NORTH DAKOTA BANKERS ASSOCIATION

LEGAL UPDATE

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ACCOUNT FRAUD

Failure to Cure Insufficient or Conclusory Pleading Leads to Dismissal [SD NY]

A professional limited liability company's sole member (the "customer") held an account at a bank, which it formed by signing a Business Deposit Account Agreement ("the Agreement"). The Agreement contained a Security Procedure provision (the "Security Provision") which specified three procedures that the bank "may" use in verifying fund transfer authorizations. After receiving an email request, the customer sent a wire transfer for a settlement payment. In the following week, the customer identified a fraudulent check withdrawal from its account equal to the settlement payment amount. This prompted the customer to report both the wire transfer and the check as fraud to a branch manager of the bank. Despite the manager's promise, he failed to report the incidents to the bank's fraud department and allegedly did not attempt to recall the funds until two weeks later. The customer filed a complaint with the Internet Crime Complaint Center run by the FBI, and the bank allegedly refused to cooperate with the FBI. As a result, the customer sued the bank with claims of negligence, gross negligence, New York Uniform Commercial Code (UCC) violations, and breach of contract. In response to the bank's Federal Rule of Civil Procedure 12(b)(6) motion, the customer withdrew its UCC claim, and the court granted the motion to dismiss but allowed the customer to amend its complaint. The customer's amended complaint reasserted its gross negligence and breach of contract claims with a more limited inclusion of facts. It also omitted the negligence claim. The bank again moved to dismiss or to strike certain allegations in the alternative. To counter, the customer moved to compel the bank to furnish witnesses and for leave to amend its amended complaint.

In **Rejuvenating Fertility Ctr., PLLC v. TD Bank, N.A.,** No. 1:23-cv-05973 (JLR), 2025 WL 588570, 2025,U.S. Dist. LEXIS 32860 (S.D.N.Y. Feb. 24, 2025) (unpublished opinion), the court granted the bank's motion to dismiss, dismissed the customer's claims with prejudice, denied the customer leave to amend, and dismissed the bank's motion to strike and the customer's motion to compel discovery as moot. The court first concluded that the customer failed to state a claim for breach of the Security Provision in the Agreement because the customer did not allege that the bank failed to use any of the three verification procedures in the two transactions. The court concluded the allegation that the bank breached the Security Provision by not alerting the Fraud Department was "conclusory." The court held that for a breach of contract claim in New York, the customer needed to identify a specific provision in the contract that created a duty and show sufficient facts to "raise a reasonable expectation" that discovery will prove a breach. Bell Atl. Corp. v. Twombly, 550 U.S. 544, 545 (2007). Regarding the gross negligence claim, the court agreed with the bank that the customer failed to allege a duty distinct from the bank's contractual duties; accordingly, the court ruled that the allegations were insufficient to state a claim. Additionally, the court concluded that the customer did not claim damages outside of contractual damages or intentional or reckless conduct extreme enough to plausibly indicate gross negligence. The court held that the use of the term "intentional" or "reckless" without facts in support constituted conclusory assertions. After dismissing the customer's claims, the court denied the customer leave to amend; reasoning that "the proposed amendments are futile." The court explained that the rule to grant leave to amend "when justice so requires" leaves courts discretion to deny the motion, specifically when proposed amendments would still fail to state a claim. Additionally, the court had previously allowed the customer to amend its complaint, and the customer had not cured the detailed deficiencies. Therefore, the court denied the bank's motion to strike and the customer's motion to compel because its prior rulings rendered the motions moot.

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Scammer Steals $2 Million From Unsuspecting Depositor [MD FL]

The depositor was a customer of the bank with two open accounts, a personal account and an account belonging to her deceased husband's estate. Notably, the executor of the estate conveyed the estate's right to sue to the depositor. The depositor received a phone call from a scammer purporting to work for the Federal Trade Commission (FTC), who told her that her accounts were compromised, and he had been assigned to her case. The scammer convinced the depositor to make several wire transfers to another bank account after converting the funds into cryptocurrency. The depositor went to her bank and attempted to transfer the funds to the requested account. The bank complied with the depositor's request and sent the wire transfer. The depositor then made a series of wire transfers to a cryptocurrency exchange. In addition, the scammer transferred funds from the estate account to her personal account. In total, the scammer had fraudulently transferred nearly $2 million of the depositor's funds. Subsequently, the depositor contacted the FTC about the scammer, and she learned that she had been defrauded. The depositor submitted a fraud report to the bank detailing the fraudulent transfers. The bank recovered a portion of the transferred funds and credited her account. The depositor sued the bank for "violations of Florida's Deceptive and Unfair Trade Practices Act (Count I); violations of Florida's UCC Article 4A (Count II); negligence per se (Count III); breach of contract (Counts IV and V); breach of the implied covenant of good faith and fair dealing (Count VI); negligent undertaking (Count VII); negligent hiring (Count VIII); negligent supervision and retention (Count IX); and promissory estoppel (Count X)." The bank moved to dismiss the lawsuit under Federal Rules of Civil Procedure 12(b)(l) and 12(b)(6).

In **Bucklin v. Bank. Of Am., N.A.**, Case No.: 2:24-cv-278-JLB-NPM, 2025 WL 1504043, 2025 U.S. Dist. Lexis 43707 (M.D. Fla. Mar. 11, 2025) (opinion not yet released for publication), the court granted the bank's motion to dismiss in part and denied it in part. The court began by dismissing the bank's argument that the depositor lacked legal standing to sue under Rule 12(b)(1) regarding her claims related to the bank account belonging to her deceased husband's estate and that the conveyance of the estate's right to sue was invalid. The court stated that the depositor had standing and that the bank did not provide any authority to prove that the conveyance was invalid. Next, the court analyzed the bank's Rule 12(b)(6) motion to dismiss. First, the court dismissed Count I because the bank was federally regulated and Fla. Stat. § 501.212 was inapplicable to federally regulated banks. Second, the court dismissed the depositor's claim that the bank violated the Florida UCC by "fail[ing] to utilize 'commercially reasonable methods of providing security.'" However, the court found that the depositor had in fact authorized the transactions and could provide no evidence that the bank had knowledge or suspicion of fraud. Third, the court dismissed Count III because the depositor's negligence per se claim was under the Florida Adult Protective Services Act (FAPSA), which did not confer the depositor a private right of action. Fourth, the court denied the bank's motion to dismiss the depositor's breach of contract claim, arising from the bank's Online Banking Agreement. The bank argued that this agreement was not a contract and that, regardless, there was no breach of a material obligation. The depositor claimed that the bank had breached a material obligation by holding her liable for unauthorized transactions after she had notified the bank within the prescribed time in the Online Banking Agreement. The bank countered that it had sent the depositor a written explanation and that this was sufficient to preclude liability. However, the court found that the bank had provided insufficient evidence to demonstrate that the written explanation "absolve[d] it of liability for an unauthorized transaction." Fifth, the court dismissed Count V because the depositor failed to provide the court with the documents that she claimed the bank had breached. Sixth, the court dismissed the depositor's breach of good faith and fair dealing claim because "Florida law does not impose a duty on banks to investigate transactions." Lawrence v. Bank of Am., NA., 455 Fed. Appx. 904, 907 (11th Cir. 2012). Seventh, the court dismissed the depositor's negligent undertaking claim. In Florida, liability arises for negligent undertaking if "(a) his failure to exercise reasonable care increases the risk of such harm, or (b) he has undertaken to perform a duty owed by the other to the third person, or (c) the harm is suffered because of reliance of the other or the third person upon the undertaking." The depositor failed to show any of these elements, and the court dismissed her claim. Next, the court dismissed both the depositor's negligent supervision and negligent hiring claims. Regarding the negligent hiring claim, the depositor provided no evidence that the bank should have conducted an investigation before hiring the employees who authorized the transactions. The depositor's negligent supervision claim fails because she failed to provide evidence that the "bank (1) received actual or constructive notice of the employee's unfitness, and (2) it did not take corrective action." Finally, the court found that the depositor's promissory estoppel claim was "adequately pleaded." The depositor relied on the Online Banking Agreement and timely filed her claim for reimbursement in a timely manner. Thus, the court found that the depositor had provided sufficient evidence to survive the Rule 12(b)(6) motion to dismiss. Ultimately, the court

dismissed all the depositor's claims for failure to state a claim, except for Count IV and Count X, dismissing Counts I and III with prejudice and Counts II, V, VI, VII, VIII, and IX without prejudice, and granting leave to amend by April 1, 2025.

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ARBITRATION

How to Avoid Arbitration: Must Have the Same Claim, Not Just the Same Facts [5TH CIR]

The customer disputed several charges to her business rewards bank account as fraudulent, refusing to pay the charges until the bank provided information regarding the charges. The bank then sued the customer for breach of contract under state law for the unpaid charges (the "bank's prior action"), but the case was dismissed for the bank's failure to prosecute. The customer later sued the bank, alleging it had violated the Fair Credit Reporting Act ("FCRA") by failing to investigate the disputed charges. In response, the bank moved to compel arbitration. The district court denied the bank's arbitration motion, finding that the bank's prior action mirrored the customer's action because both actions were merely the parties disputing whether the customer owed the charges.

In Barnett v. Am. Express Nat'L Bank, No. 24-60391, 2025 WL 2143697, 2015 U.S. App. LEXIS 18976 (5th Cir. July 29, 2025), the Fifth Circuit reversed and remanded the district court's holding, finding that, based on its recent decision in Forby v. One Technologies, LP, the bank did not waive its right to arbitrate the customer's FCRA claim. 13 F.4th 460 (5th Cir. 2021). The court explained that "[a] party can waive its right to arbitration by invoking the judicial process," but, as explained in Forby, such judicial process is only invoked "to the extent it litigates a specific claim it subsequently seeks to arbitrate." The court ultimately found that because the bank's prior action involved different claims than the customer's FCRA action, the bank "did not substantially invoke the judicial process as to those claims." Specifically, the court emphasized that even though both claims arose from the same set of facts and both centered around the customer's debt, that did not make the two claims the same.

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BANKRUPTCY

Creditors Barred from Collecting Debt After Debtor's Discharge [5TH CIR]

The debtor entered into a series of loan contracts with the creditors. The debtor allegedly pledged his property as collateral for the loans. The debtor failed to pay taxes on the property, and the school district sued in state court to recover taxes owed (the "state tax matter"). The creditors filed a petition to quiet title in the state tax matter. Shortly thereafter, the debtor filed for chapter 7 bankruptcy relief, listing the property as his exempted homestead and the creditors as unsecured creditors. The bankruptcy court eventually granted a discharge to the debtor and notice of the discharge was served on the creditors. However, even after the notice, the creditors filed a motion seeking a default judgment in the state tax matter. The debtor again notified the creditors of the bankruptcy discharge and that the motion for default judgment violated the discharge order. Regardless, the creditors obtained a default judgment in the state tax matter and shortly after placed locks on the property and posted the default judgment. The debtor then initiated an adversary proceeding in the bankruptcy case, alleging that the creditors' state default judgment violated the discharge order. The bankruptcy court found that the creditors violated the discharge order because the creditors "held only an unsecured claim," because the liens were not perfected. The bankruptcy court held the creditors in civil contempt for violation of the discharge order and awarded damages and attorneys' fees to the debtor. The bankruptcy court also awarded the debtor title to the property. The creditors appealed, and the district court affirmed the bankruptcy court's decision. The creditors then appealed to the Fifth Circuit.

In **Wyly v. Eichor (In re Eichor),** No. 24- 20238, 2025 WL 619168, 2025 U.S. App. LEXIS 4511 (5th Cir. Feb. 26, 2025) (opinion not yet released for publication), the Fifth Circuit again affirmed the lower courts. The creditors relied on two arguments, neither of which persuaded the Fifth Circuit. The creditors first argued that the debtor's "discharge order did not contain clear and specific language prohibiting the [creditors] from seeking a declaratory judgment in the state tax matter that they had title to the property in question." The Fifth Circuit found that the discharge · order expressly "discharge[d] the debtor from all debts that arose before the date of the order for relief under this chapter." Under a heading titled "Creditors Cannot Collect Discharged Debts" the order stated that "creditors cannot sue." However, there was an exception that stated, "a creditor with a lien may enforce a claim against the debtors' property subject to that lien unless the lien was avoided or eliminated." But the bankruptcy court concluded that the loans qualified as debts that were not properly secured; therefore, the creditors could not collect on the debts. Second, the creditors argued "they had an

objectively reasonable basis for believing they owned the property, such that their conduct did not support a contempt holding." The creditors argued that under their agreements with the debtor, they did not just loan the debtor money, "but actually bought the pledged property." The creditors stated that all three contracts held "sales agreement" labels. But the Fifth Circuit disagreed, because it made "little sense for the parties to have 'sold' and 'bought' the same property three times, in fairly quick succession, for an ever-evolving price." Therefore, the bankruptcy court acted within its bounds when it ruled these contracts to be personal loans. The court held that the debtor's discharge order covered these personal loans, and the bankruptcy court did not err in holding the creditors in contempt and ordering the relief it did. The Fifth Circuit also stated that even if the agreements were sales contracts, the Texas Constitution would render "any condition of defeasance" in the improperly recorded contracts void. Tex. Const. art. XVI, § 50(c). A condition of defeasance is one that would permit the seller to "reclaim title to the property conveyed after the loan is repaid," which the creditors purported that the contracts did. In re Perry, 345 F.3d 303, 313 (5th Cir. 2003). These purchase agreements, therefore, did not comply with either the Texas Constitution or Texas property law, and the court did not find the creditors' belief to the contrary objectively reasonable. Therefore, the Fifth Circuit affirmed the trial court's decision.

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FCRA

Fifth Circuit Sides with Credit Reporting Agencies in FCRA Dispute [5TH CIR]

The cardholder received notification of potential fraudulent charges on her credit card. The cardholder subsequently cancelled the card and received a new card and account. The cardholder reported several allegedly unauthorized transactions to the card issuer (the "creditor") and filed a police report. However, the creditor argued that the transactions were authorized. In response, the cardholder filed a complaint with the Consumer Finance Protection Bureau and stopped making payments to the creditor. The creditor reported the missed payments to credit reporting agencies. The cardholder sent a letter to one of the credit reporting agencies (the "agency") to protest the inclusion of an overdue balance on her credit report, claiming she was a victim of identity theft and fraud: The creditor sent another letter to the cardholder stating that it believed the transactions were valid because the charges were authorized through a card that was in her possession and processed through the "embedded chip, which cannot be duplicated." Afterward, the cardholder sued the agency under the Fair Credit Reporting Act (FCRA) for "negligently and willfully violat[ing] 15 U.S.C. § 1681e by failing to follow reasonable procedures in reporting information, as well as § 1681i by failing to conduct a reasonable investigation... "The district court dismissed both claims, and the cardholder appealed the dismissal of her § 1681 claim.

In **Reyes v. Equifax Info Servs., L.L.C.**, 140 F.4th 279 (5th Cir. 2025), the Fifth Circuit affirmed the district court's holding. The court began by discussing the FRCA and § 1681i, which requires that consumer reporting agencies have "'reasonable procedures for meeting the needs of commerce for consumer credit...in a manner which is fair and equitable to the consumer, with regard to... accuracy... of such information." The cardholder alleges that the creditor provided the agency with inaccurate information. The Fifth Circuit has previously defined inaccurate information under the FCRA to be either "'patently incorrect, or... misleading in such a way and to such an extent that it can be expected to adversely affect credit decisions.'" Sepulvado v. CSC Credit Servs., Inc., 158 F.3d 890, 895 (5th Cir. 1998). If an agency receives notice of a potential inaccuracy, the agency "must 'conduct a reasonable reinvestigation to determine whether the disputed information is inaccurate.'" § 1681i(a)(l)(A). The court further stated that an "inaccuracy is a threshold requirement for § 1681i claims," joining the Ninth and First circuits' interpretation of the FCRA. Consequently, if the cardholder could not prove that the information reported by the creditor. to the agency was inaccurate, her claim would fail. The cardholder argued that there was an inaccuracy because she claimed she did not authorize the charges. Therefore, reporting the unpaid balance on her account for those charges was inaccurate because she contested whether she actually "owed the debt." The agency disputed this argument, claiming that it was "an impermissible collateral attack on the validity of her debt with [the creditor]." The court found persuasive a series of cases in other circuits and district courts that held that "credit reporting agencies are not tribunals and 'are neither qualified nor obligated to resolve legal issues.'" Denan v. Trans Union LLC, 959 F.3d 290, 296 (7th Cir. 2020). Therefore, the cardholder could not challenge the validity of her debt in an FCRA claim against the agency because it was a legal issue that had to be resolved by the appropriate authority. The cardholder urged the court to disregard those cases because she claimed the agency was required to delete the credit information if it was unable to verify the accuracy of the information, and, further, the agency was unable to "verify" the debt if the debt was contested. The court disagreed and found that for a reported inaccuracy to be the basis of an FCRA claim, it must be "sufficiently objectively verifiable." Sessa v. Trans Union, LLC, 74 F.4th 38, 40 (2d

Cir. 2023). The court reiterated its holding that "consumer reporting agencies are not required· to investigate the legal validity of disputed debts under the FCRA." Therefore, because the validity of her debt was a legal issue, rather than a factual issue, the agency was not required to perform an investigation. Thus, her claim that the agency failed to conduct a reasonable investigation under § 168 li was dismissed.

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LENDING

Decedent Defaulted on Loan: Heirs Take the Hit [ND TX]

The debtor entered into a loan agreement with the bank, which consisted of a note and a security interest in the debtor's property. The debtor promised to pay periodic payments of the original sum with interest. However, after the debtor passed away, the bank still sent notice of default on the loan to the property's address, and the default was not cured. The bank sought a declaratory judgment and foreclosure on the property owned by the debtor's heirs (hereinafter referred to as debtors). The debtors failed to answer the bank's process, so the bank requested the entry of a default. The Clerk of Court entered the default, and then the bank moved for a default judgment based on non judicial foreclosure.

In **US Bank N.A. v. White**, No. 3:24-cv-1212-K-BN, 2025 WL 714250, 2025 U.S. Dist. LEXIS 40688 (N.D. Tex. Feb. 10, 2025) (opinion not yet released for publication), the district court granted the bank's motion for default judgment. To obtain a default judgment in the Fifth Circuit, one must receive: "(1) default by the defendant; (2) entry of default by the Clerk's office; and (3) entry of a default judgment by the district court." See NY. Life Ins. Co. v. Brown, 84 F.3d 137, 141 (5th Cir. 1996). The court analyzed that " In Texas, to foreclose under a security instrument with a power of sale, the lender is required to show that: (1) a debt exists; (2) the debt is secured by a lien created under Texas law; (3) the borrower is in default under the note and security instrument; and (4) the borrower has been properly served with notice of default and acceleration." Singleton v. United States Bank NA., No. 4:15-cv-100-A, 2016 U.S. Dist. LEXIS 53019, 2016 WL 1611378, at *7 (N.D. Tex. Apr. 20, 2016). The court concluded that the bank had met all the elements for non-judicial foreclosure because (1) the bank alleged a debt exists; (2) the debt is secured by a lien on the Property under Article 16, Section 50(a)(6) of the Texas Constitution; (3) there is a default on the loan; and (4) the bank sent notice of default via certified mail to the address of the decedent. "Service of notice is complete when the notice is sent via certified mail." Martins v. BAC Home Loans Servicing, L.P., 722 F.3d 249, 256 (5th Cir. 2013). Next, the court explained that because the bank referred to the loan agreement as a "mortgage contract," it needed to analyze whether the bank adequately pleaded a breach of contract claim. The bank showed that (1) a valid contract existed as a loan agreement; (2) the bank fully performed under the loan agreement; (3) the debtors failed to pay under the loan agreement; and (4)the bank suffered damages for the unpaid payments from the breach of contract. Therefore, the court concluded the bank satisfied the elements required for a breach of contract claim. The court also concluded that the bank had standing to initiate a non-judicial foreclosure because it was a "mortgagee" under Chapter 51 of the Texas Property Code. The bank could also recover attorneys' fees because the loan agreement had a provision that stated: "the Note Holder will have the right to be paid back by [borrower] for all of its costs and expenses in enforcing this Note to the extent not prohibited by applicable law. Those expenses include, for example, reasonable attorneys' fees." Finally, the court considered relevant factors before it entered the default judgment. It found that no substantial prejudice was present, there were "clearly established grounds for default," and no indication that the debtor's "default was caused by good faith or excusable neglect." Therefore, the court granted the bank's motion for default judgment against the debtors.

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SECURITY INTERESTS

Bank's Perfected Security Interest Supports Stay Relief, But Not Attorneys' Fees [BKR SD NY]

The debtor filed a voluntary petition under chapter 7 of the Bankruptcy Code in October 2024. Her schedules listed a $22,474 debt partially secured by a 2022 vehicle (the "Vehicle"), with $14,500 treated as a secured claim and $7,974 treated as an unsecured claim. The bank asserted the value of the vehicle was $20,000 and that the amount due on the vehicle was about $21,000. The debtor did not claim the vehicle as exempt under 11 U.S.C. § 522(b). Under the retail installment sale contract (the "Agreement"), the debtor granted the bank a security interest in the vehicle, and the security interest had been perfected on the certificate of title. The debtor's payment history showed that the debtor had made only two of the six required post-petition payments. The bank moved for relief from the automatic stay under Bankruptcy Code sections 362(d)(l) and 362(d)(2), seeking to repossess the vehicle and. recover attorneys' fees. The debtor

did not respond to the motion or appear at the hearing, but the bank appeared through counsel.

In **In re Marita Padiernos Rosado**, No. 24-11851 (JLG), 2025 WL 1520515, 2025 Bankr. LEXIS 1312 (Bankr. S.D.N.Y. May 28, 2025) (opinion not for publication), the court granted the bank's motion in part. The court first considered whether the bank was entitled to relief from the automatic stay under section 362(d)(l) for lack of adequate protection of an interest in the property. The court held the bank lacked adequate protection because the debtor had failed to fulfill its payment obligations in accordance with the Agreement. The court next considered whether the bank was entitled to relief under section 362(d)(2), which requires a demonstration of the claim's amount, that the claim is secured by a perfected security interest, and that the debtor lacks equity in the property. Because the value of the claim exceeded the vehicle's value, the court held the debtor lacked equity in the vehicle. Further, the debtor could not show that the vehicle was necessary to an effective reorganization, given that the case was a chapter 7 liquidation case; thus, there is "no reorganization for the Vehicle to effectuate." Given that the bank had met its burden, the court found that the bank was entitled to relief from the automatic stay under section 362(d)(2). Finally, the court held that the bank was not entitled to attorneys' fees because the debtor lacked equity in the vehicle; therefore, the bank was an undersecured creditor, and under 506(b), only a secured creditor is entitled to fees.

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Guarantor for Bankrupt Crypto Kiosk Company Liable for Breach of Contract After Missing Payments to Creditor [D UT]

The creditor, a leasing and financing company, entered into a "Master Lease Agreement" with another company, under which the creditor would lease bitcoin kiosks to the company. Alongside the lease agreement with the company, the creditor also entered into a Personal Guaranty agreement with the guarantor which provided that the guarantor would be held liable for "full, complete and prompt payment, performance and observance of all payment and other obligations of Lessee under each Lease," "resulting from Lessee's breach or non-performance thereof and all of Lessor's collection costs and legal expenses and reasonable attorney fees related to any and all of the foregoing." On the penultimate month of the lease, the company filed for Chapter 11 bankruptcy, which led the creditor to file a proof of claim asserting it was owed $1,314,335. However, the bankruptcy court instead had the kiosks auctioned off, which only gave $273,733.50 to the creditor. This prompted the creditor to sue the guarantor for breach of contract so that the creditor could recover the remaining stipulated loss value and interest. The guarantor countered that the creditor breached first by filing a UCC financing statement, which went against the parties' intent of creating a true lease instead of a financing arrangement.

In AVT Nevada, L.P. v. McAlary, No. 2:23- cv-594-TS-DBP, 2025 WL 1517693, 2025 U.S. Dist. LEXIS 101453 (D. Utah May 28, 2025) (opinion not yet released for publication), the district court rejected the guarantor's argument for breach of contract and found that he was liable to pay the stipulated loss value. The court first addressed the guarantor's claim for breach of contract and determined it was unfounded because the lease agreement specifically permitted the creditor to file a UCC financing statement and create a security interest in the kiosks. Likewise, the court also found that the damages provision in the lease agreement was enforceable because the bankruptcy court did not treat the creditor as the owner of the kiosks; rather, it was just a secured creditor. Therefore, the creditor was entitled to the lease's stipulated collateral.

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Loan Agreements Remain Enforceable Despite Temporary Loss of Ownership [9TH CIR]

The debtor purchased a car and entered into a loan agreement with the bank. Subsequently, the debtor defaulted on the loan and went into bankruptcy. A creditor foreclosed on a lien and acquired the debtor's car. The debtor then purchased his car back from the creditor in a foreclosure sale. When the debtor regained his car, the bank repossessed it under the loan agreement. The debtor sued the bank for seizing his vehicle, and the district court granted the bank's summary judgment motion, allowing enforcement of its security interest and recovery under its breach of contract counterclaim. On appeal, the debtor claimed that the creditor's acquisition of the car extinguished the loan agreement with the bank. The debtor also appealed the dismissal of his claims based on conversion of the vehicle and of his personal possessions that were in the car, negligence, negligent misrepresentation, and unjust enrichment. Further, the debtor appealed the denial of his motion for leave to amend his complaint to add claims of intentional infliction of emotional distress and a violation of California Commercial Code § 9609(b)(2), the denial of his motion to quash the bank's subpoena to the creditor, the grant of the bank's declaratory judgment motion, and the "prejudicial bias" of the district judge.

In Maynard v. USAA F.S.B., No. 23-15566, 2025 WL 1098551, 2025 U.S. App. LEXIS 8734 (9th Cir. Apr. 14, 2025) (opinion not yet released for publication), the court affirmed the district court decision in part, reversed in part, and remanded for further proceedings. The court disagreed with the debtor that the loan

agreement still applied after his repurchase of the car in the lien sale. The. court cited the California Commercial Code rule that "a buyer of goods does not take free of a security interest" unless "authorized by the secured party." See Cal. Comm. Code§§ 920l(a), 9315(a)(l). Because the bank did not authorize the disposition of the collateral on the loan by written consent, the court held that the bank never released its security interest and that no exceptions to the rule applied. The court then affirmed the breach of contract ruling, finding that a breach occurred immediately before the debtor filed for bankruptcy. Similarly, the court affirmed the dismissal of the conversion claim because the bank possessed a legal right to the car. With respect to the personal possessions, the court reversed the judgment and remanded the issue because the court failed to address that claim, although the issue had been raised in the debtor's brief. The court next found summary judgment in favor of the bank proper for the negligence and negligent misrepresentation claims. While not deciding on whether the bank owed a duty to verify its lien before repossessing the car, the court ruled that failure to confirm its interest did not proximately cause the debtor's injury due to the bank's valid and current interest. From that finding, the court affirmed the declaratory judgment that (1) "the loan agreement remains effective"; (2) the debtor "is not a buyer in due course"; (3) the bank "continues to have a security interest" in the car; and (4) the debtor must return the car to the bank and "facilitate the transfer of ownership[.]" Because the debtor appealed pro se, the court construed his claims liberally and remanded the unjust enrichment claim, which the district court did not consider. The court denied leave to amend, however, because adding an intentional infliction of emotional distress claim and a California Commercial Code claim would prove futile. The court also ordered the debtor to comply with discovery, as he had initiated the suit. The court did not find any abuse of discretion in the denial of the motion to quash or in the alleged prejudicial bias of the district judge.

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Wife's Bankruptcy Filing Prevents Financial Firm from Collecting Husband's Post-Petition Client Fees [WD WA]

In 2019, an investment advisor (the "husband") entered into a loan agreement with his employer (the "creditor"), a wealth management company. The creditor took and perfected a security interest "in 'all of [the husband's] rights, title, and interest to all [his] assets..., whether now owned or hereinafter acquired, wherever located, and all proceeds... thereof." However, the husband was later fired and, as a result, defaulted on the loan. After the creditor initiated arbitration to attempt to recover the unpaid amount (approximately $2.34 million), the husband's wife (the "debtor") filed for chapter 11 bankruptcy, which stayed the arbitration proceeding. In the meantime, the husband started employment with another financial firm, bringing a significant number of his old clients with him. At the time of filing, the husband and debtor had $1,230.61 in their bank account, and the husband was owed a little over $7,226.18 in advisory client fees from his new employer. As a result, the creditor had a secured lien on $8,456.79. However, the creditor also argued it was entitled to the husband's post-petition client fees that were generated from advisory agreements the husband had entered into pre petition because the fees were proceeds under 11 U.S.C. § 552(b). The bankruptcy court disagreed, finding that the total collateral was only $8,456.76, which the creditor collected.

In **LPL Fin. LLC v. Bumstead (In re Bumstead)**, 782 F.Supp.3d 1026 (W.D. Wash. 2025), the court affirmed the bankruptcy court, finding that the creditor's security interest did not extend to the postpetition client fees owed to the husband. The court first explained that under the bankruptcy code, bankruptcy filing cuts off security interests in property acquired by a debtor's estate after 'the commencement of the case'" 11 U.S.C. § 552(a). However, the creditor's argument rested on § 552(b)(l), a narrow exception to§ 522(a), which provides that "if a security agreement extends to property of the debtor acquired prebankruptcy and 'to proceeds...of such property,' then the security interest extends to those proceeds even if they are received" post-petition. The creditor argued that the client fees owed to the husband by the new employer were proceeds "because 'they [were] derived from and [arose] out of [the creditor's] pre-petition security interest in [the husband's] accounts." Further, the creditor emphasized that the security agreement covered investment advisory accounts held by the husband regardless of where the accounts were held, and that the fees owed to the husband were "directly and indisputably traceable to the original collateral." First, the court found that the post-petition client fees were much more like post-petition accounts receivable attributable to the husband's labor, in which the creditor did not have a security interest. The court looked to the Ninth Circuit Bankruptcy Appellate Panel's (the "BAP") holding that "revenue generated after filing for bankruptcy 'solely as a result of a debtor's labor is not subject to a creditor's pre-petition interest.'" In re Skagit Pacific Corp., 316 B.R. 330 (9th Cir. BAP 2004). In other words, § 552(b) only permits a security interest to "encompass[ ] the cash collected on existing pre-petition accounts," therefore, '[p]roceeds of post-petition accounts receivable do not fall within the § 552(b) proceeds exception." Id. The court found that the client fees were the result of the husband's labor and did not fall within the § 552(b) proceeds exemption. Next, the court found that even if the creditor had an interest in the fees because they were a result of its clients following the husband to the new employer, those fees were

commingled with the husband's post-petition earnings, and the creditor failed to prove using an approved tracing method that the fees corresponded to its original collateral. The Washington UCC, which conforms with §552(b), provides that a creditor's security interest only continues post-petition in its collateral and "any identifiable proceeds." RCW 62A.9A-315(a) (emphasis added). Both the Washington UCC and the BAP require that a creditor use proper methods of tracing permitted by law to trace back the proceeds to the pre-petition collateral. The court found that the debtor had failed to use any proper methods of tracing, and its testimony that the fees related to the pre-petition collateral were not enough.

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TILA

Securitization Does Not Extinguish Borrower's Debt [ND OH]

The borrower entered into a retail installment contract with the lender to obtain an auto loan for the purchase of her vehicle. The borrower claimed the lender violated the Truth in Lending Act (TILA), the Uniform Commercial Code (UCC), and Ohio Rev. Code § 1303.31 (UCC 3-301) by failing to perfect its security interest, selling the note evidencing the loan and "converting it 'into an asset-backed security'" and by failing to disclose the securitization process. She further asserted that because the lender sold the note, it was unenforceable and the lender "voluntarily discharged [the borrower's] debt... , absolving [the borrower] of any liability under the note." The borrower sought damages, declaratory relief, and an order requiring the lender to produce the original note in order to show it was not securitized and, therefore, unenforceable. The lender moved to dismiss, arguing that the borrower had failed to identify any required TILA disclosures required to be made and that securitization does not render a loan unenforceable. Although the borrower filed a response, she did not address the merits of these arguments, and the lender asserted that she waived her claims.

In **Cox v. Bank of Am.**, No. 1:23-cv-01977, 2025 WL 638905, 2025 U.S. Dist. LEXIS 35180 (N.D. Ohio Feb. 27, 2025) (opinion not yet released for publication), the court granted the lender's motion to dismiss. The court noted that a plaintiff's failure to address the merits of the argument in a motion to dismiss can itself warrant dismissal. However, the court also addressed why the borrower's claims failed. First, it explained that TILA requires creditors to make principal disclosure obligations before the consummation of a credit transaction; it does not require disclosures for later actions. The TILA also requires borrowers to raise TILA related disputes at the time of the loan extension. Therefore, the borrower's claim failed because she did not contest the adequacy of the material disclosures when the credit was extended, only after. The court explained that her allegations "fail[ed] to support a contention that any 'mandatory disclosure was not properly or timely submitted.'" Next, the court explained that securitization creates a separate, distinct contract from the borrower's contract with the creditor, which establishes their payment obligations. Therefore, the court rejected the borrower's additional claims under TILA and the UCC, holding that securitization alone does not render a note unenforceable or alter a borrower's obligations under a loan.

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