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## ARBITRATION

### District Court Proceedings Must Stay When Interlocutory Appeal in Play [5TH CIR]

Members of a non-profit electric power association (the “co-op”) sued the co-op for alleged violations of Mississippi Electric Power Association Law § 235 in state court. The co-op removed the case to federal court and moved to compel arbitration based on its bylaws’ arbitration provision. The court initially granted the co-op’s motion to compel arbitration. The members filed a motion for reconsideration. The court then vacated and reversed its earlier order, granted the members’ motion for reconsideration, and denied the motion to compel arbitration. In response, the co-op filed an interlocutory appeal under 9 U.S.C. § 16(a)(1)(B). The appeal remained pending in the Fifth Circuit. While the appeal was pending, the co-op moved, in district court, to stay the proceedings, but the district court deferred consideration of the motion. The co-op then filed a motion to dismiss the members’ complaint on the merits. The court granted the co-op’s motion to dismiss and denied the stay motion as moot. The members then appealed the dismissal order.

In **Baria v. Singing River Blec. Coop.**, No. 20-60744, 2025 WL 1419721, 2025 U.S. App. LEXIS 11948 (5th Cir. May 16, 2025) (unpublished opinion), the Fifth Circuit vacated the district court’s dismissal order. The Fifth Circuit noted that, after the district court entered its dismissal order, several legal developments materially affected the case. The Supreme Court, applying the Griggs principle, held in *Coinbase, Inc. v. Bielski*, 599 U.S. 736 (2023), that a district court must stay its proceedings while an interlocutory appeal on arbitrability under 9 U.S.C. § 16(a) is pending because the filing of a notice of appeal “divests the district court of its control over those aspects of the case involved in the appeal.” 599 U.S. 736 (2023); *Griggs v. Provident Consumer Disc. Co.*, 459 U.S.

56 (1982). Applying *Coinbase* and the Griggs principle, the Fifth Circuit found that the filing of the co-op’s interlocutory appeal deprived the district court of jurisdiction over the case, requiring a stay and precluding the district court from ruling on the merits of the motion to dismiss. Although the district court acted consistently with then-existing precedent permitting proceedings to continue during an interlocutory appeal of an order denying arbitration, the Fifth Circuit clarified that the Supreme Court’s subsequent decision in *Coinbase* applies retroactively to cases still on direct review. Therefore, the court of appeals vacated the district court’s dismissal order.

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## BANK FRAUD

### No Remand After Post-Removal Amendment of Amount in Controversy [ND TX]

The account holder alleged that he had been “scammed into depositing money orders and cashier’s checks totaling \$94,345 into various bank accounts.” The police confirmed that the accounts were scam accounts and that the deposited money had been transferred overseas. After the account holder filed claims against the bank, the bank returned \$26,815. However, the account holder alleged that the bank had improperly declined to pay the remaining \$68,000. The account holder asserted claims for fraud and negligence per se, and sought actual and exemplary damages, attorneys’ fees, and pre-and post-judgment interest.” The bank removed the case to federal court and filed a motion to dismiss for failure to state a claim under Fed. R. Civ. P. 12(b)(6). In response, the account holder moved to remand the case to the state court.

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In **Venkatraman v. Bank of Am.**, N.A., No. 3:24-CV-2821-K-BW, 2025 WL 1335660, 2025 U.S. Dist. LEXIS 87903 (N.D. Tex. Apr. 7, 2025) (unpublished opinion), the magistrate court recommended that the district court deny the account holder's motion to remand and grant the bank's motion to dismiss. First, the court addressed the motion to remand and recommended that it be denied. At the time the action was removed, the account holder's complaint exceeded the \$75,000 amount-in-controversy requirement for diversity jurisdiction in the federal courts; however, after the case had been removed, the account holder had amended his complaint and limited the requested relief to \$68,000 (the amount not yet returned by the bank). The court explained, however, that amending the amount in controversy after removal cannot defeat removal. The account holder relied on *Butler* and *St. Paul Mercury* to persuade the court to remand the case. However, neither the *Butler* nor the *St. Paul Mercury*'s holdings helped the account holder's case. The court in *Butler* held that "a pleading amendment cannot deprive the court of federal jurisdiction after a proper removal from state court." *Butler v. CitiMortgage, Inc.*, No. H-12-3315, 2013 U.S. Dist. LEXIS 1307, 2013 WL 69230 (S.D. Tex. Jan. 4, 2013). The court in *St. Paul Mercury* held that the amount in controversy cannot be changed to defeat the case's removal. *St. Paul Mercury Indemn. Co. v. Red Cab Co.*, 303 U.S. 283 (1938). The court then addressed the motion to dismiss and recommended that it be granted. Under Fed. R. Civ. P. 9(b), seven elements must be met for a defendant to be liable for fraud. The court found the account holder failed to allege three of the seven elements. Additionally, the account holder failed to comply with Fed. R. Civ. Pro. 9(b)'s heightened pleading standards, in which the account holder must allege a misrepresentation of the bank and provide details about "the 'who, what, when, where, and how' of the fraud." *Maiden Biosciences, Inc. v. Document Sec. Sys. Inc.*, No. 3:21-CV-0327-D, 2021 U.S. Dist. LEXIS 148390, 2021 WL 3492339, at \*3 (N.D. Tex. Aug. 9, 2021). The court also found that the account holder's negligence claim failed under the pleading standards of Rule 12(b)(6). In order to assert a claim for negligence, a "plaintiff must allege (1) a legal duty on the part of the defendant; (2) breach of that duty; and (3) damages proximately resulting from that breach." *Lane v. Halliburton*, 529 F.3d 548, 565 (5th Cir. 2008). The account holder did not establish the first element-that the bank owed any duty. Therefore, the account holder's motion to remand was denied, the bank's motion to dismiss was granted, and the account holder was given an opportunity to file an amended complaint.

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## EMPLOYMENT LAW

### ADA and other Disability Laws Require More than General Allegations [5TH CIR]

An employee sought accommodations for disabilities acquired during her military service. Specifically, the employee requested permission to bring her certified service dog to work. After obtaining two professional medical opinions and further correspondence with the employer, the employer repeatedly found the opinions and documents the employee submitted through the accommodations process insufficient and continued to insist on information regarding alternative accommodations. Frustrated with the delays in the process, the employee filed suit alleging "(1) failure to accommodate, (2) hostile work environment, (3) disability discrimination, (4) retaliation, and (5) interference, all in violation of the Americans with Disabilities Act ("ADA"), the Rehabilitation Act of 1973, and Texas disability laws." Ultimately, the lower court dismissed the first two claims and granted the employer's summary judgment motion regarding the last three claims. The employee appealed.

In **Strife v. Aldine Indep. Sch. Dist.**, 138 F.4th 237 (5th Cir. 2025), the Fifth Circuit reversed the lower court's ruling on the failure-to-accommodate claim and affirmed the rest of its rulings. To succeed on such a claim, the employee would need to show "(1) the plaintiff is a qualified individual with a disability,' (2) the disability and its consequential limitations were known by the covered employer,' and (3) the employer failed to make reasonable accommodations for such known limitations." *Amedee v. Shell Chem. L.P.*, 953 F.3d 831, 837 (5th Cir. 2020). The issue was whether the six-month delay would be considered a failure to "make reasonable accommodations." The court found that the record indicated the delay showed a lack of good faith on the employer's part in evaluating her request in a timely and appropriate manner, and "crucially" the employer was the reason for the delay. The employer's insistence on the employee receiving an independent medical exam, despite her providing alternative information, would allow a factfinder to find that the delay was unreasonable. Next, in affirming the dismissal of the hostile work environment claim, the court noted that the record did not show that the two alleged instances were so "pervasive or severe" as to create an abusive work environment. Regarding the disability discrimination claim, the court found that it was unsupported by the record. As to the retaliation claim, the court found the employer's explanation for needing an independent medical examination had been valid because none of the documents addressed whether alternative accommodations were viable, and the employee failed to meet its burden of showing the rationale was merely a pretext for discrimination. In addressing the final claim, the Fifth Circuit agreed with the lower court that the employee could not "point to specific evidence in the record"

that showed how the employer had interfered with her rights. Therefore, the court affirmed all claims except the failure-to-accommodate claim and reversed and remanded the case for further proceedings.

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## FDCPA

### Repossession Declared Unlawful as Police Officers Became Involved [SD IL]

The borrower purchased the vehicle with an automobile loan from the lender. Nearly 14 months later, the borrower had fallen behind on her payments. The lender then sent an order to a repossession corporation to repossess the borrower's vehicle. The repossession agent received a GPS notification and later identified the vehicle through a license plate reader hit at a nearby apartment complex, where he commenced repossession despite knowing repossession was dangerous under the circumstances and seeing the borrower inside the vehicle. After the agent placed grabber arms around the borrower's vehicle, he realized he could not safely complete the repossession with the borrower inside. The agent approached the borrower's vehicle window and instructed the borrower to exit the vehicle, but the borrower refused. Subsequently, the agent called local police. When police arrived, they again told the borrower to get out of the vehicle. It was not until the police threatened to remove her with force that the borrower finally exited the vehicle, and the agent finished the repossession process. The borrower filed suit for (1) unlawful repossession, (2) violation of the Fair Debt Collection Practices Act (FDCPA), and (3) conversion.

In **Roberts v. Image Recovery Serv.**, No. 24-cv-01119-JPG, 2025 WL 2896460, 2025 U.S. Dist. LEXIS 201554 (S.D. Ill. Oct. 10, 2025) (opinion not yet released for publication), the court granted summary judgment in favor of the borrower for unlawful repossession and breach of the FDCPA. According to Illinois law, a party may not engage in self-help repossession "if doing so would cause a breach of the peace." *Mimnaugh v. Toyota Motor Credit Corp.*, No. 04 C 4607, 2005 U.S. Dist. LEXIS 64011, 2005 WL 8179044, at \*2 (N.D. Ill. July, 11, 2025). Because there had been no judicial process, the repossession was valid only if the agent accomplished it without breaching the peace. Illinois courts interpret breaching the peace as "conduct which incites or is likely to incite immediate public turbulence, or which leads to an immediate loss of public order and tranquility." *Chrysler Credit Corp. v. Koontz*, 661 N.E.2d 1171, 1173 (Ill. App. Ct. 1996). The court relied on the fact that the agent started the repossession knowing the borrower was inside the vehicle. One court within the

same circuit had found that repossessing an occupied vehicle constitutes a breach of the peace. *Shue v. JMAC Distribution, LLC.*, 45 F. Supp. 3d 3, 7-8 (D. Mass. 2024). Additionally, the court found that the police officers' assistance in the repossession constituted a breach of the peace, holding that the dispute should be resolved by the courts, not by police officers. Because the court had granted summary judgment in favor of the borrower, she was also entitled to statutory damages, which the court calculated as "the cost of obtaining financing plus ten percent of the original cost of the collateral." *Yazzie v. Gurley Motor Co.*, CIV 14-555 JAP/SCY, 2016 U.S. Dist. LEXIS 192277, 2016 WL 7477770, at \*8 (D.N.M. Mar. 8, 2016). Furthermore, the repossession agent had violated the FDCPA, which protects consumers from abusive debt collection practices. The court concluded the borrower had met all three elements required for a violation of the law: (1) plaintiff was a consumer, (2) defendant was a debt collector, and (3) defendant violated the FDCPA. See *Anderson v. Leading Edge Recovery Sols., LLC*, No. 11-609-GPM, 2012 U.S. Dist. LEXIS 141051, 2012 WL 4506012, at \*4 n.1 (S.D. Ill. Sept. 30, 2012). The agent had breached the peace and thus lacked the present right to possess the vehicle. However, the court denied summary judgment on the borrower's conversion claim because she failed to meet element two of a conversion claim: she lacked an absolute and unconditional right to possess her vehicle due to her default on the car loan. Therefore, the court granted the borrower's motion for summary judgment on the claims of unlawful repossession and violation of the FDCPA, but denied the borrower's motion for summary judgment on the conversion claim.

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## MORTGAGES

### Abuse of Discretion: Trial Court Denied Motion to Open Without Required Foreclosure Notice [CT APP]

The mortgagee commenced a foreclosure action against the mortgagor after the mortgagor defaulted on a commercial loan secured by a mortgage on real property. The mortgagor failed to appear, and the court entered a default judgment. Following the default judgment, the mortgagee obtained an order allowing amounts due under a different promissory note to be included in the total debt for purposes of judgment and bidding. The trial court ordered a foreclosure by sale and set a new sale date. The mortgagor then appeared in court and filed

a motion to open and vacate the foreclosure judgment. The mortgagor argued that the mortgagee (1) lacked standing; (2) the judgment improperly included the second note debt; and (3) the mortgagee had failed to give the required notice of the foreclosure judgment modification to nonappearing junior mortgage holders. The court denied the mortgagor's motion, and the foreclosure sale commenced. The mortgagor appealed the judgment

In **E. Conn. Sav. Bank v. Venus Devs., LLC**, 231 Conn. App. 750 (Conn. App. Ct. 2025), the court reversed and remanded with direction to open the judgment, vacate the sale, and set a new sale date. The court held that the trial court had abused its discretion in denying the mortgagor's motion to open and remanded the case because the mortgagee had failed to comply with the notice requirement in Practice Book § 17-22. The court held that § 17-22 required the mortgagee's counsel to send notice of the terms of the modified judgment to nonappearing junior mortgage holders within ten days, and that notice of the earlier foreclosure judgment did not satisfy the rule. The court further reasoned that proper notice could have affected bidding at the foreclosure sale and potentially benefited the mortgagor. However, the court rejected the mortgagor's first claim, its standing argument, because the mortgagee had been the holder of the promissory note when it commenced the foreclosure action, and thus had standing to enforce the note. Furthermore, the court declined to address the mortgagor's second claim challenging the inclusion and proof of the second promissory note debt because the borrower failed to timely appeal the underlying foreclosure judgment under Practice Book § 63-1(a). Therefore, the court remanded for the limited purpose of opening the judgment, vacating the foreclosure sale, and setting a new sale date.

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## PACA

### Cherry on Top: Produce Growers Granted Priority over Perfected Security Interest [BKR D DE]

The debtors entered into agreements with two agricultural producers (collectively, the "creditors"). Under the terms of the agreements, the creditors would supply the debtors with agricultural products, including cherries, frozen fruit, and vegetables. The creditors, who were licensed produce dealers under the Perishable Agricultural Commodities Act ("PACA"),

sent the debtors an invoice after delivering the commodities. The invoices stated that the commodities were "sold subject to the statutory trust" under Section 5(c) of PACA. The debtors failed to pay invoices from each of the creditors in a timely manner. The debtors also received a loan from the lenders in exchange for granting the lenders a security interest in all the debtors' assets. The lenders perfected its security interest. Subsequently, the debtors filed for chapter 11 bankruptcy; the debtors' assets were sold at auction for nearly \$1 million; the bankruptcy case was converted to a chapter 7 case; and a trustee was appointed. The creditors initiated an adversary proceeding against the debtors, lenders, and the chapter 7 trustee, arguing that, under PACA, it was entitled to the funds held by the chapter 7 trustee. In response, the lenders argued that they were entitled to the funds held by the trustee because (1) the creditors' course of dealings waived PACA protections, (2) no PACA trust existed when the creditors had shipped the commodities, (3) a percentage of the funds were not protected by the PACA trust (if one were to exist), (4) granting the funds to the creditors would violate the lenders' constitutional rights under the Due Process and Takings Clause, and (5) the creditors were not entitled to prepetition and post-petition interest or attorneys' fees.

In **Peterson Farms, Inc. v. Something Sweet Acquisition (In re Something Sweet Acquisition)**, Case No. 21-10992 (CTG), Adv. Proc. No. 23-50752 (CTG), 2025 Bankr. LEXIS 2691 (Bankr. D. Del. Oct. 20, 2025) (opinion not yet released for publication), the bankruptcy court held that the creditors were entitled to the funds held by the chapter 7 trustee. As a preliminary matter, the court discussed PACA and the authorization of a statutory trust for producers of agricultural goods. The court cited a second circuit case that explained that "the seller [of produce] retains an equitable interest in the trust property pending payment... [i]n the event of a buyer's bankruptcy, the trust assets are excluded from the bankruptcy estate." *In re Kornblum & Co., Inc.*, 81 F.3d 280, 284 (2d Cir. 1996). Further, "a 'PACA trust beneficiary is thereby entitled to claim trust property ahead of even creditors holding security interests in the property.'" *Id.* The bankruptcy court then adopted the Second Circuit's burden-shifting analysis, stating that "[o]nce it is established that a PACA trust has come into existence, a party contending that particular assets are outside of that trust bears the burden of proving one of three things:" (1) at the time of purchase no trust existed, (2) trust assets were not used to purchase the commodities in question, or (3) the debtor paid all unpaid sellers in full. The court found that a PACA trust existed, which shifted the burden to the lenders. The court then addressed the lender's five arguments in turn.

First, the court held that the creditors' course of dealing had not waived the PACA protections. The lenders argued that because the creditors made shipments while the debtors had outstanding invoices, the creditors had "implicitly agreed" to payment terms

longer than PACA's requirement that suppliers require payment within 30 days of shipment. However, only pre-transaction agreements that extend the time for payment operate to waive the PACA trust. See 7 C.F.R. § 46.46. Here, the court found that making the shipments while outstanding invoices remained unpaid was a post-transaction agreement that would not waive the trust. Second, the court held that the lenders failed to meet their burden to show that the trust had terminated. The lenders had argued that one of the creditors had not had any unpaid invoices until after the lenders had a perfected security interest, and thus no trust was established for that creditor. However, the court noted that the lenders had the burden to show "that there was a point in time when all produce suppliers had been paid in full," which the lenders were unable to do. Third, the court held that the proceeds of the sale of the debtor's assets in the trustee's possession were held in a PACA trust. The lenders argued that the proceeds were not held in trust because the "bulk of the value in the § 363 sale was attributable to the equipment" and was purchased before the PACA claims arose. The court found the lenders' argument to be unpersuasive because it held that a trust had been created before the lenders obtained their security interest and the lenders failed to "[take] steps to ensure that the assets in which they took a security interest had been acquired by the debtors with funds that fell outside the ambit of any then-existing PACA trust." Therefore, the court found that the lenders failed to meet its burden that the proceeds were not part of the trust. Fourth, the court held that the lenders' Due Process and Takings clauses rights had not been violated. The court summarily dismissed the lenders' argument because the Supreme Court requires that the challenging party establish that the law "interferes with the party's reasonable investment-backed expectations." *E. Enters. v. Apfel*, 524 U.S. 498, 523 (1998). Here, the law had been enacted in 1984 and was settled by the time of the lenders' loan, and thus, the lenders could not have had a "reasonable investment-backed expectation" that the court would grant priority to their security interest over a PACA trust. Finally, the court held that the creditors were entitled to both prepetition and post-petition interest. The lenders argued that awarding post-petition interest would be inequitable, or, in the alternative, that the bankruptcy code does not grant the right of post-petition interest to unsecured creditors. The court dismissed both arguments, finding it had no authority to invoke its equitable powers to alter the terms of the agreements between the creditors and the debtors. Additionally, the court held that bankruptcy code section 506(b) entitled the creditors to post-petition fees and interest. In conclusion, the court held that a PACA trust existed, that the creditors, as opposed to the lenders, were the beneficiaries, and ordered the proceeds be distributed to the creditors.

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## SBA LOANS

### Guaranteeing a Spouse's SBA-Backed Business Loan: A Legal Requirement or Completely Voluntary? [5TH CIR]

The borrower applied for and received a Small Business Administration ("SBA") backed small business loan from the bank for his business. The bank told the borrower that the SBA required that the borrower's wife also sign the loan application and a guaranty. At the time, the wife (the "guarantor") was the business's secretary but was otherwise unemployed and had no "income or liquid assets" or an ownership interest in the small business. The guaranty included terms stating that it was "continuing and unconditional" and that the loan would make the borrower and the guarantor "jointly and severally liable" until all the loan obligations were satisfied. The borrower's business failed to make payments on the loan. The loan terms were restructured to extend the repayment schedule, but the business defaulted again under the restructured terms. The bank filed suit against the guarantor to collect on the loan based on her personal guaranty. The guarantor denied liability for the loan, arguing the guaranty was illegal. Eventually, the bank transferred the debt to the SBA. After a series of communications with the guarantor, the SBA began withholding portions of the guarantor's Social Security payments to satisfy the debt. The guarantor sued both the bank and the SBA, disputing the enforcement of the guaranty because the "requirement that she personally guarantee the loan violated both federal regulations and the SBA's Standard Operating Procedures." The bank and SBA both moved to dismiss and the district court granted both motions. The guarantor appealed two of her claims—fraudulent misrepresentation and negligent misrepresentation—against the bank and sought a declaratory judgment against the SBA that her personal guaranty was unenforceable due to illegality, fraudulent inducement, mutual mistake of fact, and novation.

In **Oldham v. U.S. SBA**, No. 19-10644, 2025 WL 1393867, 2025 U.S. App. LEXIS 11673 (5th Cir. May 14, 2025) (unpublished opinion), the Fifth Circuit affirmed in part, reversed in part, vacated in part, and remanded the case to the district court for further proceedings. The court first found that the district court properly dismissed the guarantor's claims against the bank as barred by the statute of limitations. A four-year statute of limitations governs fraudulent misrepresentation claims, and a two-year statute of limitations governs negligent misrepresentation claims. In Texas, the statute of limitations begins to run "at the time the alleged false statement or misrepresentation is made." The two claims against the bank were based on the bank's 2006 statement that the SBA required that the guarantor personally guarantee the borrower's loan. Because the suit was not brought until 2018, the court found

that the statute of limitations had run. The court rejected the guarantor's argument that the statute of limitations for both claims had been tolled under the discovery rule. It explained that the rule requires due diligence and a "potential plaintiff [is required] to 'make themselves aware of pertinent information available on public record.'" Both the sources of violations claimed by the guarantor-violation of federal regulations and SBA's standard operating procedures- "are public information." The court explained that the guarantor should have "availed herself of this information" at the time she signed the guaranty in 2006 and certainly by the time the bank first sued her to enforce the guaranty in 2012. The court also held that the guarantor's argument that the bank committed a separate tortious act in selling the alleged illegal guaranty to the SBA was forfeited because she failed to raise the issue in her amended complaint or opening brief; instead, it was only raised in her reply brief.

Next, the court addressed the declaratory judgment sought by the guarantor against the SBA, in which she sought a finding that the guaranty was unenforceable based on illegality, fraudulent inducement, mutual mistake, and novation. The Fifth Circuit explained that it had authority to affirm the district court's dismissal "on any ground supported by the record or argued" by the SBA on appeal and addressed each of the SBA's four arguments for dismissal as a potential basis to affirm. The SBA's first argument was that "the court lacked subject-matter jurisdiction because [the guarantor] sued the SBA and not the SBA administrator." The court found this argument to be unpersuasive and stated that the district court erred to the extent it relied on this argument to dismiss. The SBA's administrator "can 'sue or be sued in any court of record of a State having general jurisdiction, or in any United States district court,' meaning sovereign immunity is waived, and jurisdiction is conferred on the district courts. 15 U.S.C. § 634(b)(1). The court noted that the guarantor named the administrator in the amended complaint caption, included the administrator as a party to receive service of summons, and included language in the amended complaint regarding the administrator and how the administrator could be served. On appeal, the SBA presented a slightly different argument: that the guarantor had failed to properly effectuate service on the SBA administrator or add the administrator's name to the docket. The court found this argument had been forfeited because the SBA had failed to raise it in its motion to dismiss. The SBA's second argument was that the guarantor "failed to exhaust her administrative remedies before the SBA." The court again found this argument had been forfeited because the SBA had failed to raise it in the district court. The SBA's third argument was that the guarantor's "declaratory judgment action neither waived the SBA's sovereign immunity nor independently conferred jurisdiction to the court." Specifically,

the SBA argued that the Federal Declaratory Judgment Act ("FDJA") does not by itself act "to waive sovereign immunity or to confer jurisdiction on the federal courts" and, therefore, an independent basis was required. The court agreed with the SBA's argument regarding the effect of the FDJA but found that the "sue and be sued" clause of 15 U.S.C. § 634(b)(1) served as an independent basis to confer jurisdiction. Therefore, the court found the third argument unpersuasive. The SBA's fourth and final argument was that the guarantor "failed to state a plausible claim for relief on any of the theories supporting her declaratory judgment action." These theories included illegality, fraudulent inducement, mutual mistake of fact, and novation. As a preliminary matter, the court found that the guarantor was permitted to assert these contract defenses offensively in the declaratory judgment action; in other words, it did not matter that these defenses had not been raised defensively. As to the illegality theory, the court held that the guaranty was improper, and that the district court had erred in finding otherwise. The guarantor alleged that the guaranty was illegal because 13 C.F.R. § 120.160 (as it was in 2006) and the SBA's standard operating procedures "prohibited the [bank] from requiring a personal guaranty from her." The SBA argued that the regulations and procedures gave the bank's loan officer discretion to decide "whether to require a personal guaranty from an individual with less than five percent ownership" in the small business. The court agreed that discretion was allowed, but only under certain circumstances, none of which were present here. The 2006 version of 13 C.F.R. §120.160 provided that personal guarantees were "normally required" of holders of at least 20% ownership and a lender "in its discretion... may require other appropriate individuals to guarantee the loan as well, except SBA will not require personal guarantees from those owning less than 5% ownership." The SBA operating procedures further clarified the regulation, giving examples of the "exceptional circumstances" when personal guarantees may be required regardless of ownership, such as when the individual is a "key management person," that would be "vital to repayment ability" of the business. The examples also provide that a spouse may be the additional personal guarantor "if the spouse volunteers." However, neither the bank nor the SBA had the discretion to require a non-owner spouse to be a guarantor unless state law otherwise allowed or required it. The court explained that the guarantor did not fit any description or example of a non-owner spouse whom the bank could require to sign a personal guarantee as a condition of the loan. As to the fraudulent inducement theory, the court vacated the district court's finding and remanded it for consideration based on the Fifth Circuit's finding that the personal guaranty had been improperly required. The guarantor argued that the bank had made false representations in stating that her personal guarantee was required, even though requiring such a guarantee

was illegal. The court explained that the district court had no opportunity to consider this claim because it had already found the guaranty not illegal. As to the mutual mistake of fact theory, the court found the district court did not err in dismissing the claim. The court explained that, in Texas, to prove mutual mistake, a party must present “evidence showing both parties were acting under the same misunderstanding regarding the same material fact.” Here, because the guarantor intended to sign the guaranty to allow the borrower’s business to obtain an SBA-backed loan, there was no mistake in her intent to sign the guaranty; she was mistaken only about whether it was required by law. As to the novation theory, the court found the district court did not err in dismissing the claim. The guarantor argued that the restructured loan terms “extinguished all prior debt, including her personal guaranty.” The court explained, however, that for the guaranty to be extinguished it must be clear that the parties intended a novation, and that intent is not presumed. *Fulcrum Cent. v. AutoTester, Inc.*, 102 S.W.3d 274 (Tex. App.-Dallas 2003, no pet.). Here, the guarantor had failed to allege that the bank or the SBA intended to release the guarantor from her personal guaranty as a part of the restructured agreement.

Ultimately, the Fifth Circuit (1) affirmed the district court’s dismissal of the guarantor’s claims against the bank; (2) affirmed the district court’s dismissal of the guarantor’s mutual mistake of fact and novation declaratory judgment claims; (3) reversed the district court’s dismissal of the guarantor’s illegality declaratory judgment claim; (4) vacated and remanded the district court’s dismissal of the guarantor’s fraudulent inducement declaratory judgment claim; (5) remanded the entire case for further proceedings based on its opinion.

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## SECURITY INTERESTS

### Contract Carefully: Intercreditor Agreement Overrides UCC Provisions [BAP 8TH CIR]

In compliance with the Miller Act, which was passed to protect subcontractors and suppliers on federal construction projects, the debtor posted performance and payment bonds from the surety. In exchange, the surety required the debtor to sign a General Indemnity Agreement (the “indemnity agreement”), which “irrevocably assigned, transferred, and conveyed” to the surety “all the [d]ebtor’s rights in, arising from, or related to [the] [b]onds.” The debtor then obtained two loans from the creditor, with the majority of the debtor’s assets serving as collateral. The creditor obtained a perfected security interest in the debtor’s two deposit accounts, both maintained by the creditor. To account for the overlapping interests in the debtor’s assets, the surety and the creditor executed an Intercreditor

Collateral Agreement (the “collateral agreement”). The collateral agreement established the respective rights and priorities of the two parties regarding the debtor’s assets. The debtor filed for Chapter 7 bankruptcy, and the creditor subsequently froze the debtor’s deposit accounts. The creditor filed a motion for relief from the automatic stay in order to collect the amounts in the debtor’s deposit accounts based on its setoff rights under the terms of the account agreements and the loan agreements. The surety objected on the grounds that the indemnity agreement and collateral agreement assigned the rights to the funds to the surety. The bankruptcy court granted the creditor’s motion for relief from the stay.

In *Hartford Accident & Indem. Co. v. Cap. Credit Union (In Re Pro-Mark Servs.)*, 673 B.R. 565 (B.A.P. 8th Cir. 2025), the court reversed the bankruptcy court’s judgment and remanded for further proceedings. A party “may obtain relief from the automatic stay to exercise its rights of setoff for ‘cause.’” 11 U.S.C. § 362(d)(l). “Generally, a creditor makes a prima facie showing of ‘cause’ by establishing a right of setoff.” *In re Ealy*, 392 B.R. 408 (Bankr. E.D. Ark. 2008). The court explained that there are four elements necessary for a creditor to establish the existence of a right of setoff: “(1) a debt exists from the creditor to the debtor that arose prepetition; (2) the creditor has a claim against the debtor which arose prepetition; (3) the debt and the claim are mutual obligations; and (4) the creditor has a right to set off the debt under applicable non-bankruptcy law.” *United States v. Krause (In re Krause)*, 261 B.R. 218, 222 (B.A.P. 8th Cir. 2001). In deciding the fourth element, the court ruled that the bankruptcy court erred in deciding the parties’ positions primarily based on the indemnity agreement and state UCC law. The court held that the terms of the collateral agreement governed the priority of the parties because they contractually agreed to vary from applicable UCC provisions. The court remanded the matter to the bankruptcy court to decide the issue on the merits, based on the agreed-upon definitions, rights, and parties’ positions under the collateral agreement.

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### Crossed Wires: No Negligence Action Where Article 4-A Provides Remedy [ED NY]

A New York bank customer (the “account holder”) was defrauded out of nearly a quarter of a million dollars, after being convinced by scammers that his accounts were compromised and that his funds needed to be “secured” through urgent wire transfers. Over a series of in-person visits to his bank, the account holder made several large wire transfers to overseas

accounts controlled by the fraudsters. When requesting each wire transfer, the account holder informed the bank employee “that he had been instructed to wire money to Thailand.” After he discovered that the funds were lost, he brought suit against the bank in federal court. The account holder alleged the bank “knew or should have known” that there was a “substantial probability” he was being scammed and did nothing to warn him, contending that it had a duty to warn or halt the transactions (seemingly asserting a negligence claim under New York common law, although the complaint did not specifically assert a cause of action). A contractual relationship existed between the account holder and the bank through various account agreements and wire transfer agreements. The bank moved to dismiss the complaint, arguing primarily that the claim was preempted by New York UCC Article 4-A (“Article 4-A”). The bank contended that Article 4-A provides an exclusive statutory structure that governs the duties and liabilities of parties involved in facilitating and initiating wire transfers, meaning that because each payment order was authorized and properly executed separately and in accordance with Article 4-A, it had fulfilled its obligations under the statute. Therefore, it owed no common law duty to intervene or warn of suspicious activity. The account holder did not dispute the bank’s presentation of Article 4-A but asked the court to nonetheless “impose ‘a duty to warn’” on the bank before completing the transfers, which he argued would bring the claim outside of Article 4-A’s scope.

In **McCarthy v. JP Morgan Chase Bank**, 772 F. Supp. 3d 298 (E.D.N.Y. 2025), the court held that Article 4-A preempted the common law claim, and that even if the claim was not preempted, it had failed to state a negligence claim under New York tort law, and no “duty to warn” was created by any agreements between the bank and the account holder. First, the court held that Article 4-A preempts common law claims when they arise from the execution of funds transfers (which are “commonly referred to... as a wholesale wire transfer”) because Article 4-A was designed to be the “exclusive means of determining the rights, duties, and liabilities” of parties engaged in activity covered by Article 4-A. N.Y. U.C.C. § 4-A-102; *Fischer & Mandell LLP v. Citibank, NA.*, 632 F.3d 793, 797 (2d Cir. 2011). It further found the account holder’s claim fell completely within the scope of a funds transfer governed by Article 4-A because the wire transfers were ordered in-person, and, therefore, “authorized” under Article 4-A-202(1). Next, the court, relying on Article 4-A-212, rejected the account holder’s attempt to avoid preemption by framing his claim as a pre-transaction “duty to warn” negligence action. Article 4-A-212 limits a bank’s duties to those specifically in Article 4-A, which do not include a duty to warn. Next, the court found that even if the claim was not preempted, the account holder had failed to state a claim for negligence under New York law. To

successfully bring a claim for negligence under New York law, a plaintiff must allege that “the defendant owed the plaintiff a cognizable duty of care as a matter of law.” *Serengeti Express, LLC v. JPMorgan Chase Bank, NA.*, No. 19-cv-5487, 2020 U.S. Dist. LEXIS 81151, 2020 WL 2216661 \*1, \*3 (S.D.N.Y. May 7, 2020). The duty of care must arise under New York tort law. *Fillmore East BS Subsidiary LLC v. Capmark Bank*, 552 F. App’x 13 (2d Cir. 2014). The court noted that New York courts have consistently refused to impose extra-statutory duties on institutions facilitating a wire transfer. Therefore, the court similarly refused to impose any “duty to warn” on the bank here. Finally, the court found that there was no contractual duty to warn created by any of the agreements, and the account holder had failed to allege that the bank failed to comply with any of the agreements’ terms. Ultimately, the court found the account holder’s claims were preempted by Article 4-A, and all alternate arguments raised by the account holder attempting to bring his claims out of the scope of Article 4-A had failed.

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