NORTH DAKOTA BANKERS ASSOCIATION

LEGAL UPDATE

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BANKING

Incarcerated Depositor's Suit Gets Tossed for Failing to Timely Notify His Bank of Suspected Fraud [SD FL]

The depositor opened four accounts with the bank over a two-year period. To open the accounts, the depositor signed the bank's terms and conditions agreement. Subsequently, the bank amended the agreement on several occasions, provided the depositor notice, and posted the updated version on its website. Notably, the agreement required the depositor to provide written notification to the bank (depending on the issue, between 30 and 60 days) in the event of suspected fraud or unauthorized transactions. A few years later, the depositor appointed his sister as attorney-in-fact, giving her control over all of his banking activities. Meanwhile, the depositor was arrested and sentenced to five years in prison. While incarcerated, the depositor allowed his cellmate's mother to enter his home (where he had left sensitive financial information and passwords in plain view) to care for his pets. Within the next year, the depositor contacted the police to report missing sums from his bank accounts and accused the cellmate's mother of wrongdoing. The depositor and his sister, on separate occasions, also contacted the bank to report fraudulent activity. The bank froze the accounts, but the accounts had already been significantly depleted. Over the next few years, different individuals called the bank claiming to be the depositor to transfer money but were prevented from doing so by the freeze. The bank provided the depositor's sister with statements from his account, but she was unable (or unwilling) to identify any potentially fraudulent transactions. The depositor then filed a lawsuit against the bank alleging "(1) breach of contract, (2) civil theft, (3) intentional breach of fiduciary duty, (4) fraud, and (5) constructive fraud." The depositor alleged over $400,000 in damages due to the value of stolen money, damage to his credit score, and mental anguish. The bank moved for summary judgment on all counts.

In **Johnstone v. Discover Bank**, Case No. 23-14340-CIV-MAYNARD, 2025 WL 1285838, 2025 U.S. Dist. LEXIS 60730 (S.D. Fla. Mar. 28, 2025) (opinion not yet released for publication), the court granted summary judgment in favor of the bank on all counts. The court first dismissed the depositor's argument that the court must first consider Uniform Commercial Code (UCC) Article 4A, as the depositor had waived the argument by failing to raise it sooner. Furthermore, the majority of the claims fell outside the scope of Article 4A. The court then addressed each of the depositor's claims. First, the court summarily dismissed the depositor's breach of contract claim. The depositor claimed that he had notified the bank of the suspected fraud and that the bank was liable for subsequent fraudulent transactions. However, the court disagreed, finding that the depositor did not provide written notice until well after the agreement required him to do so, and thus, the claims were barred. Further, the court stated that the depositor failed to "establish[] an essential element of his breach of contract claim- an actual breach." Second, the court dismissed the depositor's allegation that the bank had committed civil theft by denying him access to his bank accounts and refusing to return the allegedly stolen money. In Florida, a claim for civil theft in a contractual agreement "must go beyond, and be independent from, a failure to comply with the terms of a contract." The court found that the depositor's claims were "virtually identical" to his breach of contract claims and, therefore, were not independent and must be dismissed. In addition, the depositor failed to provide "clear and convincing evidence" of the bank's "felonious intent" to steal from the depositor, which was required under Florida law. Fla. Stat. § 772.11. Third, the court dismissed the depositor's breach of fiduciary duty claim. The depositor argued that an implied fiduciary duty existed between the bank and himself. The court disagreed and found no evidence that the bank assumed a fiduciary role. Additionally, the bank had no responsibility to monitor or investigate transactions on the depositor's accounts. Finally, the court dismissed the depositor's claims of fraud and constructive fraud. The depositor claimed that the bank's failure to prevent suspicious activity, notify him, and reimburse him amounted to fraud. The court found that the depositor failed to provide any "evidence to show that [the bank] knew or should have known about fraud relating to the

[a]ccounts until it was first reported by [the depositor]" or that the bank made any false claim to the depositor. Therefore, the depositor failed to prove an essential element of fraud. Ultimately, the court found that there were no genuine issues of material fact and granted summary judgment in favor of the bank on all counts.

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No Duty for Banks to Investigate Fraudulent Transactions [MD FL]

A bank customer sued the bank after an unknown individual changed the customer's account phone number and email, reset the password, and fraudulently transferred hundreds of thousands of dollars out of the account. The bank did not notify the customer of these changes. The fraudster initiated seven wire transfers, and the bank authorized five before its fraud department contacted the customer to verify the activity. The customer alleged that the bank acted negligently by failing to exercise reasonable care and by not providing a security alert when the account information was altered. The customer also sought a declaratory judgment that two contracts, the Commercial Bank Services Agreement (the "CBSA") and the Online and Mobile Banking for Business Services Agreement (the "OMBBA"), were both procedurally and substantively unconscionable. These agreements were entered into by the customer through the customer's continued use of the account following the bank's successive acquisitions. The bank moved to dismiss under Rule 12(b)(6), and the customer opposed the motion.

In **Kountry v. Truist Bank**, No. 2:24-cv-0036-JLB-NPM, 2025 WL 744271, 2025 U.S. Dist. LEXIS 41045 (M.D. Fla. Mar. 7, 2025) (opinion not yet released for publication), the court granted the bank's motion to dismiss. Applying Rule 12(b)(6), the court viewed the facts in the light most favorable to the customer and assumed the allegations were true, but found the customer's claims failed. The bank argued the customer had not sufficiently alleged that the CBSA and OMBBA were procedurally and substantively unconscionable, and the court agreed. It explained that, under state law, both forms of unconscionability must be present to warrant judicial intervention, although they do not have to exist to the same degree. However, the court concluded that the customer failed to plead facts supporting procedural unconscionability. The customer merely alleged that the contracts were referred to in bank statements and not provided in hard copy, but cited no authority requiring paper delivery and admitted the contracts could be accessed online or at a branch. Because the customer had acknowledged the agreements and did not challenge the bank's authority to modify account terms, the court held the customer's allegations were insufficient. The court next addressed the customer's argument that the CBSA's unilateral change-in-terms provision was substantively unconscionable. It disagreed, finding the provision neither unreasonable nor unfair, and not so one-sided as to shock the conscience. The court also rejected the claim that the CBSA's limitation-of-liability clause was buried in the documentation and held that the provision's language was clear. As to the negligence claim, the bank argued that neither state law nor the parties' agreements imposed a duty to investigate the transactions, and that the claim was barred by Article 4 of the Uniform Commercial Code (UCC). The court agreed and held that the customer had failed to establish any such legal duty. The court declined to address the bank's remaining UCC and contractual arguments because no duty existed regardless. Ultimately, the court dismissed all of the customer's claims with prejudice.

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Victims of Bank Fraud Seek to Recover Over $93,000 via EFTA and Colorado UCC [D CO]

A Colorado couple (the "couple"), who had multiple accounts with the bank, fell victim to bank fraud over a four-month period in 2022. During that time, a fraudster made three transfers totaling $66,500 from the couple's savings account into their checking account and then issued ten unauthorized paper checks. The couple discovered the fraud only nine days after the fraudster wrote his last paper check, despite receiving monthly account statements from the bank. The bank only partially reimbursed the couple, who had lost a total of $93,891.62, because, under the terms of the bank's customer agreement, the couple had only 60 days to report a fraudulent transfer to be fully reimbursed. According to the bank, the couple's using the bank's services constituted an assent to the agreement. The couple opted to sue the bank to recover the full $93,891.62 under C.R.S. 4-4-401 of the Colorado UCC, which allows a bank customer to receive full reimbursement if the customer reports an unauthorized transaction within a year, and 15 USCS § 1693 of the Electronic Fund Transfer Act (EFTA), which makes banks liable for not adequately protecting a customer's account from fraud and liable for not reimbursing a customer who has been a victim of bank fraud,. The bank responded by filing for summary judgment.

In **Wingard v. TBK Bank**, SSB, 768 F. Supp. 3d 1282 (D. Colo. 2025), the district court granted and denied in part the bank's motion for summary judgment. The court held that the couple's claim under EFTA could not be sustained because the fraudster had used paper checks instead of an electronic medium to make the payments, and the EFTA only applies to electronic transactions. However, the court distinguished the EFTA claim regarding the 3 transfers between the savings and checking accounts because the transfers took place electronically and the couple did not receive any benefit from the transfers. The couple's Colorado UCC claim survived summary judgment because the court found that there was a genuine dispute as to whether the couple had agreed to the bank's terms and conditions. The reasoning for this lay in the fact that neither the bank nor the couple could produce evidence of the couple's assent to the terms, and the court further noted that the bank never provided notice of the terms for to the couple.

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Wire Fraud Exposed but Complaint Dismissed [SD FL]

The customer received a phone call from a representative of his bank who asked him about two suspicious wire transfers, totaling $97,100. The customer responded that he did not authorize or make the transfers, and the bank employee ensured the customer that she would cancel the wires and suspend the customer's account so an investigation could start. The bank employee called the customer the next day, requesting a verification code. She also informed the customer that he would receive a follow-up call from her the following day. When the customer never received a call, he traveled to one of the bank's branches. At the branch, he was told that a total of three wire transfers had occurred from his account. The bank cancelled one wire transfer but told the customer that it could not recover the original two wire transfers. The customer then filed for an investigation, and the representative told the customer he could also file a complaint. The customer then filed a fourpart complaint in state court against the bank. The bank moved to dismiss each of the customer's complaints.

In **Dickson v. Wells Fargo Bank, N.A.**, No. 25-80095-CIV-CANNON, 2025 WL 1517528, 2025 U.S. Dist. LEXIS 93992 (S.D. Fla. May 16, 2025) (opinion not yet released for publication), the court dismissed all four counts of the customer's complaint against the bank. The bank presented the following main arguments: "(1) Florida Deceptive and Unfair Trade Practices Act (FDUTPA) does not apply to Wells Fargo; (2) the Electronic Funds Transfer Act (EFTA) does not apply to the transactions at issue here; and (3) the negligence and unjust enrichment counts are preempted by Article 4 of the Uniform Commercial Code as codified under Florida law." Under the first argument, the court agreed with the bank that the FDUTPA did not apply because it exempted banks that were regulated by federal agencies. Fla. Stat. § 501.212(4)(c); In re Kachkar, 769 F. App'x 673, 682 (11th Cir. 2019). The victim did not dispute this argument; the victim simply stated that it was too premature to argue because "nothing in the complaint suggests that the bank is a federally regulated bank." The court concluded that there could be no dispute that the bank was a federally regulated bank. For count two, the bank argued the negligence claim brought by the plaintiff "is barred by the independent tort doctrine." A plaintiff must have four elements to plead negligence: "(1) a duty; (2) breach of that duty; (3) causation; and (4) harm." The victim argued the bank owed him a duty "to keep his funds safe, maintain the privacy and security of his account information, prevent unauthorized access, and flag susp1c1ous activities concerning his funds." However, the bank presented an Account Agreement and an Online Access Agreement, which delineated such duties as they pertained to the wire transfers. The court held that the customer brought the negligence claim simply because he alleged the bank did not "follow its contract." The tort doctrine barred such a claim. In the third count, the victim alleged a violation of the EFTA for the bank's failure to reimburse him. But the bank stated that the EFTA did not apply to wire transfers. The court concluded that wire transfers fell outside of the EFTA because the definition of electronic fund transfers did not include wire transfers. Finally, the bank alleged the plaintiff failed to plead the elements of unjust enrichment: "(1) plaintiff has conferred a benefit on defendant; (2) defendant voluntarily accepted and retained that benefit; and (3) the circumstances are such that it would be inequitable for defendant to retain it without paying the value thereof." The court concluded that merely "presuming" that the bank benefitted by earning interest on the accounts was insufficient. Therefore, the court dismissed counts one and two of the customer's complaint with prejudice and counts three and four without prejudice.

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BANKRUPTCY

Bankruptcy Estate Limited to In-Kind Satisfaction and Barred from Additional For-Value Recovery [5TH CIR]

When the corporation filed for Chapter 11 bankruptcy after the pandemic, the bankruptcy court approved debtor-in-possession (DIP) financing, largely from the corporation's secured creditors. The unsecured creditors objected, leading the court to deny the corporation's motion to proceed with the DIP loans pending additional negotiation. When the corporation and the creditors reached a negotiated agreement, the court approved the final DIP order. The COVID pandemic shortly thereafter led oil and gas prices to plummet, so the corporation defaulted on its obligations under the DIP order. The corporation proposed multiple reorganization plans, one of which the bankruptcy court approved (the "Plan"). The Plan released all security interests against the corporation in exchange for granting the DIP creditors approximately twenty percent of the stock in the new corporation. Additionally, the Plan addressed the three phases of litigation for the bankruptcy proceedings. In Phase One, the bankruptcy court interpreted the Final DIP Order, upholding the validity of the DIP security interests and the lender's stock allocation. For Phase Two, the court ruled the secured creditor's pre-petition liens were "avoidable preferential transfers" due to the lenders failure to timely perfect their security interests outside of the ninety-day lookback period. Phase Three allocated the remainder of the reorganized corporation's shares. The court first determined the value of the avoided security interests. From the valuation, the court awarded the secured creditors and DIP creditors thirty percent of the corporation's shares, with the remaining seventy percent of the equity going to the unsecured creditors. The secured creditors appealed, raising two legal issues for consideration: (I) whether the bankruptcy court valuation under the Plan disregarded the "single satisfaction" provision of 11 U.S.C. § 550; and (2) whether Bankruptcy Code section 550 limited the "preserved avoidance actions" following the release and discharge of the creditor's security interests.

In **Ad Hoc Grp. Of Senior Secured Noteholders v. Del. Trust Co. (In re Sanchez Energy Corp.)**, 139 F.4th 411 (5th Cir. 2025), the Fifth Circuit vacated and remanded the bankruptcy court's decision. The court remanded the case to the bankruptcy court to award the DIP creditors one hundred percent of the equity of the reorganized company because the value of the DIP security interests was greater than the total assets of the corporation. Next, the court held that the bankruptcy court erred in its plan interpretation because the Plan did not provide for "'valuation' in a vacuum irrespective of defenses that were available to the secured creditors under the same Plan." It explained that the Plan made the distributions of equity to DIP, secured, and unsecured creditors conditional on the results of the Lien-Related Litigation, preserving all defenses and rights of the DIP Lenders. When the bankruptcy court ultimately upheld the validity of the DIP liens, the Ad Hoc Secured Creditors were entitled not only to the minimum twenty percent equity specified by the Plan, but also to one hundred percent in light of the value of their superpriority liens. The court also concluded that the equity allocation went against 11 U.S.C. §§ 550(a) and (d) and that the lower court allowed more than one satisfaction against the secured creditors. When applying Texas law and the Bankruptcy Code's rule of construction to the Plan, the language of section 550(d) led the court to interpret the "or" in section (a) disjunctively, meaning that the bankruptcy estate's in-kind recovery of the returned liens precluded an additional monetary recovery of the pre-petition liens' values at the petition date. The court also highlighted that the bankruptcy court erred when it allowed recovery of the value of the pre-petition liens in addition to requiring their return to the debtors' estate under the Plan. The bankruptcy court claimed that avoidance of the certain liens would not restore the estate because the DIP lenders had rendered the prepetition liens worthless through later superpriority financing. This reasoning was flawed because no party objected to the Final DIP Order, the Plan did not mandate the litigation phases, and section 550's plain text bars awarding value when property is returned. Consistent authority confirms that section 550 remedies are mutually exclusive, and courts cannot grant value once the estate has recovered the property in kind.

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Harass with Intent and Get Stuck with Debt [BKR SD TX]

A California state court found a professor (the "debtor") liable for negligence, defamation, and intentional infliction of emotional distress against a graduate student (the "creditor"). The creditor brought the state court claims after the debtor repeatedly accused the creditor of "committ[ing] scientific misconduct through plagiarism and data falsification." The debtor made numerous accusations and complaints that the creditor's research papers were improper for various reasons. The debtor made these accusations through emails, complaints, public presentations, and various other methods to the university, fellow scientists, and employers and co-workers of the creditor. The state court awarded the creditor $776,000 for damages for negligence, intentional infliction of emotional distress, and defamation. The debtor then filed for bankruptcy. The creditor initiated the adversary proceeding seeking _a determination by the bankruptcy court that the debtor's state court judgment debt was non-dischargeable under 11 U.S.C. § 523(a)(6) of the bankruptcy code because the debt resulted from willful and malicious injury by the debtor. The creditor argued that the state court had already found that the debtor was willful and malicious in committing defamation and intentional infliction of emotional distress, and collateral estoppel prevented the debtor from relitigating the willful and malicious issue in bankruptcy court. The bankruptcy court entered summary judgment in favor of the creditor. However, the district court reversed, finding that, despite the state court's finding of willful and malicious injury, collateral estoppel did not apply to the question of the debtor's- intent for non-dischargeability purposes because the state court's finding was "'insufficient to prove [the debtor]'s intent' under§ 523(a)(6) by a preponderance of the evidence."

In **Bikkina v. Mahadevan (In re Mahadevan)**, No. 21-30545, Adv. No. 21-3054, 2025 WL 583361, 2025 Bankr. LEXIS 388 (Bankr. S.D. Tex. Feb. 21, 2025) (opinion not yet released for publication), the bankruptcy court found the debtor was substantially certain that his willful and malicious injury would cause harm, and, therefore, the state court judgment debt was nondischargeable under § 523(a)(6). The Supreme Court has held that a debt arising from a willful and malicious injury is only nondischargeable under § 523(a)(6) if the "'act[] [was] done with the actual intent to cause injury."' In re Williams, 337 F.3d 504, 508 (5th Cir. 2003). Therefore, a debt is only nondischargeable under (a)(6) if there exists 'either an objective substantial certainty of harm or a subjective motive to cause harm' on the part of the debtor." In re Vollbracht, 276 F. App'x 360, 362 (5th Cir. 2007). The bankruptcy court then explained that the creditor bore "the burden of proving that [the debtor] acted with subjective intent to cause harm or with substantially certainty of harm by a preponderance of the evidence" in order to be successful on the § 523(a)(6) nondischargeability determination. The bankruptcy court first determined that there was no subjective intent to cause harm. To show a subjective intent to cause harm, "a creditor must show that a debtor 'intend[ed] the consequences of an act,' not merely 'the act itself.'" Kawaauhau v. Geiger, 523 U.S. 57, 59 (1998). It explained that although there was "clear animosity" between the debtor and creditor based on the allegations, it was not enough for the creditor to prove the debtor intended to cause harm. Next, the bankruptcy court discussed whether there was a substantial certainty of harm, finding there was because the debtor "acted with knowledge that his actions were substantially certain to injure [the creditor] when he defamed and inflicted emotional distress upon [the creditor]." The court explained that it may infer that a debtor's "subjective intent was to inflict a willful and malicious injury" when the debtor's actions, "from a reasonable person's standpoint were substantially certain to result in harm." In re Kahn, 533 B.R. 576, 588 (Bankr. W.D. Tex. 2015). Substantial certainty requires a "realization that there is a strong probability that harm may result," not just mere recklessness or negligence on the debtor's part. In re D'Amico, 509 B.R. 550, 558 (Bankr. S.D. Tex. 2014). The bankruptcy court explained that a debtor's knowledge when the injury occurred is an important factor in determining whether there was a substantial certainty of harm. Therefore, in order for the state court judgment debt to be nondischargeable under § 523(a)(6), the creditor had to "have acted with substantial certainty that his allegations of scientific misconduct were false, and he must have spread them knowing they would harm [the creditor]." The bankruptcy court found that the debtor knew with substantial certainty that his accusations of plagiarism and data falsification were false. The debtor made allegations of the creditor's wrongdoing to the university; however, the university had informed the debtor various times that the creditor did not do any wrong related to his research papers. The debtor initially withdrew many of his complaints against the creditor, indicating he knew they were false. Further, the court found that the debtor, as a scientist himself, knew that the false allegations against the creditor would harm the creditor's "livelihood as a scientist" because "the reputation of a scientist depends on his truthfulness and accuracy of his scientific research." The bankruptcy court also found that the debtor was substantially certain that his "outrageous conduct" of continued false allegations of the creditor's wrongdoing to people who had influence over the creditor's career would cause emotional distress on the part of the creditor. Finally, the bankruptcy court found that the debtor was not substantially justified under the facts when he acted with substantial certainty of harm. The court explained that because the debtor did not plead any affirmative defenses under the state law justifying the harm, it had to determine if the debtor was substantially justified in knowingly harming the creditor by looking at the facts. The bankruptcy court found that by repeatedly making serious allegations with "no reasonable basis for believing the allegations were true," the debtor was not substantially justified in the harm caused. The bankruptcy court ultimately found that because the debtor acted with substantial certainty of causing willful and malicious injury, the state court judgment debt was nondischargeable under§ 523(a)(6).

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CONSUMER PROTECTION

Interlocutory Loss for the Attorney General of New York [SD NY]

The New York Attorney General sued the bank following a series of allegedly fraudulent wire transfers initiated by third party scammers from consumer accounts. The Attorney General asserted multiple causes of action, including a claim under the Electronic Fund Transfer Act (EFTA), 15 U.S.C. §§ 1693a et seq., and its implementing regulation; Regulation E, 12 C.F.R. §§ 1005.1 et seq. The complaint also alleged that the bank's overdraft and nonsufficient fund (NSF) fee practices were deceptive and· abusive in violation of state law and sought to enforce those laws under § 1042 of the Consumer Financial Protection Act (CFPA), part of the Dodd-Frank Act. Additionally, the Attorney General claimed that the bank's practices violated the federal prohibition on unfair, deceptive, or abusive acts or practices (UDAAP). The bank moved to dismiss the complaint in its entirety, arguing in part that 15 U.S.C. § 1693a(7)(B) barred EFTA liability for debits made pursuant to a wire transfer payment order. While the court granted the motion in part, it denied it as to the EFTA claim. The court held that § 1693a(7)(B) did not preclude liability for a fraudulent payment order that resulted in a debit from a consumer's account in connection with a wire transfer. The Attorney General subsequently moved the Second Circuit to certify the court's Opinion and Order for interlocutory appeal and to stay proceedings in the interim.

In **New York v. Citibank, N.A.**, No. 24-CV- 659 (JPO), 2025 WL 1194377, 2025 U.S. Dist. LEXIS 75855 (S.D.N.Y. Apr. 22, 2025) (opinion not yet released for publication), the court granted the bank's motion to certify the court's order and to stay the action pending appeal. First, the court noted that the certified issue carried precedential weight in many cases and would define the scope of the Attorney General's claims and the parties' burdens at trial. The court acknowledged that the bank had identified a pure and controlling question of law under § 1292(b), because reversal of the prior order could significantly affect the course of the litigation and benefit appellate guidance. Next, the court considered whether a substantial ground for a difference of opinion existed and concluded that it did. The court explained that determining the scope of § 1693a(7)(B) was complex, requiring the application of multiple interpretive canons to intricate statutory text and could potentially implicate decades of legislative and regulatory history. The court also noted that the Second Circuit had not yet addressed the issue. Third, it reasoned that immediate appellate review could clarify legal uncertainty, influence settlement, and materially advance the resolution of a case with broad implications for financial institutions and consumers nationwide. The court then addressed the Attorney General's request to certify the entire order for interlocutory appeal and explained that such a request was unnecessary, because §1292(b) allows certification of an order itself rather than each individual claim or issue it addressed. Finally, the court granted the motion to stay, reasoning that although the bank was unlikely to prevail on appeal, its arguments warranted serious consideration. The court found that resolving whether the EFTA or Article 4A governed the disputed payment orders could have broad and immediate consequences for the financial industry. A stay would conserve resources, especially because the scope of discovery under either framework remained contested. The court further found that the bank's commitment to adopt interim measures to mitigate consumer harm reduced any potential prejudice caused by the delay. Therefore, a stay would serve the public interest by promoting clarity on a significant legal issue.

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DTPA

Fraudulent Withdrawals: Is the Bank Liable? [ED TX]

A couple (the depositors) claimed their accounts with the bank were hacked after two fraudulent transfers of substantial amounts occurred. The depositors visited a local bank branch to resolve the issue and discovered that, in their initial attempt to contact the bank over the phone, they had been communicating with the hacker. The bank investigated for a few days, and upon completion, declined to return the fraudulently withdrawn amounts. Subsequently, the depositors filed ten common law claims and a single claim under the Texas Deceptive Trade Practices Consumer Protection Act (DTPA) against the bank. In response, the bank filed a motion to dismiss all the claims.

In **Barge v. Wells Fargo Bank, N.A.**, Civil Action No. 1:23-CV-00189, 2025 WL 1242327, 2025 U.S. Dist. LEXIS 85452 (E.D. Tex. Feb. 25, 2025) (opinion not yet released for publication), the court granted in part and denied in part the bank's motion to dismiss. The bank first argued that the attached expert report did not cure the depositor's deficient complaint. The court disagreed, holding that prior case law allowed the court to disregard the opinions of the report and only consider the recitation of the facts of the case included within the report. Second, the court dismissed the breach of contract claim against the bank because "broad and general claims" without proof of any substance of a contract between the parties were insufficient. Third, the court cited similar reasons for dismissing the claim for breach of implied warranty, noting that the depositors fell short of the federal pleading standards. Fourth, the court declined to dismiss the breach of express warranty claim due to its previous denial, and the bank failed to address why the court should reconsider its prior ruling. Fifth, the court addressed the negligence claim against the bank, declining to dismiss it because the court concluded that the depositors had alleged sufficient facts regarding the bank's duty owed to them and had alleged a sufficient causal connection. Sixth, the court dismissed the depositor's claim of gross negligence, finding no corporate liability because the bank did not authorize or ratify the branch manager's alleged gross negligence, and further, no evidence indicated the bank was "negligent in hiring an unfit agent." Seventh, the court dismissed the breach of fiduciary duty claim because the depositors failed to establish a special relationship, and “a banking relationship, ‘does not usually create a special or fiduciary relationship.”‘ Eighth, the court dismissed the depositors’ claim for negligent undertaking because they failed to prove they suffered a physical injury, a necessary burden of the claim in Texas. Ninth, the court declined to dismiss the negligent misrepresentation claim, c1tmg the same reason for the claim of breach of express warranty, namely that it had already declined to dismiss the claim. Tenth, the court dismissed the depositor’s fraud and fraudulent misrepresentation claims because they failed to allege sufficient facts showing the bank possessed fraudulent intent. Finally, the court declined to dismiss the DTPA cause of action, finding that the depositors had standing under the statute. Further, the court noted that in plausibly alleging breach of express warranty and negligent misrepresentation claims, the depositors appropriately brought a cause of action under the DTPA. Thus, the court denied in part and granted in part the bank’s motion to dismiss.

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EFTA

EFTA Claim on Unauthorized Electronic Fund Transfers Survives Motion to Dismiss [SD SC]

The customer held an account with the bank, which he managed through the bank’s online platform and mobile app. The bank allegedly allowed thirteen unauthorized transfers of funds from the customer’s account by thirdparty criminal use of “AnyDesk” to gain access. The bank did not flag or stop any of the transactions, undertake remedial measures, or investigate the customer’s dispute. As a result, the customer filed suit asserting three claims. Under the Electronic Funds Transfer Act (EFTA), 15 U.S.C. § 1693, and 12 C.F.R. 205 (Regulation E), the customer claimed violations arising from the bank’s refusal to investigate, reimburse, or credit him. Second, the customer sued for exploitation of a vulnerable adult under S.C. Code § 43-35-87, alleging that his age qualified him for the statute’s protections. The third claim alleged violations of South Carolina’s Uniform Commercial Code (UCC) for failure to meet the standards of good faith and commercially reasonable banking set forth in S.C. Code Ann. §§36- 4A-202 and 211. The bank responded that the customer failed to state an EFTA claim because the transfers in question did not fall under the EFTA pursuant to statutory and Regulation E exclusions. In response to the second claim, the bank responded that the statute did not create a cause of action against banking institutions and that the customer did not sufficiently plead his status as a vulnerable adult.

In **Walling v. Bank of Am., N.A.**, No. 8:24-cv-05223-BHH, 2025 WL 1392278, 2025 U.S. Dist. LEXIS 93399 (S.D. S.C. May 8, 2025) (opinion not yet released for publication), the court granted in part and denied in part the bank’s motion to dismiss. For the EFTA claim, the court assessed the plain language of the code to determine that “a funds transfer must be initiated by one bank using a payment order directed to another bank to then transfer funds to the beneficiary of the payment order.” The court distinguished between a consumer-initiated electronic payment order and a subsequent interbank wire transfer, holding that the former may fall under the EFTA even if the latter is excluded. Applying traditional tools of statutory construction, the court interpreted subsection (7)(B)’s plain text to exclude only interbank payment orders, not consumer-facing electronic transfers. In accepting the bifurcated approach urged by the customer, the court distinguished payment orders and wire transfers from one integrated transfer. Accordingly, the court denied the motion to dismiss on the EFTA claim, finding an electronic payment order fell within the scope of the statute. On the second claim, the court declined to decide whether the customer fit the vulnerable adult classification or whether S.C. Code Ann. § 43-35-87 created a private cause of action. However, the court dismissed the vulnerable adult claim because the plaintiff failed to plausibly allege the bank’s participation in, or material aid to, the alleged exploitation. However, the court decided that the customer did not plausibly allege that the bank “(1) participated in or materially aided the financial exploitation of Plaintiff through the (2) improper, unlawful, or unauthorized (3) use of the funds (4) of a vulnerable adult by a person (5) for the profit or advantage of that person or another person.” Because the customer did not point to where the statute obligated the bank to take protective measures, the court granted the motion to dismiss for failure to state that claim. Third, the court dismissed the UCC claim because S.C. Code Ann. §§36-4A-108 excluded from the chapter any transfers governed by the EFTA. The court also rejected the bank’s assertion that a payment order is indistinguishable from a wire transfer, finding that Article 4A contemplates distinct stages within a transfer. Because the court found the transfers governed by the EFTA, and Article 4A excludes such transfers, the UCC claim failed as a matter of law.

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LENDING

Motion to Dismiss Unsuccessful After Four Loans and Forced Refinancing [WD OK]

A bank (the "lender") made a total of four separate loans to the borrowers to aid the construction of ambulatory surgery centers ("ASCs"). The borrowers and guarantors (the "borrowing parties") of the loans alleged the lender's officers "interfered with their ability to use the proceeds of the loans for their intended purpose." After the closing of the first loan, the lender, acting at the direction of one of its directors, circulated the agreement to the borrowing parties. The borrowing parties were assured that the agreement "would not impact the ability to use the loans' proceeds." However, the lender's officers later relied on the agreement to argue that the lender "could refuse the release of the proceeds." The borrowing parties also alleged they were forced to refinance the loans after the lender's officers represented that the lender would not release the loans' proceeds unless the borrowing parties minimized their liabilities with the lender bank. Later, the borrowing parties sent a demand letter to the lender requesting the immediate release of all funds held for the ASCs after they had been twice reassured that the lender would release the funds. Next, the borrowing parties met with the lender, who finally released the funds via wire transfer and apologized for the mismanaged relationships. Despite the apology and the wire transfer, the lender sent notices of default to the borrowing parties and alleged violations of the agreement based on account balances. The borrowing parties sent back a letter and refuted the claims of default; however, the lender still declared a default of the loan. The borrowing parties brough six causes of action against the lender's officers, including "(1) aiding and abetting breach of the implied covenant of good faith and fair dealing/ tortious breach; (2) fraud/fraud in the inducement/constructive fraud; (3) tortious interference with contract/business relations; (4) tortious interference with a prospective contract; (5) negligence; and (6) slander." The lender filed a motion to dismiss.

In **Cmty. Health Dev. Partners LLC v. Osborne,** Case No. CIV-24-295-SLP, 2025 WL 1433694, 2025 U.S. Dist. LEXIS 91768, (W.D. Okla. May 15, 2025) (opinion not yet released for publication), the court denied the lender officers' motion to dismiss. The lender parties relied on three different arguments. "First, they argue[d] that the [c]omplaint [was] devoid of 'any conduct of the [the lender's officers] that could conceivably be actionable."' Specifically, the lender parties argued that the borrowing parties improperly engaged in group pleading and did not make particularized allegations against the named lender officers, and that fraud was not properly alleged with particularity. The court found the borrowing parties' complaint included "sufficient allegations about the individual conduct" of each of the lender parties that were named in the suit, even though the borrowing parties made numerous references and allegations against the lender generally. The court also held that the factual allegations were sufficient to satisfy the heightened pleading standard set forth in Rule 9(b) to allege fraud. The court found the borrowing parties "allegations sufficiently 'set forth the time, place, and contents of the false representation, the identity of the party making the false statements and the consequences thereof."' For example, the borrowing parties alleged the failure to release the proceeds negatively impacted them because it "impeded their ability to 'fund the constructions of the ASCs' in accordance with the planned leverage loan structure." Second, the lender parties contended that the claims were "barred as premature under 12 O.S. § 682(B)" because "[the lender's officers] were acting within the scope of their roles with the [lender]." 12 O.S. § 682(B) provides that a suit "shall not be brough against any officer... for the liability of a corporation of which he or she is an officer. .. , until judgment is obtained ... against the corporation and execution thereon returned unsatisfied." However, the statute does not prohibit a party from bringing a claim against a corporation's officer for the officer's own conduct. The court held that the borrowing parties "set forth minimal facts to avoid dismissal at the pleading stage." For example, the borrowing parties alleged that the lender's officers themselves falsely assured them multiple times that the funds would be released. Finally, the lender parties argued that the borrowing parties' claims should have '" fail[ed] because the [lender parties] did not owe any duties to [the borrowing parties] under 6 O.S. § 425.'" The statute provides that a bank will not have a special or fiduciary duty to a borrower unless the bank agrees to such a duty in writing. The lender parties argued that the complaint lacked any allegations that there was a written assumption of legal duties. The borrowing parties argued that the lender parties did, however, owe an "implied duty of good faith and fair dealing." The court found that the borrowing parties' claims did not specifically allege a special or fiduciary duty, so § 425 was inapplicable, and the lender parties could not use it as a basis to dismiss the claims. Ultimately, the court denied the lender parties' motion to dismiss.

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PERSONAL JURISDICTION

Personal Jurisdiction, the Sneaky Claim Killer [D UT]

One or more unknown individuals opened an account with a bank using falsified identity documents. Once the account was created, the unknown individuals contacted a Utah law firm using emails, pretending to be a client; the emails instructed the law firm to wire large sums of money belonging to the client to the bank account they had created using the false identity. The law firm complied with the instructions. By the time the client discovered the fraud, most of the money was gone. The client sued the bank, arguing that the mismatched information regarding the bank account and the name of the beneficiary should have alerted the bank to the fraud. The bank asserted that the court lacked general and specific jurisdiction. The client sought leave to amend his complaint, and the bank filed a motion to dismiss.

In **Ellsworth v. Cap. One, N.A.**, No. 2:24-cv- 00468-JNP-DAO, 2025 WL 933869, 2025 U.S. Dist. LEXIS 58937 (D. Utah Mar. 27, 2025) (opinion not yet released for publication), the court dismissed the case without prejudice for lack of personal jurisdiction. The client conceded that the court lacked general personal jurisdiction; therefore, it focused its analysis on specific personal jurisdiction. To establish specific jurisdiction, the plaintiff had to show that the bank purposefully directed its conduct at Utah and that the claim arose from the bank's own conduct creating a substantial connection with the state. The court found that the client's proposed amended complaint did not meet the above standard. The court emphasized that the proposed conspiracy was not directed at Utah and that the fraudulent emails sent to the Utah law firm were not alleged to be in furtherance of the conspiracy, which was limited to opening the account without proper customer identification. Specifically, the court noted that the amended complaint did not allege that the unnamed individuals and the bank entered into a conspiracy to trick Utah citizens into transferring money to the account at the bank, but rather that the conspiracy was to open the account without complying with applicable laws. Because the allegations in the proposed amendment did not establish that the bank had minimum contacts with Utah, the court dismissed the action for lack of personal jurisdiction.

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WIRE TRANSFERS

Article 4A Preempts Certain Common Law Claims [SD TX]

A Texas limited partnership (the "partnership") made a substantial wire transfer to a bank ("bank l"), which sent a portion of the funds to another bank ("bank 2"). The partnership denied any knowledge as to how or why any of the transactions took place. The partnership sought to recover the allegedly fraudulently transferred funds, which remained frozen in an account at bank 2. The partnership sued both banks for "money had and received," "unjust enrichment," and "aiding and abetting." After the partnership filed suit, the court dismissed bank 1 as a party, and bank 2 moved for summary judgment under Rule 12(b)(6).

In **Peatwatuck Enters. v. Truist Bank,** 773 F. Supp. 3d 366 (S.D. Tex. 2025), the district court dismissed all three of the partnership's claims reasoning that Article 4A of the Texas Uniform Commercial Code preempted all the claims. Article 4A covered each of the partnership's claims because it governs fund transfers, which are "the series of transactions, beginning with the originator's payment order, made for the purpose of making payment to the beneficiary of the order." § 4A.104(1). Therefore, Article 4A preempted each of the partnership's common law claims. Additionally, the court placed great emphasis on how the partnership's claims for unjust enrichment and aiding and abetting did not allege the necessary facts for the claim to proceed. For the unjust enrichment claim, the partnership failed to state whether bank 2 held the requisite knowledge for the tort or whether it received any benefit from the transfer. Regarding the aiding and abetting claim, the partnership failed to provide any facts that could support its claim. As a result, the court dismissed the entirety of the partnership's petition, with leave for the partnership to amend pleadings.

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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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