

General Litigation Trends

By

C. Ed Harrell and David F. Johnson

Texas Bankers Association

April 4, 2013

Introduction

- Financial institutions impact almost every part of our society.
- Home loans, commercial loans, bank accounts, fiduciary services, etc.
- There is a constant stream of legal issues that arise in litigation.
- This speech addresses several of these issues.

Arbitration In Trust Documents

- Is an arbitration clause in a trust document enforceable?
- In *Rachal v. Reitz*, a beneficiary sued a trustee for failing to provide an accounting and otherwise breaching fiduciary duties, and the trustee moved to compel arbitration. 347 S.W.3d 305 (Tex. App.—Dallas 2011, pet. granted).

Arbitration in Trust Documents

- The court held that arbitration is a matter of contract law, and that the trustee had the burden to establish an enforceable arbitration agreement.
- The court noted: “Rachal did not establish how the settlor's expression of intent satisfied all of the required elements of a contract or how this expression of the settlor's intent transformed the trust provision into an agreement to arbitrate between Rachal and Reitz.”
- After a dissenting justice disagreed, the Texas Supreme Court granted the petition and oral argument was in November of 2012.

**BORROWERS LACK
STANDING TO ATTACK OR
ASSERT VIOLATIONS OF A
PSA**

Standing To Attack PSA

- 1. Case Authority:
- Bittinger v. Wells Fargo
- a) Not a party to PSA
- b) Not a third party beneficiary

- Result: Cannot sue for breach of PSA nor use
- breach as a basis for wrongful foreclosure.

Standing To Attack PSA

- **2. Points of Attack:**
- **A) Endorsements on Notes**
- **B) Delivery of Notes, Assignments, etc.**
- **C) Non-compliance with delivery requirements**

Standing To Attack PSA

- 3. Choice of Law Clauses:
 - a) “Voiding” arguments under foreign state law
 - b) Foreclosure is a creature of state law
- In Texas, the owners or holders of notes may enforce
- the note or foreclosure regardless of alleged breach.

Standing of Special Servicers

- The right of the special servicer to pursue claims may become an issue.
- For example, in *ECF North Ridge Assocs., L.P. v. ORIX Capital Markets, L.L.C.*, the court of appeals held that a servicer had standing to assert claims under a mortgage and a pooling and servicing agreement ("PSA"). 336 S.W.3d 400, 405-06 (Tex. App.—Dallas Dec. 20, 2010, pet. denied).

Standing of Special Servicers

- The court of appeals held that a loan servicer on behalf of a loan pool's trustee had standing to bring suit in its own name under the language of the PSA between it and the trustee, which conferred broad powers on the servicer.
- The court also held that pooling and servicing agreements are not controlled by the general rule that "[i]n order to establish standing to maintain a breach of contract action, a plaintiff must show either third-party beneficiary status or privity."

LITIGATION AVOIDANCE

- a) Pros and cons for waivers and releases
- b) Italian Cowboy Partners, Ltd., 341 S.W.3d 323 (Tex. 2011)
 - 1. Use Disclaimer of Reliance
 - 2. Not Merger Clause

Credit Reporting Claims

- Because financial institutions report to various credit agencies, consumers often file defamation claims based on this reporting.
- In asserting defamation, a plaintiff must allege that a defendant: (1) published a statement; (2) that was defamatory concerning the plaintiff; and (3) while acting negligently with regard to the truth of the statement. Truth is a defense.
- The Fair Credit Reporting Act ("FCRA") preempts state law defamation claims unless the customer proves "malice or willful intent to injure" the customer.

Credit Reporting Claims

- One area where defamation claims often arise is where the borrower files for bankruptcy, obtains a discharge, and the lender either fails to update a credit report or actively continues to report the debt as active and in default.
- In *Barton v. Ocwen Loan Servicing LLC*, the court held that a plaintiff had stated such a claim for defamation. 2012 U.S. Dist. LEXIS 137536 (D. Minn. Sept. 26, 2012).

Credit Reporting Claims

- In *Kreeger v. U.S. Bank* (In re Kreeger), the Kreegers sought to retain their home by making post-petition payments without reaffirming the debt, but fell behind in those payments. 2001 Bankr. LEXIS 2193, Adversary Proceeding 7-00-00155-WSA, (Bankr. W.D.Va, September 5, 2001). The court found that the creditor made a truthful statement to a credit bureau when it correctly reported the status of a secured debt post-discharge.

4-YEAR BAR OF LIMITATIONS

- *Priester v. J.P. Morgan Chase*

Liability For Creating Accounts

- In *A.G. Edwards & Sons Inc. v. Maria Alicia Beyer*, the Court held that a customer can potentially raise a claim against a financial institution for failing to create a JTROS account.
- The Bank lost documentation creating a JTROS account and before new documents could be signed, the father fell into a coma and later died.
- The Bank paid the funds, which it held in an older account that was not a JTROS account, to the father's estate.

Liability For Creating Accounts

- The daughter sued the Bank for conversion, negligence, fraud, breach of contract, and breach of fiduciary duty, and a jury found for her, awarding damages.
- The Court stated: "Section 439(a) does not govern [the daughter's] claim against [the bank]. [The Bank's] failure to take sufficient steps to create the JTWROS account necessary to establish [the daughter's] right of survivorship is a breach of a separate duty owed to [the daughter]."
- The Court did not specify what "duty" it was referring to but allowed extrinsic evidence of the bank's failure to create the account.

Liability For Creating Accounts

- In *Clark v. Wells Fargo Bank, N.A.*, the court distinguished *A.G. Edwards* because the claimants did not have any contractual relationship with the bank: "There is no evidence that they ever participated in the opening of the CDs or, as in *Beyer*, jointly executed any documents with Williams that would have given them any rights to the funds at issue."
- In *Koonce v. First Victoria Nat'l Bank*, the court found that there was a fact issue as to whether a bank breached a contractual duty to set up a POD account where a document was signed and executed.

Conclusion

- Financial institutions are very important to our society and impact our lives in many different ways.
- Because of this, litigation seemingly never ends.
- We hope that this presentation was helpful in pointing out some recent issues in this area.