NORTH DAKOTA BANKERS ASSOCIATION

LEGAL UPDATE

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ARBITRATION

Failure to Raise Issue at Trial Court Bars the Issue as Grounds for Appeal [TX APP]

The drawer sued the bank in a class action "on behalf of herself and Classes of all other Texas Citizens similarly situated." In her petition, the drawer alleged that the bank improperly imposed overdraft fees on authorized transactions from debit cards with sufficient funds and that the bank charged multiple fees on the same item. The drawer claimed that the bank's actions breached the account agreement. The bank moved to compel arbitration under the account agreement, arguing that the drawer's claims were subject to arbitration. In response, the drawer asserted that the arbitration clause was "illusory and unenforceable" because the "Amendments and Alterations" clause in the account agreement permitted the bank to "retroactively modify or eliminate the arbitration clause." The drawer also argued that because the bank sought to compel arbitration, it bore the burden to show the existence of an enforceable arbitration clause. The bank did not reply to the drawer's response and cited time constraints as the reason for its failure to do so. The trial court held a hearing on the motion to compel arbitration, though no record existed of the hearing, and the court denied the motion without stating its grounds. The bank argued on appeal that the trial court erred by denying its motion to compel arbitration based on the alleged illusory nature of the arbitration provision.

In Citizens Nat'l Bank of Tex. v. Wiggins, No. 05-25-00397-CV, 2025 WL 3619385, 2025 Tex. App. LEXIS 9557 (Tex. App.--Dallas Dec. 12, 2025) (opinion not yet released for publication), the court affirmed the denial of the bank's motion to stay proceedings and compel arbitration. The court based its holding on two key procedural deficiencies: (1) that the bank did not submit a response to the drawer's trial court claims regarding the illusory nature of the arbitration clause, and (2) that the reporter's record of the court proceeding does not exist to show any arguments raised in the hearing. The bank had the burden of proof to show that it presented the issue to the trial court and either obtained a ruling or objected to the court's failure to rule. The court concluded that, because no reporter's record existed and the bank failed to show it raised these arguments below, the missing record was presumed to have supported the trial court's ruling. Under that presumption, the court overruled the bank's issue on appeal and affirmed the trial court order.

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BANK FAILURE

Federal Government's Motion to Intervene Granted and Stay Partially Granted with Lender's Request for Production [WD OK]

The borrower, a bank, received word from the Office of the Comptroller of the Currency (the agency) that it needed an injection of $3.5 to $4.5 million dollars to prevent the borrower's closure. The borrower's owners agreed for a lender to inject the necessary funds, and in exchange, the borrower would assign certain classified loans and written off overdrafts to the lender. Both parties executed Loan Purchase and Assignment and Assumption of Loan documents. A month later, the borrower failed, and the court appointed a receiver. The receiver contacted the lender and indicated that the receiver paid some funds toward the lender's assigned loans and overdrafts. The lender then demanded payment of those funds in a claim. The receiver disallowed the claim under 12 U.S.C. § 1821(d)(5)(D)(i). The lender then alleged that the receiver already tendered some payments under the loans and written off overdrafts. The lender filed suit, objecting to the receiver's disallowance of its claim. The United States of America requested to intervene under Rule 24 of the Federal Rules of Civil Procedure, which neither party opposed. However, the lender opposed the government's motion to stay proceedings for a pending criminal case related to the borrower's failure.

In FDS Fin., LLC v. FDIC, No. CIV-25-1123-R, 2025 WL 3565345, 2025 U.S. Dist. LEXIS 257505, (W.D. Okla. Dec. 12, 2025) (opinion not yet released for publication), the court partially granted the government's motion to intervene and stay. In determining whether a stay is appropriate, courts must balance six factors: "(l) the extent to which issues in the criminal case overlap with those presented in the civil case"; "(2) the status of the criminal case"; "(3) the private interests of the plaintiff in proceeding expeditiously versus the prejudice to plaintiff caused by the delay; (4) the private interests of, and burden on, the defendant; (5) the interests of the [c]ourt; and (6) the public's interest." Obispo v Ishkiret's Grp., LLC, No. CIV-24-889-D, 2024 WL 5056643 at *3, 2024 U.S. Dist. LEXIS 223080 (W.D. Okla. Dec. 10, 2024). The government argued under the first factor that a significant overlap existed between the civil matter involving the borrower's failure and the criminal investigation into the borrower's failure. Under the second factor, the government also indicated that it had filed an indictment against the borrower's former CEO, and more indictments could follow. Under the third factor, the lender argued that a stay would delay or frustrate its ability to collect on the loans and overdrafts, which it needed to begin the process of repaying the loan it gave to the borrower. The lender also argued it needed the loan documents, which the receiver refused to provide, and without these documents, the lender could be prohibited from collecting the loans and overdrafts before the relevant limitations periods expired. The court concluded that this factor favored the lender. Under the fourth factor, the receiver did not oppose the stay by the government; however, the lender argued that the risk of prejudice against itself outweighed the receiver's risk of prejudice. Courts have recognized that a plaintiff's prejudice can outweigh the defendant's when the defendant is forced to choose between fulfilling civil discovery or asserting his Fifth Amendment privilege. See Obispo at *4. However, the court noted the receiver was not a criminal defendant in any proceeding. Finally, factors five and six address the interests of the court and the public, respectively. The court holds a strong interest in efficient litigation, but the court noted that it must consider that the resolution of the criminal case could increase the possibility of a settlement and affect the scope of discovery in the civil case. The public interest focuses on the government's stake in obtaining a stay. In re CFS-Related Secs. Fraud Litig., 256 F. Supp. 2d 1227, 1242 (N.D. Okla. Mar. 10, 2003). The government argued that it had a strong interest in protecting the integrity of the criminal proceeding and in preventing the civil discovery process from influencing the evidence of the criminal case. The court concluded that only the third factor tilted slightly in favor of the lender and prepared to tailor the stay accordingly. At oral arguments, the lender stated that it would not object to the stay if the court allowed it to move for a Request for Production of loan and overdraft documents held by the receiver, with the promise of the lender's cooperation in the government's investigation. The court allowed the request and otherwise granted the motion to stay.

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CARD ACT

CARD Act Allows Variable Rates Based on Month-End Prime Rate [9TH CIR]

The borrower sued the bank, alleging that the bank's agreement for variable-rate credit cards violated the Credit Card Accountability Responsibility and Disclosure Act of 2009 (CARD Act) by allowing increased interest rates on outstanding credit card balances. The CARD Act generally prohibits banks from changing rates on outstanding balances, but an exception "permits increases in a variable annual percentage rate if the rate changes according to the operation of an index that is not under the creditor's control and is available to the general public." 15 U.S.C.S. § 1666i-l(b)(2). The bank calculated its variable rates by adding a fixed margin to the U.S. Prime Rate "on the last publication day of each month." The bank then applied that rate to the entire billing cycle, even for prior purchases. The borrower claimed both the method used to calculate the rate and the application of the rate to outstanding balances violated the CARD Act. The district court found the bank's actions did not violate the CARD Act and dismissed the case under Rule 12(b)(6).

In Milliken v. Bank of Am., N.A., 162 F.4th 1030 (9th Cir. 2025), the Ninth Circuit affirmed the district court's dismissal of the case. The court held that the bank's credit card agreement complied with the CARD Act's variable-rate exception in 15 U.S.C. § 1666i-l(b)(2). The court explained that the U.S. Prime Rate formed the only variable that affected the interest rate, and because the U.S. Prime Rate is both publicly available and outside of the bank's control, it properly fit under the statutory exception. Further, the court found that the CARD Act exception requires only that rate changes occur "according to operation of an index" and contained no day-to-day conformity requirement. The court also noted that the borrower's argument ignored the consideration that decreases in the Prime Rate would benefit cardholders just as increases could harm them.

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CFBP

Biweekly Mortgage Servicer Liable for Deceptive Practices Under CFPA [9TH CIR]

The Consumer Financial Protection Bureau (CFPB) sued a biweekly mortgage payment servicer (the servicer) and its owner for deceptive and abusive practices under the Consumer Financial Protection Act of 2010 (CFPA). The servicer marketed a program promising substantial monthly and annual savings on mortgage payments, but the CFPB alleged that the servicer misled customers about the immediacy of their savings, the servicer's affiliation with their lenders, and the uniqueness of the services offered. After a bench trial, the district court found the servicer liable and imposed civil penalties. The servicer appealed. The Ninth Circuit remanded the case to the district court to determine the applicability of relevant Supreme Court and Ninth Circuit opinions issued while the first appeal was pending. After the district court judgment on remand, the servicer again appealed, challenging findings of fact and the constitutionality of enforcement because of the suit's filing before the Seila Law v. CFPB decision. 591 U.S. 197, 213, 238 (2020). The servicer also claimed that the statute-of-limitations barred the claim that it did not constitute a "seller" under the Telemarketing and Consumer Fraud and Abuse Prevention Act (TCFAPA) and that the district court had erred in denying its counterclaims and excluding evidence.

In Consumer Fin. Prot. Bureau v. Nationwide Biweekly Admin., Inc., No. 24-5940, 2025 WL 3205699, 2025 U.S. App. LEXIS 29944 (9th Cir. Nov. 17, 2025) (opinion not yet released for publication), the Ninth Circuit affirmed the district court's findings. The court held that the district court's factual findings of deception were not clearly erroneous, were supported by substantial evidence in the trial record, and would not be overturned under the deferential standard of review. Wash. Mut., Inc. v. United States, 856 F.3d 711 (9th Cir. 2002). The court also rejected, the servicer's argument that the enforcement action was invalid due to the CFPB director's former for-cause removal protections, citing binding precedent under CFPB v. Cashcall, Inc., 35 F.4th 734, 742 (9th Cir. 2022). The court applied Cashcall to conclude that the servicer did not produce specific evidence showing a constitutional harm from the for-cause removal provision when it was in effect, or that it failed to show "that the CFPB would not have pursued the enforcement action here were it not for such a culture [of recklessness]." The court also ruled that the action was timely because the CFPB neither discovered nor reasonably should have discovered the specific violations before the limitations period had expired. The court also analyzed the servicer's argument that it was not a "seller" covered by TCFAPA because it did not cold-call customers or execute payments over the phone. However, the servicer did qualify as a seller because it "'offer[ed] to provide' financial services to customers who called it." 16 C.F.R. § 310.2(ee). Furthermore, the court held that the servicer engaged in telemarketing within the definition of the TCFAPA because the servicer "sent out mailers and operated a call center that fielded millions of telephone calls." The court upheld the district court's evidentiary rulings and rejection of the servicer's counterclaims. The court found no abuse of discretion and no due process violation. On appeal, the servicer argued that the district court applied the wrong legal standard, and that only a "connection" between wrongful government conduct and reputational harm was required. However, the court held that the servicer failed even under the connection standard. Finally, the court held that the district court did not abuse its discretion when it excluded exhibits and the servicer's expert witness testimony. The court ruled the exhibits were irrelevant and held that the expert witness only relied on litigation documents and news reports. Therefore, the court affirmed the judgment against the servicer.

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FEDERAL RESERVE

"May," "Shall," and the Power of Little Words [10TH CIR]

The Federal Reserve requires master accounts in order for a federally chartered bank to use the Fed's services. The bank was a Wyoming-chartered special purpose depository institution, but under the applicable state law it could not issue loans and must fully back all deposits with liquid assets. It otherwise operates similarly to any other bank. The bank sought to use the Federal Reserve's services, specifically a master account, and applied to become an official member of the Federal Reserve. During its application, the Federal Reserve Board issued a new framework for evaluating applications from institutions with novel charters, including the bank here. Because the bank specialized in instant wire, cryptocurrency, and other digital asset transfers, it argued that the Federal Reserve's own framework granted it entitlement to a master account. The Federal Reserve rejected the bank's application under the new framework. Absent this framework, the bank's application would likely receive agency approval. The bank filed suit, alleging that the Federal Reserve violated the Administrative Procedure Act (APA), and sought a writ of mandamus to compel the approval of the application. The bank also sought a declaratory judgment regarding the Federal Reserve's

statutory obligation to provide the bank with a master account. The bank amended these claims to allege that the Federal Reserve Act (FRA) and the Depository Institutions Deregulation and Monetary Control Act (MCA) entitled the bank to the master account. The District Court of Wyoming granted summary judgment in favor of the Federal Reserve, ruling that no genuine dispute existed as to "whether [the bank] was statutorily entitled to a master account or whether, instead, the [Federal Reserve] had discretion in granting master accounts." On appeal, the issues concerned whether a final agency action occurred as required to bring an APA claim and whether the FRA, MCA, and the MCA's Toomey Amendment entitled the bank to a master account.

In Custodia Bank, Inc. v. Fed. Rsrv. Bd. of Governors, 157 F.4th 1235 (10th Cir. 2025), the Tenth Circuit first determined that the bank's APA claims failed due to the absence of a final agency action. Under the test in Bennett v. Spear, an agency must "(1) 'mark the consummation of the agency's decision-making process—it must not be of a merely tentative or interlocutory nature'; and (2) 'be one by which rights or obligations have been determined, or from which legal consequences will flow."' 520 U.S. 154, 177-78 (1997). The court ruled that the Board's email did not satisfy the second prong of the test because the final decision rested with the Reserve Bank. The court next considered § 342 of the FRA regarding the scope of granted discretion, § 248a of the MCA regarding whether the Federal Reserve must grant the bank a master account, and the MCA's Toomey Amendment regarding whether it independently required such a grant. The court affirmed the district court's findings on all claims. After briefly discussing the constitutionality of the rule itself, the court concluded the framework did not violate the final agency action restriction. Because § 342 of the FRA provides that "[a]ny Federal reserve bank may receive..." (emphasis added), the court interpreted the term "may" as a grant of broad discretion to Reserve Banks. Therefore, the Reserve Bank had no obligation to grant the bank a master account under the statute. In effect, even if the bank attained full membership of the Federal Reserve, the bank would not necessarily possess entitlement to a master account. However, § 248a(c)(2) of the MCA provides that "services covered by the fee schedule shall be available to nonmember depository institutions..." (emphasis added). This phrase, the majority held, did not restrict the Reserve Bank's discretion to require it to grant the bank a master account because "services" as used in §248a relate only to the pricing of the services and prohibited discrimination against member and nonmember institutions in that regard. It did not entitle the bank to a master account, only equal pricing for the services provided. The court also acknowledged that Congress did not intend to interfere with or alter the fundamentals of federal banking regulation, particularly where the MCA did not regulate the Federal Reserve Banks, just the Federal Reserve Board. The court concluded that the plain language of § 248a only implied a right to access for nonmember institutions as a class, noting that the statute did not include the word "all" before "nonmember institutions" while including it earlier in relation to "Federal Reserve Bank Services." In concluding that the lack of the modifier distinguished the phrases, the court ruled that each nonmember could not automatically receive all services, including master accounts. Finally, the court analyzed the Toomey Amendment's requirement that the Federal Reserve identify and report the status of every application-including a rejection-of a master account and specify the entity types. Each entity specified was eligible for a master account. Therefore, the court ruled that the Toomey Amendment granted the Federal Reserve discretion to reject an application submitted by an eligible entity. That amendment, which was passed in 2022, requires the Federal Reserve Board to establish a "public, online; and searchable database" tracking all master account requests and listing whether the request "was approved, rejected, pending, or withdrawn." 12 U.S.C. § 248c(b)(l)(B)(ii). In light of the meanings and purposes of the statutory provisions individually and when interpreted as a whole, the law did not require the Reserve Bank to grant the bank a master account, and the court rejected the bank's arguments to the contrary.

The dissenting opinion addressed the nondelegation issue and the scope of the Federal Reserve's discretion. Specifically, the dissent reasoned that the unelected nature of the Federal Reserve Board obligated the Federal Reserve to grant a master account to the bank. Relying on § 248a, the dissent argued that § 248a(b)(8)'s "any new services" provision covered master accounts. Because none of the enumerated services regarded accounts, the dissent concluded the master account necessarily fell into the "any new services" provision as a necessary prerequisite. Similarly, the dissent rejected the majority's contextual interpretation of "Pricing of services," as a guide to the section's general idea, instead favoring a plain meaning approach to the language of that section. The dissent rejected the majority's reading of "all" and its omission with nonmember institutions as innocuous and a grammatical convention, rather than requiring a strict statutory interpretation. Similarly, the dissent interpreted § 342 as giving the authority to federal banks to accept deposits; however, it held that the Federal Reserve does not retain a broad authorization to deny eligible institutions a master account.

It concluded by expressing doubt about the authority of the Fed to appoint Reserve Bank presidents under the Appointment Clause of the Constitution and suggested that Fed employees may not constitutionally have the executive authority to deny master accounts in the first place.

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FIRREA

Failure to Exhaust FIRREA Administrative Requirements Leads to Case Dismissal [DC CIR]

The mortgagors sent an email to the former outside counsel for the Federal Deposit Insurance Corporation (FDIC) containing their proof of claim on a violation under the Financial Institutions Reform, Recovery, and Enforcement Act of 1989 (FIRREA) in relation to the lending practices of the mortgagee. The receiver treated the email as a valid filing, despite the proper filing mechanisms of uploading claims documents on its website, via mail, or by fax. 12 C.F.R. § 380.34(b). Nonetheless, the district court for the District of Columbia dismissed the mortgagors' complaint for failure to exhaust FIRREA' s administrative exhaustion requirement because the mortgagors improperly submitted their complaint. The district court denied the mortgagors leave to amend· their complaint because no amendment could cure the jurisdictional defect that resulted from the failure to exhaust FIRREA's administrative requirements. The district court remanded the case to the New Jersey state court. The mortgagors appealed.

In Sequeira v. FDIC, No. 24-5209, 2025 WL 2426914, 2025 U.S. App. LEXIS 21605 (D.C. Cir. Aug. 22, 2025) (unpublished opinion), the court affirmed both the district court's dismissal of the mortgagors' complaint and its refusal to amend their complaint. The court found that 12 C.F.R. § 380.34(b) requires that a FIRREA mortgagor file a claim pursuant to the receiver's provided instructions. Because the mortgagors failed to do this, the court upheld the dismissal. The court also held that the district court did not err in considering matters outside the pleadings themselves when deciding whether the court possessed jurisdiction. Furthermore, the court held that the district court did not abuse its discretion in denying the mortgagors leave to amend their complaint because such amendments did not cure jurisdictional defects. Additionally, the court found the district court's remand to New Jersey state court had been proper because a case may be removed only to "the district court of the United States for the district and division embracing the place where such action is pending." 28 U.S.C. § 1441(a). Therefore, the court affirmed the district court's holding.

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SECURED CLAIMS

Unhappy Camper: Trustee's Objection Fails to Reclassify Claim [BKR ND IN]

The debtor filed a Chapter 13 petition listing a bank as a secured creditor based on a perfected security interest on a camper. Although the debtor attempted to surrender the collateral, the bank declined and instead filed its proof of claim as unsecured. The trustee objected, asserting that the court should treat the claim as a secured one due to the existence of the security interest and requested that the court either disallow the unsecured designation or reclassify and bifurcate the claim based on the collateral's value. The trustee further argued that the bank failed to comply with applicable state law governing secured creditors' liquidation and valuation obligations. Following the trustee's filing of the objection, the court considered the disputed issues as a contested matter without requiring an adversary proceeding.

In In re Noah, No. 24-30129-pes, 2025 WL 3641360, 2025 Bankr. LEXIS 3251 (Bankr. N.D. Ind. Dec. 12, 2025) (unpublished opinion), the court overruled the trustee's objection, holding that a secured creditor may waive its rights as a secured creditor and elect to file a general unsecured claim. The court explained that, under established bankruptcy principles, a secured creditor retains multiple choices for its claim: it may rely on its collateral, file a secured claim, pursue a deficiency claim as an unsecured claim, or waive its security interest entirely and file as a general unsecured creditor. The court determined that the bank elected for the latter option and, by doing so, waived its right to assert secured status. The court further rejected the trustee's argument that the existence of a perfected security interest compelled secured treatment and permitted the creditor, not the trustee, to control how it asserted the claim. The court also addressed the trustee's attempt to reclassify and bifurcate the claim. In bankruptcy contested matters, the court distinguished between a permissible objection to the amount of a claim and an impermissible attempt to alter its character without an adversary proceeding. The court held that the trustee's requested relief required a determination of "the validity, priority, or extent of alien" that could only occur in an adversary proceeding. Those determinations, pursuant to Bankruptcy Rule 7001, must advance through an adversary proceeding rather than in a contested matter. Accordingly, because the bank chose unsecured treatment and no party filed an adversary proceeding, the court allowed the claim as filed and rejected the trustee's objection.

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SECURITY INTERESTS

Automatic Perfection of PMSI Bars Debtor's Objection [BKR SD OH]

The debtor filed for Chapter 13 bankruptcy and objected to the creditor's secured claim for the debtor's household goods-a fireplace, microwave, and a leaf blower based on a "Retail Installment Sales Agreement" attached to the proof of claim. The debtor argued that the court should reclassify the claim as an unsecured claim because the creditor failed to provide documentation indicating that a security interest existed and had failed to file a financing statement with the secretary of state. The debtor previously contested the security interest; however, the court denied the objection and held that the debtor had provided no basis for the objection. The debtor had failed to overcome the claim's presumption of validity, and the debtor had not addressed whether the creditor properly perfected the claim under Ohio law. The debtor filed a second objection and continued to argue that, without a filed financing statement, the creditor's interest was unperfected and therefore invalid.

In In re Dews, No. 25-30191, 2025 WL 3265032, 2025 Bankr. LEXIS 3073 (Bankr. S.D. Ohio Nov. 20, 2025) (opinion not yet released for publication), the court denied the debtor's objection without prejudice, holding that a purchase-money security interest (PMSI) in consumer goods automatically perfected upon attachment, which "occurs upon execution of the security agreement." See Ohio Rev. Code § 1309.203. Because the PMSI perfected automatically under Ohio law, the creditor did not need to file a financing statement. The court defined consumer goods as "goods that are used or bought for use primarily for personal, family, or household purposes." R.C. § 1309.102(A)(23). The court emphasized that the debtor presented no evidence that the fireplace, microwave, and leaf blower were not consumer goods, and under Ohio law, the absence of a financing statement does not invalidate a PMSI. Furthermore, the debtor made no allegations that they purchased those items for anything other than personal use. Therefore, the court denied the debtor's second objection.

Eds. Note: This ruling is consistent with Article 9 of the U.C.C. as generally adopted.

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Commercial Reasonableness Needed for a Deficiency Judgement [CA SUPER]

The creditor loaned the debtor funds and secured the loan with designated pieces of art. The debtor defaulted on the loan, so the creditor brought an action and thereafter settled with the debtor to recover the debt. Under the terms of the settlement, the debtor received a period of time to sell art and obtain the necessary funds to pay the creditor. If the art remained unsold after that period, the settlement provided for the art to be sold at an agreed-upon auction house. The period passed, and the debtor then caused multiple delays of the auction by making claims that he secured a buyer who then fell through or by not possessing certain pieces. The creditor eventually received a court order directing the sale of the art; however, by that time, the questionable authenticity of the art led the creditor to conclude that the art would not sell for enough money to satisfy the debt. The court granted the creditor leave to place its own credit bid on the art, and the creditor purchased the art for an amount less than the amount of the debt. Because of this, the creditor filed a motion for a deficiency judgment to recover the remaining balance that the debtor owed. The court denied the motion under the California Code of Civil Procedure Section 664.6 because the settlement contained no provision to account for an insufficient sale price. The creditor filed another motion for deficiency judgment under the California Uniform Commercial Code (CUCC), raising the issue of whether the sale of the art complied with the CUCC requirements to obtain a deficiency judgment.

In Vinson lnvs. LLC v. Strong, No. 20SMCV00872, 2025 Cal. Super. LEXIS 53460 (Cal. Super. Sept. 8, 2025) (unpublished opinion), the court issued a tentative ruling on the creditor's motion for deficiency judgment and then denied the motion after hearing oral argument. The court first determined that the creditor held a valid security interest in the art. The debtor argued that a discrepancy in the title of the art collection between the settlement agreement and the UCC-1 filing invalidated the security interest. The court rejected that argument, holding that even if the UCC-1 statement failed to perfect the security interest, the unperfected security interest still existed and remained enforceable, though subordinate to perfected interests. The court then addressed the second requirement to obtain a deficiency judgment: whether the sale of the art was "commercially reasonable." The court found that the debtor received ample notice as a party to the settlement and at multiple court appearances prior to the sale. The court ruled that notice alone did not make the sale commercially reasonable but cited California Commercial Code Section 9627(c)(l), which makes a "collection, enforcement, disposition, or acceptance" commercially reasonable if approved "in a judicial proceeding." The court therefore tentatively ruled in favor of a deficiency judgment because the sale was judicially approved. The court made the ruling tentatively

pending the determination of two remaining questions related to commercial reasonableness: (1) whether the sale occurred in a public or private manner; and (2) whether the creditor sufficiently pleaded satisfaction of the California. UCC requirements needed to secure a deficiency judgment. Additionally, the court considered whether it should grant the motion or whether summary judgment would provide the proper procedure. After holding a hearing, the court denied the creditor's motion because the creditor had failed to proceed with summary judgment or trial procedures. Accordingly, the court indicated it would rule when the proper procedures were followed.

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Failure to Allege Facts Supporting Claims Results in Summary Judgment [D NV]

The borrower purchased a car under a financing agreement with the lender, giving the lender a security interest in the car. Under the agreement, the lender could repossess the car if the borrower failed to adhere to the agreement. Specifically, if the borrower allowed another security interest on the car, the lend.er could take immediate possession of the vehicle. Several years later, the borrower crashed the car, and the police department towed the car to a local tow yard. The tow yard attempted to contact the borrower about storage foes and inform the borrower that the tow yard would sell the vehicle at auction if fees were not paid, but the borrower never received any communications. The borrower never contacted the tow yard and never paid any of the storage fees. Before the auction of the car, the lender paid the storage fees and repossessed the car. The lender then proceeded to move the cat to a different storage company. The lender sent the borrower a letter stating that the lender now had possession of the car and the borrower could redeem the car by paying the full balance owed, or the lender would sell it. The borrower stopped making payments under the original agreement, so the storage company transferred title of the car to the lender. The lender also provided a repossession affidavit, which allowed the storage company to sell the car. The storage company then sold the car, and the lender sent the borrower a final statement claiming the borrower owed additional money on the car because of the late fees. The borrower proceeded to sue the lender and the storage company, asserting claims for breach of contract, breach of the implied covenant of good faith and fair dealing, fraudulent misrepresentation, slander, conversion, deceptive trade practices, unjust enrichment, civil conspiracy and concert of action claims, aiding and abetting, declaratory relief, and punitive damages. The borrower did not respond to the summary judgment motions, and his unanswered requests for admission were deemed admitted in the action.

In Spicer v. U.S. Bank, No. 2:22-cv-01003-APG-BNW, 2025 WL 2687150, 2025 U.S. Dist. LEXIS 184092 (D. Nev. Sept. 19, 2025) (opinion not yet released for publication), the court granted summary judgment in favor of the lender and storage company on all claims. First, the court held that no reasonable jury could find that the lender breached its contract or breached its implied covenant of good faith and fair dealing with the borrower because the borrower had allowed another security interest on the car. To succeed on a breach of contract claim, the plaintiff must show: (1) formation of a valid contract, (2) performance or excuse of performance by the plaintiff, (3) material breach by the defendant; and (4) damages. Under the financing agreement, the lender could repossess the car if another party obtained a security interest in the car. The borrower triggered this right when he failed to pay storage fees to the original tow yard, resulting in a lien on the vehicle. Next, to succeed on a claim for breach of the implied covenant of good faith and fair dealing, the plaintiff must prove: (1) the existence of a contract between the parties, (2) that defendant breached its duty of good faith and fair dealing by acting in a manner unfaithful to the purpose of the contract; and (3) the plaintiffs justified expectations under the contract were denied. The court granted summary judgment for the lender on the basis that the lender acted faithfully to the financing agreement when it repossessed the car from the storage company because another party had obtained a security interest in the car. Next, to succeed on a fraudulent misrepresentation claim, the borrower must show: (1) the lender made a false representation with either knowledge or belief that the representation was false or without a sufficient foundation to make the statement, (2) the lender intended to induce the borrower's reliance; and (3) the borrower suffered damages as a result of that reliance. The borrower's fraudulent misrepresentation claim failed because he presented no evidence that the lender's final statement claiming the borrower owed more money was incorrect. Furthermore, the borrower presented no facts supporting his claim that the lender slandered him by charging an incorrect amount. Therefore, the court granted summary judgment to the lender. The lender and the storage company prevailed on the borrower's conversion claims because the borrower provided no evidence that either party wrongfully possessed the car. The borrower's deceptive trade practices claim similarly failed because the storage company never obtained a lien on the car, a requirement to bring the claim under Nevada law. Likewise, the borrower failed to provide any evidence that the lender or storage company participated in consumer fraud. Specifically, the borrower alleged no facts that the lender or storage company unlawfully repossessed the car. The lender only repossessed the car after the initial tow yard placed a lien on it, which constituted a default under the applicable agreements. Additionally, the court recognized that the lender requested the vehicle to be sold at auction only after giving the borrower around eight months to pay the balance he owed on the vehicle.

Based on this failure to present facts of unlawful repossession, the court also denied the borrower's claims of unjust enrichment. Because the borrower presented no evidence of an agreement between the lender and the storage company, the borrower's civil conspiracy and concert of action claims failed. To establish aiding and abetting, the plaintiff must show that the primary violator breached a duty that injured the plaintiff. Because the court previously found no breach of contract by either the lender or storage company, neither could be liable for aiding and abetting. Therefore, because all the borrower's claims failed, the court held the borrower could not receive punitive damages or declaratory relief.

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Lock Breaking: A Breach of the Peace? [EDCA]

A borrower took out a loan from the bank to finance the purchase of his new pickup truck. The borrower soon failed to make the payments due under the loan. Consequently, the bank contracted with a debt collection firm to recover the vehicle. The day of the repossession, the borrower left his pickup at his property, behind a locked gate. When the tow truck arrived to take possession of the pickup, the borrower's girlfriend noticed the tow truck and informed the operators that they were trespassing. The tow truck operators cut the lock on the borrower's gate and threatened to involve law enforcement if the girlfriend did not allow them to leave with the pickup. The tow truck operators left with the borrower's truck. Later that day, the borrower returned to find the lock on his gate cut and his vehicle missing. The borrower subsequently sued the bank and the debt collection firm, alleging: (1) a violation of the Fair Debt Collection Practices Act (FDCPA) against the debt collection firm; (2) a violation of the California Rosenthal Fair Debt Collection Practices Act (Rosenthal Act) against both parties; (3) a breach of the peace repossession against both parties; and (4) conversion against both parties. The bank filed a motion to dismiss claims one through three under Fed. R. Civ. P. 12(b)(6), arguing that the borrower had failed to establish a breach of the peace, a required element of those claims.

In Roberts v. Plumas Bank, No. 2:25-cv-01484-TLN-DMC, 2025 WL 3704535, 2025 U.S. Dist. LEXIS 264431 (E.D. Cal. Dec. 19, 2025) (opinion not yet released for publication), the court denied the bank's motion to dismiss for failure to state a claim. The court focused on the cases the borrower cited in which courts have held that a repossessor does not have the legal right to force their way past "a locked gate in order to effectuate the repossession." Clark v. PAR, Inc., No. CV-15-02322-MWF (FFMx), 2015 WL 1378146, 2015 U.S. Dist. LEXIS 198216 (C.D. Cal. July 22, 2015); Rivin v. Patrick K. Willis Co., No. 2:20-cv-07431-RGK-KS, 2020 WL 8365251, 2020 U.S. Dist. LEXIS 249263 (C.D. Cal. Dec. 4, 2020). Furthermore, the court acknowledged precedent stating that "a secured party can lose their present right to possession of collateral by actions taken during repossession," and that "California law makes it unlawful for repossessors to enter 'any private building or secured area without the consent of the owner ... at the time of the repossession."' Additionally, because the borrower parked the vehicle behind a locked gate on private property and the bank's agent forcibly broke that lock to enter, the court found that the borrower had pled sufficient facts to establish a breach of the peace. The bank argued that because the property was a standalone gate without a fence and was not locked, there should be no breach of the peace. The court was not persuaded and denied the bank's motion to dismiss on claim one. Furthermore, the court held that the borrower sufficiently alleged a violation of the FDCPA and a breach of the peace. Therefore, the court denied the bank's motion to dismiss claims two and three.

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Out of Line and Unsecured: Funder Denied Priority [BKR ND TX]

A litigation funder entered into a capital provision agreement (the CPA) with several debtors, providing $35 million in funding in exchange for the right to recover from proceeds of anticipated antitrust litigation, which the debtors had brought as plaintiffs. The CPA included a provision that prioritized repayment to the funder and required that any litigation proceeds be routed through a designated payment agent. The CPA also clarified that the funder was merely a funder and not an owner of any of the related claims. The debtors' secured lenders, through their agent, asserted a perfected security interest in the same litigation proceeds. The funder then filed an adversary proceeding seeking a declaratory judgment that it held a first-priority interest in those proceeds. It argued that the CPA was a subordination agreement and requested enforcement of its alleged priority claims or equitable relief based on trust theories. The debtors, the secured lenders, and the unsecured creditors' committee moved to dismiss the litigation funder's complaint under Rule 12(b)(6).

In Blakemore Invs. LLC v. Hamilton Meat, LLC (In re Harvest Sherwood Food Distribs. Inc.), 676 B.R. 748 (Bankr. N.D. Tex. 2025), the court granted the motions and dismissed the adversary proceeding with prejudice. The court held that the funder failed to plausibly allege that it held a valid, first-priority security interest in the litigation proceeds. It rejected the funder's attempt to characterize the CPA as creating a secured interest, a subordination agreement, or a trust. The court explained that

the CPA did not function as a loan, an assignment of proceeds, or a fee-sharing arrangement. It also noted that the funder had not filed any UCC financing statements and that the agreement lacked language sufficient to create or perfect a security interest. The court also held that the CPA did not qualify as a subordination agreement because no secured creditor had agreed to subordinate its rights as a part of the CPA, and there was no binding inter-creditor agreement governing priority. The court further held that the funder's trust theories also failed, because the complaint did not adequately plead the elements of either an express or constructive trust under applicable law. Applying the Iqbal/Twombly plausibility standard (whether there is a justiciable controversy involving a matter over which the court has authority to grant declaratory relief and which would not interfere with another court's jurisdiction), the court concluded that the funder's allegations did not support any entitlement to priority over the secured lenders. Bell Atlantic Corp. v. Twombly, 550 U.S. 544 (2007); Ashcroft v. Iqbal, 556 U.S. 662 (2009). At most, the funder held an unsecured interest that was subordinate to the secured lenders' perfected lien. Accordingly, the court dismissed all claims with prejudice.

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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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