

Highlights to the 2025 Edition

The litigation bubble caused by the Great Recession of 2006-2008 is now more than a decade old but business and regulatory decisions made before and during that time continue to color the types of claims being brought against financial institutions. Borrowers continue to test the traditional causes of action trying to see if they can work their way around old prohibitions to create new duties. Cases arising from the Covid Pandemic of 2020-22 are still in their early stages and it will be several years before we see any reported decisions. We already know that the trend to working at home has caused major ripples in the commercial real estate market with valuations on office buildings dropping. Some properties have already been returned to the lenders and those banks that have a concentration in commercial real estate have come under stress. As I write this in early 2025, the emptying out of offices may have reached its peak as major banks and the federal government begin to require employees to be physically present in the office. We will see whether that change is sufficient to return office buildings to anything like full occupancy.

The basics of contract law undergird the entire relationship between a customer and their financial institution, whether the relationship is based on obtaining credit, access to checking or savings accounts or the purchase of esoteric financial products. The law of contracts establishes a legal relationship to address not only the creation of the relationship but also its dissolution. Language in an email stating “Your loan is good and approved” together with an understanding about the specific terms was found sufficient to allow a breach of contract claim to proceed. *Gaughan v. New America Funding, LLC.*, No. 23-CV-641-JPS, 2024 WL 4275719, at *8 (E.D. Wis. Sept. 24, 2024). [Section 2:2]

The Statute of Frauds continues to provide a bulwark against many breach of contract claims. In *Strange. v. U.S. Bank Tr. Co., N.A.*, No. 4:23-CV-796, 2024 WL 2159960, at *3 (S.D. Tex. May 14, 2024) the court held that since the plaintiff’s claims for fraud were predicated on an alleged oral promise to restructure the existing mortgage loan, the claims were barred by the statute of frauds as a matter of law. Likewise, the Iowa Statute of Frauds barred a claim for negligence and fraudulent misrepresentation when the alleged contract when such claims arose out of an alleged oral agreement. *County Bank v. Shalla*, 10 N.W.3d 440 (Iowa Ct. App. 2024). [Section 2:3]

Careful drafting of a term sheet to indicate that it was not a commitment and that any loan would be subject to execution of

satisfactory documentation and other such terms and conditions as to be determined solely by the lender was sufficient to defeat a claim of breach of contract. *Cypress Gates, Inc. v. Societe Generale, S.A.*, 224 A.D.3d 586, 587, 206 N.Y.S.3d 540, 541 (2024). [Section 2:6]

Debtors continue to struggle with claims of duress. Lenders are wise to include waivers of such claims in loan restructuring agreements and modifications. *Heishman v. Farm Credit Servs. of Am., PCA*, No. 23-0867, 2024 WL 4222584, at *3 (Iowa Ct. App. Sept. 18, 2024). [Section 3:1] Mere financial distress is never enough to negate an amendment or loan restructuring. *McMahan v. U.S. Bank Nat'l Ass'n*, No. 4:22-CV-01525, 2024 WL 2243301, at *29 (S.D. Tex. Apr. 11, 2024), report and recommendation adopted, No. CV H-22-1525, 2024 WL 2304264 (S.D. Tex. May 21, 2024). [Section 3:5]

Another area of law involving the existence of a “duty” to third parties is that of negligence or aiding and abetting. Generally, simply allowing a party to open up a bank account is insufficient to show “substantial assistance” to a wrong-doer. *FW Distributing, LLC, v. J.P. Morgan Chase Bank & Valley National Bankcorp*, No. 24-CV-21385, 2024 WL 4665255, at *11 (S.D. Fla. Nov. 4, 2024). [Section 6:5] The collapse of the crypto-currency exchange FTX which involved large sums of money that were supposed to be segregated and custodied gave rise to negligence claims by defrauded customers. Actions by the bank convinced a court that there was a close connection between those actions and the harm suffered by the customers of FTX. *Bhatia v. Silvergate Bank*, No. 3:23-CV-01406-RBM-BLM, 2024 WL 1199679, at *18 (S.D. Cal. Mar. 20, 2024). [Section 7:1]

The most significant case arising in the bankruptcy arena was the Supreme Court’s decision involving the issue of third party releases. In the case of *Harrington v. Purdue Pharma L. P.*, 144 S. Ct. 2071, 219 L. Ed. 2d 721 (2024) [Section 12:42] the debtor argued that Section 1123(6) of the Bankruptcy Code, which provides that a plan may include any other “appropriate” provision not inconsistent with the applicable provisions of the Bankruptcy Code, provided a sufficient base for the releases of the owners of Purdue, the Sackler family. The Court noted that Congress could have said in paragraph (6) that “everything not expressly prohibited is permitted” but it didn’t. Instead, Congress set out a detailed list of powers, followed by a catchall that it qualified with the term “appropriate.” The Court also agreed with the US Trustee that public policy mitigated against allowing a party to obtain a non-consensual release for tort claims which are not typically dischargeable without making their assets available to claimants.

Several cases explored the parameters of the prohibition on making False Statements to a federally insured financial

HIGHLIGHTS TO THE 2025 EDITION

institution. The elements of this crime requires (1) that the defendant have made a false statement or willfully overvalues any land, property or security (2) for the purpose of influencing in any way the action of a financial institution or a federal agency, (3) for an extension of credit including but not limited to an advance, discount, purchase, purchase agreement, repurchase agreement, commitment, loan, insurance agreement or any renewal or deferment. Cases explored false statements made in applications for a loan under the Paycheck Protection Program *United States v. Boler*, 115 F.4th 316, 319–20 (4th Cir. 2024) and loan applications generally *United States v. Thompson*, 89 F.4th 1010, 1017 (7th Cir. 2024), cert. granted, No. 23-1095, 2024 WL 4394117 (U.S. Oct. 4, 2024). [Section 24:23]

Waivers of jury trial are subject to the normal contract creation issues. A claim of fraud, however, must be targeted at the inclusion of the waiver itself, and not against the contract in general. *Merrill Lynch & Co. Inc. v. Allegheny Energy, Inc.*, 500 F.3d 171, 188 (2d Cir. 2007) and *Pizza Hut L.L.C. v. Pandya*, 79 F.4th 535, 544 (5th Cir. 2023). [Section 26:9]