

Banking Litigation Update: 2013

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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. 347 S.W.3d 305 (Tex. App.—Dallas 2011, pet. granted).

Arbitration in Trust Documents

- The trustee filed a motion to compel arbitration of those claims due to an arbitration provision in the trust instrument.
- After the trial court denied that motion, the trustee appealed.
- The court of appeals held that arbitration is a matter of contract law, and that the trustee had the burden to establish the existence of an enforceable arbitration agreement.

Arbitration in Trust Documents

- 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.”
- Dissenting justice disagreed
- Texas Supreme Court granted the petition and oral argument was in November of 2012.

Special Servicer Standing

- Banks may pool assets together and appoint a trustee to oversee the pool.
- That trustee, in turn, may hire another entity, a special servicer, to manage difficult assets.
- The special servicer then hires attorneys to prosecute bad debt claims.

Special Servicers Standing

- The right of the special servicer to pursue claims may also 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).

Special Servicer Standing

- 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."

Credit Reporting Claims

- Because financial institutions regularly report to various credit agencies, consumers often file defamation claims based on this reporting.
- In asserting defamation under Texas law, 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.

Credit Reporting Claims

- Moreover, the Fair Credit Reporting Act ("FCRA") preempts state law defamation claims unless the customer proves "malice or willful intent to injure" the customer.
- Truth is a defense.
- In *Priester v. JPMorgan Chase Bank, N.A.*, homeowners sued for declaratory relief against their lender claiming that the lien on their home was void under the Texas Constitution. No. 12-40032, 2013 U.S. App. LEXIS 3097 (5th Cir. February 13, 2013). Because the loan was valid, and the Priesters were delinquent, the statements to these effects were true, and so no defamation occurred.

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 reported the post-discharge status of a discharged secured debt that remained secured post-discharge.

Rights Of Survivorship

- Parties can own property in either joint tenancy or in tenancy in common.
- A joint tenancy carries rights of survivorship, whereas tenancy in common does not.
- Texas eliminated automatic survivorship in 1848.
- The parties to a joint account at a bank may make a valid and enforceable written agreement that funds deposited by either of them will belong to the survivor.
- But, regarding joint bank accounts, there has historically been “considerable confusion” regarding the effect of particular agreements.

Rights of Survivorship

- To assist with the confusion regarding joint accounts, the Texas Legislature has enacted a statute that dictates the type of language that is required to create survivorship rights: Texas Probate Code Section 439.
- Statutory requirements for the creation of a right of survivorship to a joint account are that there be (1) a written agreement, (2) signed by the decedent, (3) which makes his interest "survive" to the other party.

Rights of Survivorship

- An agreement confers a right of survivorship if the agreement states in substantially the following form:
"On the death of one party to a joint account, all sums in the account on the date of the death vest in and belong to the surviving party as his or her separate property and estate."
- A survivorship agreement will not be inferred from the mere fact that the account is a joint account or that the account is designated as JT TEN, Joint Tenancy, or joint, or with other similar language.

Rights of Survivorship

- *Stauffer v. Henderson*, 801 S.W.2d 858 (Tex.1990):
- Section 439 provides the exclusive means for creating a right of survivorship in joint accounts.
- There is a necessity of a written agreement signed by the decedent to create a right of survivorship.
- If the agreement is unambiguous and complete, parol evidence is inadmissible to establish the intent of the parties.

Rights of Survivorship

- Absent the appropriate language and a signature, the funds in an account will not transfer to the surviving member of the account, but will transfer to the original owner's probate estate.

Rights of Survivorship: Spouses

- Probate Code section 451 states: “[S]pouses may agree between themselves that all or part of their community property, then existing or to be acquired, becomes the property of the surviving spouse on the death of a spouse.”
- *Holmes v. Beatty*, 290 S.W.3d 852, 855 (Tex. 2009): the Court found that a "Joint (WROS)," "joint tenancy," or "JT TEN" designation on an account was sufficient to create rights of survivorship in community property.

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.
- After a bank representative recommended that a father and daughter create a new JTROS account, they delivered all of the documentation necessary to create such an account.

Liability For Creating Accounts

- The Bank lost the documentation 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.
- The daughter sued the Bank for conversion, negligence, fraud, breach of contract, and breach of fiduciary duty.
- The jury found for the daughter and awarded her damages and attorney's fees, and the Bank appealed.

Liability For Creating Accounts

- The Texas Supreme 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 of appeals held that a bank did not tortiously interfere with inheritance rights or act with negligence with respect to CDs.
- 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."

Liability For Creating Accounts

- In *Koonce v. First Victoria Nat'l Bank*, the court of appeals reversed a summary judgment in part and 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.
- Court, however, denied negligence and DTPA claims.

Bank's Duties To Borrowers

- Generally, a lender has no fiduciary duty to its borrowers.
- The relationship between a borrower and lender is usually neither a fiduciary relationship nor a special relationship.
- However, when a court sustains a special relationship between a borrower and lender, that has rested on extraneous facts and conduct, such as excessive lender control over, or influence in, the borrower's business activities.

Bank's Duties To Borrowers

- In *Chambers v. First United Bank & Trust Company*, the court of appeals sustained a finding that the bank did not owe fiduciary duties to home equity borrowers.
- The bank filed suit to foreclose, and the borrowers filed various claims, including a claim that the bank had breached its fiduciary duties.

Bank's Duties To Borrowers

- There was no evidence of any formal relationship between the bank and the borrowers, though a bank representative had been the trustee of the borrowers' trust.
- The court focused on whether there was an informal fiduciary duty

Bank's Duties To Borrowers

- “A person is justified in placing confidence in the belief that another party will act in his best interest only where he is accustomed to being guided by the judgment or advice of the other party and there exists a long association in a business relationship as well as personal friendship.”
- The court held that to "impose such a relationship in a business transaction, there must be a fiduciary relationship before, and apart from, the agreement made the basis of the suit."

Bank's Duties To Borrowers

- The borrower argued that the evidence showed that a bank representative acted as trustee for the borrower's trust and that control extended to the borrower and his business.
- The court of appeals held that even if this created a fact question on a "special relationship," it did not mean that such created a fiduciary duty (as opposed to a duty of good faith and fair dealing).
- Rather, "[i]nstead, to create a fact issue at trial regarding the existence of an informal fiduciary duty, the [borrowers] needed to offer evidence of a moral, social, domestic, or purely personal relationship of trust and confidence that existed before they obtained the 1999 loan."

Conclusion

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