealing with her personal property… that is subject to a lender's lien: (a) she can reaffirm the indebtedness… (b) she can redeem the vehicle by paying the lender the amount of its secured claim… (c) she can surrender the vehicle." In re Law, 497 B.R. 843, 850 (Bankr. N.D. Tex. 2013). Failure to comply with one of the three options could result in the lifting of the automatic stay, and the property would no longer be considered part of the estate. 11 U.S.C. § 521(a)(6). Further, creditors are permitted "to take 'whatever action' they could under 'applicable nonbankruptcy law.'" Id. Therefore, the debtor could not "ride-through" by keeping her car and making payments without reaffirming or redeeming the collateral and "had no right to retain the [car]." Additionally, the debtor's failure to "substantially compl[y]" with § 52l(a)(6) precluded a "backdoor ride-through" option, which would apply if the debtor had attempted to comply, but the court had prevented her from doing so. Thus, the debtor violated § 521(a)(6), and the court then addressed what remedies were available to the creditor "in the face of the Debtor's chapter 13 filing." The creditor argued that the debtor's violations of § 521(a)(6) compelled the lifting of the automatic stay in this case. The debtor argued that Congress had not overruled Johnson and therefore she was not prevented from keeping possession of her car despite her failure to reaffirm or redeem. The debtor supported her argument and cited a case with similar circumstances to her own, where the judge held that "Johnson suggests that a debtor is 'entitled' to retain their collateral and restructure the debt on it in a subsequent Chapter 13." In re Francis, No. 14-42974-RFN, 2015 Bankr. LEXIS 69, 2015 WL 139520, at *3 (Bankr. N.D. Tex. Jan. 7, 2015). The creditor argued that Francis is distinguishable because the creditor did not have a PMSI or an ipso facto clause in the sales contract; therefore, § 521(a)(6) was inapplicable in that case. Thus, the creditor argued that these two circumstances together "effectively overrule Johnson." In addition, the creditor argued that the language "not retain possession" compelled the lifting of the automatic stay § 521(a)(6). The court disagreed with the creditor's assertion because the "explicit and exclusive remedy" under § 521(a)(6) was available during the Chapter 7 case and was no longer available during the Chapter 13 case because a "new" automatic stay applied. Francis, 2015 WL 139520, at *5. The court found that there was no clear congressional intent to overrule Johnson, nor that the termination of the automatic stay in the Chapter 7 case applied to "all subsequent filings by that Debtor." Therefore, the court denied the request to lift the automatic stay on the basis of a violation of § 521(a)(6). However, the court ultimately lifted the automatic stay under § 105 and § 362(d)(l). The court noted that a bad faith filing of a bankruptcy case was "cause" sufficient to justify relief under § 362(d)(l). In re Little Creek Dev. Co., 779 F.2d 1068, 1072 (5th Cir. 1986). While the debtor's "Chapter 20" [a Chapter 13 case following a Chapter 7 case] filing was not "per se" bad faith, the failure to comply with § 521(a) resulted in "a heightened scrutiny of good faith." The court described the four facts to determine good faith in a Chapter 20 filing as: "[1) The proximity in time of the chapter 13 filing to the chapter 7 filing; [2] Whether the debtor has incurred some change in circumstances between the filings that suggests a second filing was appropriate and that the debtor will be able to comply with the terms of a chapter 13 plan; [3] Whether the two filings accomplish a result that is not permitted in either chapter standing alone; and [4] Whether the two filings treat creditors in a fundamentally fair and equitable manner or whether they are rather an attempt to manipulate the bankruptcy system or are an abuse of the purpose and spirit of the Bankruptcy Code." In re Pollard, No. 10- 17396, 2011 Bankr. LEXIS 595, 2011 WL 576599, at *2 (Bankr. D. Md. Feb. 9, 2011). Here, the debtor filed her Chapter 13 case one week after she received her Chapter 7 discharge and had no "significant financial change," which suggested bad faith. The court held that the "most dispositive factor" was that the debtor attempted to achieve redemption by making installment payments, which is prohibited by § 722. In addition, the court found that the debtor's failure to reaffirm the debt after the debtor expressed an intention to do so was "not conducive with bankruptcy policy." Therefore, considering all the factors, the court held that "the [d]ebtor's Chapter 13 filing lacks any indicia of good faith." Regardless, the bankruptcy court had authority under§ 105(a) to lift the automatic stay to "prevent abuse of process." And the debtor's violations of the bankruptcy code and attempts to avoid the consequences by filing for Chapter 13 qualified as an abuse of process. Ultimately, the court granted the creditor relief from the automatic stay.

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Fraudulent Acts: A Vehicle for Excepting Debt from Discharge in Bankruptcy [BKR D NE]

The debtor, as an indirect majority owner and manager of a car dealership (the "company" or "dealership"), financed the dealership's floor inventory through the creditor. Under the Automotive Wholesale Financing and Security Agreement (the "Agreement") between the creditor and the dealership, the creditor agreed to fund the vehicle inventory but had to receive a security interest in all assets of the company except for real property. After conducting three audits of the company's inventory, the creditor determined that the company breached the Agreement by selling vehicles "out of trust," or not paying the creditor after making sales. The debtor admitted this breach, claiming the company could not pay because some buyers had not yet paid the company. The debtor then obtained funding from outside sources to continue operating the company, which resulted in some of the vehicles being pledged to multiple lenders. The creditor sent a written notice of the default and a loan termination date by which the company must pay the balance owed. The company continued to breach the Agreement with the creditor. In response, the creditor sued in state court, where it obtained a judgment and a temporary order of replevin requiring the debtor and the company to preserve the creditor's collateral. In violation of the order, the company continued to sell vehicles in breach of trust. The state court held the debtor in contempt and sentenced him to thirty days in jail; however, the court commuted his sentence because he submitted a payment to the creditor. Later, the creditor received court approval to remove its collateral from the company, which soon closed. The debtor filed for bankruptcy, listing the dealership as a business name he had used. In the bankruptcy case, the creditor sued the debtor for "fraud, embezzlement, and willful and malicious injury," and asked the court to declare the debt nondischargeable based on· the debtor's fraudulent acts.

In ***Nissan Motor Acceptance Co. LLC v. Bunn (In re Bunn)***, Nos. BK22-40994-TLS, A23-4004-TLS, 2024 Bankr. LEXIS 2091 (Bankr. D. Neb. Sept. 9, 2024) (opinion not yet released for publication), the court found that the company owed the full amount claimed by the creditor, and, with respect to the debtor, excepted from discharge the portion of the debt attributable to the sale of collateral out of trust and the pledge of the collateral to another lender, under 11 U.S.C. §§ 523(a)(2)(A), (a)(4), and (a)(6). First, the court concluded that state law authorized the imposition of individual liability on "officers and directors" of a company for tortious acts. Huffman v. Poore, 569 N.W.2d 549, 557-59 (Neb. Ct. App. 1997). The court then considered both the Nebraska fraudulent misrepresentation and the bankruptcy code section 523 false representation claims. The court held that the debtor met the elements for both by accepting funds under the Agreement while also securing alternate financing with the same collateral, which financially harmed the creditor due to its justifiable reliance on the Agreement. Additionally, the court concluded that the out-of-trust sales independently supported fraud claims, regardless of the debtor's assertion that he lacked knowledge of the out-of-trust sales, because as the director, he should have known of the company's ongoing breaches of the Agreement. The court similarly held that the debtor's conduct was "unarguably" willful and malicious because he "knowingly, intentionally, and wrongfully" caused economic injury to the creditor by repeatedly breaching both the Agreement and the state court's replevin order. The court also noted that the debtor commingled funds from various businesses and treated business accounts as personal accounts, casting serious doubt on his claims that he did not personally benefit from the misused funds. Finally, the court held that the debtor committed embezzlement by failing to remit proceeds owed to the creditor and instead using the funds for the debtor's own or the company's purposes.

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Unenforceable Automatic Stay Waivers Bring Good News for Debtors [BKR SD IL]

TThe debtor owned and operated a hotel, which included a restaurant and a convention center. The debtor began operations after executing a promissory note (the note) to the bank for a loan secured by a first mortgage lien, an assignment of leases and rents, and "substantially all of the [d]ebtor's assets," including cash and revenue. The debtor defaulted on the note, and the bank assigned the note, along with a mortgage and loan agreement, to the creditor. The creditor and debtor then signed a forbearance agreement. The forbearance agreement prevented the creditor from collecting on the loan for seventy-five days; however, the debtor was required to pay the creditor interest on three occasions during that period. If the debtor failed to pay in time, then the deed to the debtor's hotel would pass to the creditor. The forbearance agreement also waived the debtor's right to an automatic stay upon filing for bankruptcy. When the debtor filed for bankruptcy, the creditor requested that the court enforce the automatic stay waiver of the forbearance agreement and, therefore, allow the creditor to take possession of the hotel. The creditor argued that it sought to prevent the debtor's property from falling into disrepair, which would significantly diminish the property's value.

In ***In re DJK Enters., LLC***, No. 24-60126, 2025 Bankr. LEXIS 327 (Bankr. S.D. Ill. Feb. 13, 2025) (opinion not yet released for publication), the bankruptcy court struck down the automatic stay waiver, thereby granting relief to the debtor. The court grounded its decision on the finding that automatic stay waivers are unenforceable as a matter of law. Courts do not enforce automatic stay waivers in non-single asset cases because such a waiver only protects a single creditor, leaving the debtor in possession and other creditors at risk. In this case, if the court enforced the automatic stay waiver, then the rest of the debtor's creditors would receive nothing because the creditor had an interest in practically all of the debtor's property. The court then addressed whether the debtor had ceded its ownership interest in the hotel property to the creditor at the time of the forbearance agreement, finding that it had not. The court applied Illinois state law which construes the deed's transfer as an equitable mortgage, or as an interest in the property rather than as a conveyance of the ownership because the forbearance agreement did not transfer title of the hotel to the creditor upon execution, instead the creditor could only seek to record the deed if the debtor defaulted. The court also noted, as further evidence that the debtor maintained its ownership interest and not the creditor, that the creditor reserved a specific right under the forbearance agreement to foreclose on the property which indicated that it did not have an ownership interest foreclosure would not be necessary to eliminate subsequent liens against the debtor if the creditor was the owner. The court also noted that under the forbearance agreement, any deed transfer alone did not satisfy the debt, as the forbearance agreement stated that the debtor's obligation would continue until the underlying debt was paid in full and certain provisions provided that the debtor would remain liable for damages, such as attorney's fees, in the event of default. Illinois law clearly provides that if a debtor still owes under an agreement following the execution of the deed, "then the whole transaction amounts to a mortgage," regardless of how the parties otherwise refer to it. Schwartzentruber v. Stevens, 133 N.E.2d 33, 36 (Ill. 1956). The creditor's last attempt to acquire the property by getting the automatic stay lifted relied on relief for "cause" provided for by Section 362(d)(l) of the bankruptcy code. Whether cause exists is a fact-intensive inquiry and requires a case by-case balancing test of the totality of the circumstances. The creditor alleged that it would suffer financial harm due to the hotel's apparent deteriorating condition. However, the hotel manager, who "exhibited a deep knowledge and understanding of the [d]ebtor's operations," gave detailed information on the hotel's more than satisfactory condition and even provided the hotel's projected profits for the next four calendar years. Furthermore, the manager testified that the hotel stood among the top ten percent in franchise performance. The court also noted that the creditor failed to offer any evidence to indicate that the property was deteriorating or as to its alleged poor financial situation post-petition. Ultimately, the court found there was no cause for granting relief from the automatic stay.

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Valuing Personal Property for a Chapter 13 Cram Down [BKR ED NC]

The debtors voluntarily filed for Chapter 13 bankruptcy. The debtors listed their mobile home (the "personal property") as an asset on their Schedule A/B and valued it at $6,000. Schedule D indicated that the creditor held a lien on the personal property, securing a loan of approximately $33,401.57. The debtors' proposed plan sought to bifurcate the creditor's claim, treating $6,000 of the claim as secured and the remainder as a general unsecured claim. The creditor objected to the confirmation of the debtors' plan, arguing that the proposed value was too low and attaching a home value report to support its objection to the $6,000 valuation. The court held an evidentiary hearing to determine the value of the personal property; however, there was little evidence presented. At the hearing, the debtors testified that the personal property had been purchased used and was in poor condition (windows broken, roof detached, and severe water damage that would all cost money to repair), and, while the debtors had not attempted to sell it and did not know of anyone trying to sell something similar, they believed the present value of the personal property was $6,000. Photographs submitted by the creditor reflected the condition described by the debtors. The creditor, however, relied on both the photographs and the value report to argue the value was higher than $6,000. The debtors objected to the home value report, and the creditor conceded that the value in the report was likely too high.

In ***In re Lamb***, 665 B.R. 603 (Bankr. E.D.N.C. 2024), the bankruptcy court sustained the objection to confirmation and denied confirmation of the plan. The court first looked at how claims may generally be valued in connection with Chapter 13 plans. Section 1325(a)(5)(B) of the Bankruptcy Code provides a "cram down option," which allows the debtor to retain the property over the creditor's objection while the creditor retains its lien and receives payments over the life of the plan that total "the present value of the allowed secured claim..." Hurlburt v. Black, 925 F.3d 154, 159 (4th Cir. 2019); 11 U.S.C. § 1325(a)(5)(B). The allowed secured claim is the present value of the property at the time of the repayment plan's effective date. Thus, a debtor may pay only the present value of the underlying collateral and treat any remainder as a separate unsecured claim. If a debtor seeks to "cram down" the plan, the court must then determine the value of the allowed secured claim (i.e., the collateral). For that reason, the court looked to Bankruptcy Code § 506(a)(2). Section 506(a)(2) provides that the "value with respect to personal property securing an allowed claim shall be determined based on the replacement value of such property. as of the date of the filing of the petition," and the "replacement value shall mean the price a retail merchant would charge for property of that kind considering the age and condition of the property." 11 U.S.C. § 506(a)(2). The best method for determining replacement value should be left to the triers of fact to decide on a case-by-case basis, but before determining this, the court first found that the burden of proof fell on the debtor to establish that the "plan provide[d] for payments equal to the value of the collateral." The court found that while the debtors' testimony regarding the condition of the home was credible, the debtors never gave any basis for how they arrived at the $6,000 amount. The court further noted that the valuation needed to have "a clearly articulated rational basis," whether it was based on an expert valuation, a NADA report (a generally accepted valuation basis for bankruptcy courts) as a starting point, or the value of similar personal property. Ultimately, the court found that the debtors failed to meet their burden of proof as to the personal property's value for the cram down option and denied confirmation of the plan.

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LENDING

Bad Borrower Loses in Court [WD TX]

The creditor (the "Creditor bank") entered into multiple loan agreements with various LLCs, all of which were represented by the same individual. In November 2019, the Creditor bank entered into a loan agreement with business 1, the principal of which executed a promissory note for the loan. The loan was secured by multiple lots of real property as evidenced by the deed of trust. The owner of business 1 (the "debtor") further secured the loan by individually executing an unlimited continuing guaranty agreement. In September of the following year, the Creditor bank entered into loan agreements with business 2 and business 3, both also owned by the debtor, who pledged the same collateral as used in the first loan to secure these obligations. The following month, the Creditor bank granted another loan to business 4, which was again secured using the same collateral as the prior agreements. However, the businesses and the debtor soon breached each of the loan agreements in several respects. In December of 2020, the debtor granted a special warranty deed on part of the collateral to a different third-party creditor. Next, in March. 2021, the debtor transferred tax liens on the collateral properties to yet another creditor. In November 2021, the debtor granted another creditor a security interest in part of the collateral. In January 2022, the Creditor bank sent default and acceleration notices to the debtor and the four businesses for failure to make timely payments on the loans. The Creditor bank attempted to work with the debtor to arrange for him and the businesses to be brought back into good standing; however, at that point, the debtor failed to disclose the additional breaches (the granting of security interests or mortgages on the same collateral) to the Creditor bank. Soon after, an investigation by the Creditor bank revealed the debtor had impaired the collateral securing all the loans. The next month, the Creditor bank sent a notice of continuing default and reservation of rights to the debtor. In April 2022, the debtor further encumbered business 1's collateral by granting a cross access easement on some of the property securing the loans. The Creditor bank then filed a motion for summary judgment, seeking a judgment that the four businesses and the debtor were indebted to the Creditor bank, as well as . seeking recovery of attorneys' fees. The debtor and the businesses failed to respond in a timely manner (or at all) to the motion or request an extension to respond.

In ***Chub Cay, LLC v. Bank OZK***, No. SA- 22-CV-317-FB, 2025 U.S. Dist. LEXIS 45882 (W.D. Tex. Mar. 12, 2025) (opinion not yet released for publication), the court granted the Creditor bank's motion for summary judgment against the debtor and the four businesses. Applying Federal Rule of Civil Procedure 56, the court explained that a moving party must demonstrate the absence of a genuine issue of material fact by citing specific evidence in the record. The failure to respond by the non-moving party does not automatically entitle the movant to summary judgment, however; the court must still assess the merits of the case. Here, the court found that the debtor and the four businesses defaulted on the loan and guaranty agreements. The court described the debtor as the "sole person directing the interrelated and fraudulently transferr[ing] assets and pledges." The court explained that the Creditor bank acted properly by reiterating its demand for full payment on all loans and by requesting complete information on all its collateral; the debtor, however, failed to comply with or perform the terms of the loan agreements. Because neither the debtor nor the four businesses rebutted the Creditor bank's evidence, the facts were considered to be undisputed. Accordingly, the court awarded judgment in favor of the creditor, including recovery of attorneys' fees.

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Agent Not Authorized, No Notice Given [BKR DE]

The corporation and several of its affiliates (collectively, the "debtors") filed for Chapter 7 bankruptcy. The creditor was a pre-petition lender and equity interest holder in the debtors. The corporation issued $60 million in notes, and each debtor was an obligor of the notes and granted a first-priority security interest in all its assets to secure the notes. An insurance policy also was issued as collateral for the debtors' note obligations in favor of the bank. The bank served as the disbursing agent for the notes, and a servicer was appointed to hold the bank's security interest in the notes. In 2023, the debtors defaulted on its note obligations, and the bank provided notice of the default. The debtors obtained several loans to provide emergency liquidity, including two loans from the creditor. After the debtors filed for bankruptcy, the court ultimately approved the sale of all the debtors' assets for approximately $7.1 million. A creditor objected to the sale, asserting that the debtor's outstanding obligations under the loan were secured by a security interest in the debtor's assets that was superior to the bank's security interest. A major issue arose from an email exchange (the "alleged subordination agreement") between the creditor and an officer of the servicer that the creditor argued constituted an enforceable subordination agreement. However, no formal subordination agreement had been entered into. The debtor, however, had executed a promissory note, granting the creditor a first-priority security interest in all its property, which referenced the alleged subordination agreement. The creditor sued the bank to determine the priority of the security interests, arguing that the court should issue a declaratory judgment that (1) the alleged subordination agreement was valid and gave the creditor priority in the collateral; (2) the alleged subordination agreement was enforceable under 11 U.S.C. § 510(a); (3) the note was subject to equitable subordination under 11 U.S.C. § 510(c). (Bankruptcy Code section 510(a) enforces subordination agreements; Bankruptcy Code section 510(c) provides for equitable subordination in appropriate circumstances). The bank denied all allegations and asserted two crossclaims: one seeking to have the loan recharacterized as equity, and the other seeking equitable subordination of the loan.

In ***Cooks CA LLC v. UMB Bank, N.A. (In re Cooks Venture, Inc.)*** No. 24-10828 (KBO), 2025 WL 1013721, 2025 Bankr. LEXIS 844 (Bankr. Del. April 4, 2025) (opinion not yet released for publication), the bankruptcy court granted the bank's summary judgment motion. The creditor asserted that the bank had both actual and constructive knowledge of the subordination agreement through its agent (the servicer) but had refused to honor the subordination. The creditor argued that it had relied on the alleged subordination agreement when it had extended the loans to the debtors. The court stated, however, that the creditors had the burden of proving that the alleged subordination agreement was enforceable against the bank. The court found that there was no evidence that the servicer possessed either actual or apparent authority to bind the bank to a subordination agreement, despite an officer of the servicer having agreed to subordinate. The creditor argued that language in a Proceeds Disbursing and Security Agreement (PDSA) gave the servicer that authority; however, the court disagreed because: (1) the bank's first priority security interest did not cover the loan's security interest, (2) the PDSA prohibited creation of a loan with a priority payment obligation, (3) section 9.1 of the PDSA does not include the power of agent to subordinate the note obligations; and (4) the PDSA required consent of the noteholders before granting a priority security interest to the bank, which was not present. In conclusion, the bank had no notice, and the servicer had no authority to subordinate the notes. Therefore, the court granted the bank's summary judgment motion.

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When was the Maturity Date? The Factfinder Must Decide. [BKR ND GA]

The personal guarantor did business through various corporate entities that he owned directly or indirectly. The personal guarantor and the guarantor's corporate entities (three of which make up the "debtors" in this proceeding) (collectively, the "borrowers") had an ongoing banking relationship with a bank employee that lasted throughout the time that the employee moved to several different banks. Eventually, the bank employee began working for the creditor, and the creditor and borrowers began a banking relationship. The bank employee remained the borrowers' primary contact with the new lender. The creditor extended the borrowers the "973 loan," which was evidenced by the 973 note and a master agreement that provided that the maturity date could be extended by the creditor "sending [the borrowers] written notice" or "requir[ing] [the borrowers] to sign a modification." The 973 maturity date was extended twice, and the borrowers allege it was also extended a third time. The first maturity date extension was discussed via email between the personal guarantor and the bank employee. The bank employee informed the personal guarantor that the extension had been granted, and the next day, an unsigned letter was issued by the creditor to the personal guarantor confirming the extension. The second maturity date extension was evidenced by a letter again (substantially similar to the first) and then followed by an email to the personal guarantor from the bank employee stating the loan had been extended. The alleged third maturity date extension was far less clear; the creditor argued the extension was only for 60 days, while the borrowers argued the extension was for 6 months. Internal emails indicated that a third extension had never been approved beyond the 60-day mark, but the bank employee seemed to believe it had been extended for 6 months. The bank employee texted the personal guarantor regarding renewal documents and stated the "line was booked," and the texts were followed by a letter, similar to the previous two extension letters, to the personal guarantor stating that the maturity date had been extended by 60 days. Soon after, the bank employee and another bank officer informed the personal guarantor, via a phone call, that the creditor was going to end the banking relationship and the 973 loan would not be extended past the 60 days. Communications between the bank employee and the personal guarantor, however, continued, and the bank employee's communications seemed to suggest that the 973 loan could be extended again, although no evidence suggested that the creditor had agreed to this. Earlier in the banking relationship, the creditor also extended a "063 loan," as evidenced by the 063 note, which stipulated that any default under any other agreement between the parties would also constitute a default under the 063 note. At the end of the 60-day extension of the 973 loan, the creditor brought a state court action against the borrowers for breach of contract under the two notes and related loan agreements (including guaranty agreements) for failure to pay on the maturity date (the "state court litigation"). The debtors counterclaimed, alleging breach of contract by the creditor for failing to extend the maturity dates of the notes, mutual departure, and fraudulent and negligent misrepresentation. The borrowers all asserted numerous affirmative defenses with respect to the claims against them. While the state court litigation was pending, the debtors filed for chapter 11 bankruptcy and removed the state court action to the bankruptcy court. The creditor filed a motion for summary judgment in its favor as to all claims, counterclaims, and affirmative defenses.

In ***First-Citizens Bank & Trust Co. v. Parker Med. Holding Co. (In re Parker Med. Holding Co.)***, 664 B.R. 905 (Bankr. N.D. Ga. 2024), the bankruptcy court granted the creditor's motion for summary judgment in part and denied the motion in part. First, the court denied summary judgment in favor of the creditor as to all the claims it brought because there were genuine issues of material fact regarding whether the maturity date on the 973 note had been extended a third time beyond the 60-day period. The court explained that all the creditor's claims hinged on the maturity date of the 973 note, and when construing the evidence in the light most favorable to the defendants (as is required on summary judgment motions), questions remained as to whether the bank employee had agreed to extend the maturity date. The court specifically noted that questions remained as to whether some of the emails from the bank employee constituted a written notice of an additional extension (because written notice was enough to extend under the 973 master agreement). Second, the court denied summary judgment for the same reasons as to the debtors' breach of contract counterclaim, which alleged the creditor breached the contract by failing to honor the extended maturity date. The court again stated that factual issues remained as to whether the maturity date had been extended by the bank employee. Third, the court granted summary judgment in favor of the creditor as to the debtors' "mutual departure" counterclaim. Georgia state law provides that where parties to a contract "depart from its terms and pay or receive money under such departure," the parties may not then recover for failure to act according to the contract unless notice of intention to rely on the contract is given by the party that seeks to rely on the contract. Code Ann. § 13-4-4. Until that notice is given, the contract is suspended by the departure from it. Id. The court explained that, usually, whether parties have departed from the contract is a question for the fact finder; however, summary judgment may be granted when there is no evidence to support such a finding. The court found no evidence of departure and explained that the debtors' argument that the creditor departed because of an alleged agreement to extend the maturity date was not evidence of departure because there was nothing to support a finding that the creditor ever extended the maturity date without a written notice, which was the required method to extend under the 973 master agreement. Fourth, the court granted summary judgment in favor of the creditor as to the debto,;s' fraudulent misrepresentation counterclaim but denied summary judgment as to the negligent misrepresentation counterclaim (that the creditor's employee had allegedly represented that he did or would extend the maturity date). To succeed on a claim for fraudulent misrepresentation, the borrowers needed to show that the misrepresentations or falsehoods were made knowingly. The court, however, found that the borrowers provided no evidence that the creditor or any of its employees knowingly lied regarding the extension. In fact, the court stated that the evidence showed that the bank employee "believed the 973 [l]ine would be extended." To have succeeded on their claim for negligent misrepresentation, the borrowers would have needed to show that the creditor "'negligently supplied false information to foreseeable persons... who reasonably relied upon that false information, and... economic injury proximately resulted from such reliance." Brown v. Sullivan, No. CV 115- 035, 2017 WL 3446027, 2017 U.S. Dist. LEXIS 127155 (S.D. Ga. Aug. 10, 2017). The bank employee allegedly made several representations that the loan would be extended, although the employee denied making such representations regarding the 973 note. Therefore, the court found that issues of fact remained regarding the negligent misrepresentation counterclaim. Next, the court granted summary judgment in favor of the creditor as to its claim that the guarantors waived all counterclaims and defenses. Georgia state law provides that a guarantor may, in advance (such as in a part of a guarantor agreement), "waive[] defenses otherwise available to a guarantor." HWA Props., Inc. v. Community & Southern Bank, 746 S.E.2d 609 (Ga. 2013). The court further provided caselaw that showed that Georgia had consistently and broadly upheld advanced guarantor waivers of defenses and counterclaims. In relevant part, the guaranties each provided that the guarantor "waive[d] any" and all rights or defenses" and "further waive[d] and agree[d] not to assert or claim at any time any... counterclaim ... "The court found the language of the guaranties was sufficient to establish waiver. The court then granted summary judgment in favor of the creditor as to the borrowers' tortious interference counterclaim. To succeed on a claim for tortious interference with contractual relations, a party must show the defendant (1) acted without privilege; (2) acted intentionally and with malice with the intent to injure; (3) caused an anticipated business relationship to fail; and (4) that the conduct that caused the failure was tortious. The court found that there was no evidence that any contract existed with which the creditor had interfered or that any of the creditor's actions had been done with malice or intent to injure the borrowers; rather, the evidence supported the conclusion that the creditor simply wished to leave the banking relationship. Finally, the court granted summary judgment in favor of the creditor as to all the borrowers' defenses, as these defenses were waived when the borrowers failed to respond to any of the creditor's arguments on the defenses and failed to offer any evidence in support of them.

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SECURITY INTERESTS

Entity Did Not Have Sufficient Rights in the Collateral to Grant Security Interest [ND OK]

The owner's vehicle required repairs after being damaged by a third party. The owner delivered the vehicle and its title to the dealership. Several legal issues arose regarding insurance coverage for the damage, and the owner retained an attorney through the dealership's owner for assistance on the issues. The attorney filed and lost three lawsuits. In two of the lawsuits, the attorney listed the dealership as the owner of the vehicle, and on the third, the attorney listed both the dealership and the owner as the owners of the vehicle. Following the proceedings, the owner asked for the return of the vehicle and the title, but the owner of the dealership refused. The dealership had given the attorney a security interest in the vehicle in exchange for two loans. The owner sought a declaratory judgment regarding the ownership of the vehicle and sued the dealership and its owner for replevin. The attorney's firm sought to intervene to protect its security interest but was denied intervention by the court. The jury verdict declared the owner to hold sole ownership of the vehicle, and the appeals courts at each level up to the state supreme court affirmed (the "state court judgment"). During the proceedings, the owner died, and the executor took his place in the litigation. The attorney's law firm filed suit against the owner in federal court, claiming a perfected security interest in the vehicle as collateral for its loans to the dealership. The executor moved for summary judgment.

In ***Lyons & Clark, Inc. v. Alfano,*** No. 17-626 (JDR), 2025 WL 1073714, 2025 U.S. Dist. LEXIS 67512 (N.D. Okla. Apr. 9, 2025) (opinion not yet released for publication), the court granted the executor's motion for summary judgment, dismissing the case with prejudice. The court held that under state law, possession of title was not determinative of ownership, and here, the dealership did not own or jointly own the vehicle. Thus, the firm could not acquire a security interest in it from the dealership because the dealership did not have rights in the vehicle to give it as collateral. Additionally, the court concluded that the law firm shared the same interest in the vehicle as the dealership, and as a party in privity, could be bound by the state court judgment without violating due process. Therefore, on the basis of preclusion by the state court judgment, the federal court held that collateral estoppel barred the law firm from relitigating this settled issue.

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Secured Claim or General Unsecured Claim? [BKR SD IN]

The creditors advanced money under a written agreement to the debtor in exchange for the debtor's promise to sell to the creditors a specified dollar amount of unspecified receivables. The agreement further specified that to secure the debtor's performance, the debtor would grant the creditor as collateral a security interest in "all accounts, including without limitation, all deposit accounts, accounts-receivable, and other receivables, chattel paper, documents and instruments" as defined by Article 9 of the UCC, "now or hereafter owned or acquired by" the debtor. Thereafter, the debtor filed for Chapter 11 bankruptcy. The debtor objected to the creditor's assertion that it had a secured status in the collateral. However, the creditor responded arguing that (1) the· "[d]ebtor failed to rebut the prima facie validity of [its] [c]laim;" (2) the value of the collateral had been improperly determined and "forward looking valuation" was the proper valuation method rather than valuing the collateral on the petition date; (3) the creditor held an interest in the debtor's post-petition accounts receivables and was not limited to an interest in pre-petition accounts receivable by 11 U.S.C. § 552(a); and (4) under the pre petition agreement, it "owned" the debtor's post-petition account receivables. Note that 11 U.S.C. § 552(a) provides "[e]xcept as provided in subsection (b) of this section, property acquired by the estate or by the debtor after the commencement of the case is not subject to any lien resulting from any security agreement entered into by the debtor before the commencement of the case." During the bankruptcy case, the court determined that the debtor's pre-petition cash and receivables were fully encumbered by a first-perfected security interest held by a bank. The bankruptcy court's order disallowed the creditor's claim as a secured claim but allowed it as a general unsecured claim.

In ***In re Watchmen Sec. LLC***, No. 24-00087- JMC-11, 2024 WL 4903363, 2024 Bankr. LEXIS 2871 (Bankr. S.D. Ind. Nov. 20, 2024) (opinion not yet released for publication), the court sustained the debtor's objection and disallowed the claim as a secured claim and allowed the claim as a general unsecured claim. The court addressed three issues in its opinion: (1) the creditor's interest in pre-petition receivables; (2) the creditor's interest in post-petition receivables; an4 (3) whether a loan or true sale gave rise to the creditor's interest. In determining the creditor's interest in the debtor's pre-petition accounts receivable, the court found it was inferior to the security interest held by the bank. The small value of receivables as of the petition date in relation to the significant amount of prior secured debt owed to the bank left "no value in the prepetition receivables to create any allowable secured claim for the [c]reditor" under 11 U.S.C. § 506(a). The court then found that the creditor had no interest in postpetition receivables. The creditor asserted it acquired, by pre-petition agreement, the debtor's post-petition accounts receivable. The court held that the written agreement could not affect a pre-petition sale of postpetition receivables, and the debtor "could not effect a post-petition transfer of any interest in post-petition receivables by sale or grant of a security interest." The court emphasized that a pre-petition debtor would not have "the authority [or] power to sell or otherwise transfer any interest in accounts which do not come into existence until post petition." The court went further to note that even if somehow the creditor had an interest in post-petition receivables, there was nothing provided by the creditor indicating how that interest would not also be inferior to any interest the bank had. Finally, the court determined that the creditor also did not "own" any of the debtor's receivables because the pre-petition agreement did not constitute a true sale, but was, in fact, a secured loan; therefore, the creditor's interest was a security interest, not outright ownership, as the creditor had claimed. In determining whether there .is a true sale or merely a security interest to secure repayment of a loan, courts consider: "(1) whether the buyer has a right of recourse against the seller; (2) whether the seller continues to service the accounts and commingles receipts with its operating funds; (3) whether there was an independent investigation by the buyer of the account debtor; (4) whether the seller has a right to excess collections; (5) whether the seller retains an option to repurchase accounts; (6) whether the buyer can unilaterally alter the pricing terms; (7) whether the seller has the absolute power to alter or compromise the terms of the underlying asset; and (8) the language of the agreement and the conduct of the parties." The court found that the pre petition agreement between the parties reflected at least even of the above factors and indicated that the agreement was for a security interest to repay a loan, rather than a true sale. Furthermore, the creditor bore no risk, while the debtor bore the entirety of the risk of non-payment, further indicative of the existence of a loan. Therefore, the court concluded that, because the creditor was only granted a security interest under the prepetition agreement, any claims for postpetition receivables with a security interest would be defeated under Bankruptcy Code Section 552(a).

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Security Interest in Collateral Continued After Sale to Third Party [BKR ED TN]

The federal bank entered into a Revolving Loan Agreement with the debtor, as well as a Security Agreement that granted the federal bank a security interest in substantially all assets of the debtor. Further, the Security Agreement also prohibited the debtor from selling, assigning, or further encumbering the collateral. After the agreements were signed, the federal bank filed a financing statement with the Tennessee Secretary of State to perfect its security interests. Subsequently, the debtor transferred ten trailers, which were covered by the federal bank's blanket security interest, to a related entity (the "leasing debtor"). The leasing debtor later executed a Commercial Security Agreement granting the community bank a security interest in the same trailers. When the debtors filed for bankruptcy, the federal bank commenced an adversary proceeding seeking a judgment that its security interest had priority over the community bank's interest. Both parties moved for summary judgment.

In Greeneville Fed. Bank, FSB v. First Farmers & Commer. Bank (K&L Trailer Leasing, Inc.), 665 B.R. 364 (Bankr. E.D. Tenn. Nov. 4, 2024), the court held that the federal bank's interest in the ten trailers had priority over the community bank's interest. The community bank argued that Tenn. Code Ann. § 47-9-3ll(d) applied, which would have extinguished the federal bank's security interest in the trailers and create an exception to the general rule that a perfected security interest continues after collateral is transferred. However, the court focused on Tenn. Code Ann. § 47-2-403(2), which also creates an exception to the general rule that "sale of inventory in the ordinary course of business" would not allow the perfected security interest to continue. The federal bank asserted that the trailers had not been transferred in the ordinary course of business because, under the UCC, a buyer in the ordinary course of business must lack knowledge that the sale violates another party's rights in the goods. Tenn. Code Ann. § 47-1-201(9). In determining whether the leasing debtor was a buyer in the ordinary course of business, the court reviewed the unambiguous Security Agreement and Revolving Loan Agreement, relying on the plain language of these documents. The evidence established that the leasing debtor was not a buyer in the ordinary course of business in the trailer transaction because both the debtor and the leasing debtor knew that the sale violated another party's rights in the trailers. Ultimately, the court granted summary judgment in favor of the federal bank because the transaction occurred outside the ordinary course of business, and the leasing debtor was deemed to know that the transfer violated the federal bank's inventory security interest.

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Thief Cannot Grant a Valid Security Interest in the Stolen Property [MD FL]

The thief pleaded guilty to mail fraud and interstate transportation of stolen property. The thief had represented himself to be a "master psychic." The thief admitted to persuading a minor to steal jewelry from the victim. The minor followed the thief's instructions and proceeded to send the stolen property to the thief via FedEx. The stolen goods included a 15.88-carat gray diamond (diamond 1), which the thief sold to a jeweler in New York, and a 103.86-carat diamond (diamond 2), which was sold to a New Jersey enterprise that used it as collateral for a loan from a creditor. The thief further admitted the goods were stolen "directly from the victim." Following the plea, the court entered an amended preliminary order of forfeiture covering both diamonds as assets obtained through the fraud. The purchaser of diamond 1 from the jeweler filed a verified petition contesting the forfeiture of the diamond. He argued that: (1) he possessed standing to contest the forfeiture due to his ownership and possessory interest in the diamond due to the economic and reputational harm that he would suffer from the forfeiture; (2) he was a bona fide purchaser under 21 U.S.C. § 853(c); and (3) he detrimentally relied upon the government's prior statements that the diamond would not be subject to forfeiture. The government moved to dismiss his petition, and in response, the purchaser made two additional arguments: (1) that "no case or controversy" existed, making the proceeding moot; and (2) that the ancillary proceeding violated his Seventh Amendment right to a jury trial. The creditor also filed a petition contesting the forfeiture of diamond 2. The creditor argued it had standing as a bona fide purchaser under 21 U.S.C. § 853(n)(6)(B) and was reasonably unaware that the diamond had been stolen. The creditor asserted additional substantive arguments in support of its claim that it had a valid legal interest in diamond 2 including: (1) that the thief never "stole" diamond 2 but "swindled" and/or "sold or bartered" the diamond to the debtor, who then transferred it in the ordinary course of business, qualifying the thief as a "merchant" under New Jersey's merchant entrustment; (2) that alternatively, if the entrustment rule did not apply, estoppel should bar the victim from recovering under New Jersey law; (3) that the debtor possessed a "voidable" title since the thief obtained the diamond through fraud rather than outright theft; and (4) that the creditor had a valid and enforceable security interest under New York law. Subsequently, the victim filed a petition claiming title to both diamonds and provided documentation of his original purchases. The government supported the victim's petition and, together with the victim, moved to dismiss the competing petitions on the basis that the purchaser and the creditor lacked standing to contest the forfeiture.

In ***United States v. Lee, 748 F. Supp. 3d 1142***, (M.D. Fla. 2024), the court granted the government's amended motion to dismiss, the victim's motion to dismiss competing claims, and the victim's petition claiming title to the diamonds. The court dismissed both the purchaser's and the creditor's petitions. To reach its conclusions, the court considered 21 U.S.C. § 853, Federal Rule of Criminal Procedure 32.2, and applicable state laws of New York and New Jersey regarding theft and the transfer of stolen property. The court rejected the purchaser's first argument of mootness because it needed to resolve the competing ownership claims in the diamonds. The court also rejected the purchaser's second argument that the ancillary proceeding violated his Seventh Amendment right to a jury trial. It explained that 21 U.S.C. § 853(n)(2) provides that the court, not a jury, decides ancillary hearings. The court also found the purchaser's reliance on SEC v. Jarkesy, 603 U.S. 109 (2024) misplaced, because that case involved administrative penalties imposed without judicial process, whereas the ancillary proceeding here falls under judicial process authorized by statute. Next, the court explained that it dismissed the purchaser's petition for lack of standing because he failed to provide evidence that he received "good or voidable" title from the thief. The court cited New York state law, which "has long protected the right of the owner" and ensures the state does "not become a marketplace for stolen goods," even a "good-faith purchaser for value" cannot acquire a valid title to stolen goods. Because the record indicated the thief stole the diamonds "directly" from the victim, the thief held a void title that he could not convey to anyone. The court also denied the purchaser's estoppel argument even though he may have detrimentally relied on the government's misstatements, because the government's conduct did not constitute "affirmative misconduct." Moreover, ancillary proceedings focus solely on addressing the validity of the claimant's interest, not the financial or reputational impact of forfeiture. The court denied the creditor's petition for similar reasons, holding that the creditor lacked standing because the thief could not convey good or voidable title in stolen property. The court rejected the creditor's first argument that the thief obtained the diamonds by fraud, rather than theft, as an impermissible "attempt to relitigate the forfeitability," an act that is barred in ancillary proceedings. The court emphasized that, despite the use of words like "scheme" in the indictment, the thief clearly defrauded and stole the diamonds from the victim. Additionally, because the thief held a void title, the court concluded that New Jersey's good faith purchaser exception did not apply. Likewise, the court rejected the application of New Jersey's entrustment rule, finding that the thief did not constitute a merchant and that the victim never entrusted the thief with the diamonds. The court dismissed the creditor's third argument as conclusory and rejected the fourth because the thief could not convey rights in the diamonds to the debtor, which meant that the creditor did not possess a valid security interest.

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TIMBER! The Court Cuts Down the Lender's Argument [ED KY]

The borrower contracted (the "2016 timber agreement") with Elk, granting Elk the right to remove timber from the borrower's land. The borrower also entered into an agreement with a lender, assigning its royalty interests in the timber to a lender and granting the lender a security interest in the timber. Later, the borrower entered into another Elk agreement (the "2017 timber agreement).

Later, the lender sued the borrower in federal court to collect on the note the borrower had failed to pay. The court ordered the borrower to repay the remaining balance of the loan. The lender also sought to have the court hold that its security interest the borrower had granted it in the timber was superior to Elk's interest. The court declared that even though it appeared the lender had a superior interest, it declined to grant summary judgment because the lender had failed to show its agreement with the borrower subordinated Elk's interest or that the lender could take an interest in the borrower's uncut timber "when all parties were on notice that [the borrower] did not own its timber in 2016." Then, in 2022, Elk filed a motion for summary judgment seeking an order to permit it to harvest timber on the borrower's land. The lender renewed its motion for summary judgment and again requested that the court find its interest to be superior. The court made five key determinations when it granted the lender's summary judgment motion: (1) the lender's claim was not barred by res judicata; (2) the lender had obtained an enforceable security interest in the borrower's standing timber; (3) Elk did not have a security interest in the borrower's timber; (4) the lender's interest was not impaired by any royalty agreements; and (5) Elk had not purchased the timber in the ordinary course of business. Under the Article 9 of the UCC, an entity that purchases collateral from a merchant in the ordinary course of business (as that term is defined in the UCC) takes free and clear of a security interest in the inventory. However, the court found that the sale had not been in the ordinary course of business and therefore the lender's security interest in the timber had not been extinguished. Elk requested that the court reconsider its Memorandum Opinion and Order.

In **HBKY, LLC v. Kingdom Energy Res., LLC**, Civil No. 6:21-cv-00101-GFVT, 2024 WL 4244594, 2024 U.S. Dist. LEXIS 171771 (E.D. Ky., Aug. 23, 2024) (opinion not yet released for publication), the district court found in favor of the lender and rejected Elk's arguments. The court analyzed Elk's three arguments: (1) the court's failure to consider whether the 2017 timber agreement conveyed title of the timber to the lender; (2) the court's failure to consider the borrower's breach of the 2017 timber agreement; and (3) Elk's argument that it was a buyer in the ordinary course of business. First, the court found that it had considered and analyzed the 2017 timber agreement in its order. However, the lender had never previously raised the issue of whether the 2017 timber agreement conveyed title of the timber to it. The court found that, even if it were to agree that the title passed in the 2017 timber agreement, Elk failed to prove that it was a buyer of the timber in the ordinary course of business. Second, the lender never raised the issue of the borrower's breach of the 2017 agreement to the court; therefore, the court had not considered that issue. Third, the court found that Elk failed to prove it was a buyer of in the ordinary course of business because: (1) Elk had not alleged that the borrower was in the business of selling timber; (2) Elk had not alleged that it bought the timber in good faith; and (3) Elk neither received title for the timber nor identified the timber it intended to harvest. Elk attempted to rely on the explicit language of the agreements; however, if the court had allowed this argument to proceed, it would have committed a legal error. In conclusion, the court held that none of the lender's arguments were convincing and ruled in favor of the assignee,

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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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