FICC TELEBRIEFING

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Recent Cases and How They Affect Michigan Usury Provisions for Commercial Loans

PRESENTED BY

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RECENT CASES AND HOW THEY FFECT MICHIGAN USURY PROVISIONS FOR COMMERCIAL LOANS

I. Michigan Usury Statutes Generally – Michigan has a rather complex usury (interest rate authority). Permissible interest rates are based on the borrower type, lender type, collateral, and other factors. Michigan lenders have generally stayed at or under the criminal usury rate of 25%. However, with higher interest rates and with some troubled borrowers, lenders are looking at ways to charge in excess of 25%.

A. LLC Act – The LLC act specifically provides that an LLC cannot agree to pay interest in excess of the criminal usury rate.

B. Corporation Act – This act states that a corporation can agree to pay any rate of interest if agreed in writing without the defense of usury.

C. Partnership Act – This act states that a partnership can agree to pay any rate of interest if agreed in writing without the defense of usury.

D. Criminal Usury – Provides that a lender is in violation of the criminal usury statute, if it charges in excess of 25% unless otherwise permitted.

E. Business Exception for Certain Entities – This provision changes the maximum rate that corporations and partnerships may be charged in interest to match the LLC Act.

F. Interest on Interest – You cannot charge interest on interest unless the note otherwise provides and you are capped at 11%. This has to be a separate calculation.

G. Miscellaneous Provision - MCL 438.31c has a number of exceptions for loan interest rates. The one that we are most concerned with is the exception in 11, which provides that there is unlimited interest if the primary collateral for the loan is something other than a single family dwelling.

II. Michigan Usury Chart – Attached.

III. Cases –

A. Soaring Pine – This case set a fire under lenders in the last couple of years. This case stands for the proposition that you cannot rely on an interest savings clause if you knowingly charge interest in excess of the rate permitted under Michigan law. *Soaring Pine Capital Real Estate & Debt Fund II, LLC v Park St. Group Realty Servs. LLC*, 511 Mich 89 (2023)

B. Equine Properties – This most recent case actually deal with the same borrower under *Soaring Pine*. However, this Court specifically addressed the inherent conflict between the provisions above related to maximum rates of interest that a business can be charged and the provision that provides that loans that that are

secured by collateral other than a single family dwelling can bear unlimited interest. The Court stated that the criminal usury statute states that the cap only applies if there is not another exception that provides for a higher rate. Thus, the exception in MCL 438.31c(11) permits a lender to charge unlimited interest if the conditions are met, regardless of any other statute providing for a higher rate. *Equine Luxury Properties, Inc et al v. Commercial Capital Bidco, Inc.*

C. Macklin - This case stands for the proposition that the primary collateral is the collateral that would be first used to satisfy the obligation. It does not have to be a specific percentage of the loan amount, but rather what would be used first. *Macklin v Brown*, 111 MichApp 110, 114; 314 NW2d 538 (1981).

MICHIGAN STATUTORY INTEREST RATE CEILINGS

References herein are to the Michigan Compiled Laws of 1970 (MCL) available on the Michigan Legislature website, www.legislature.mi.gov.

In addition to the state laws mentioned below, a bank, savings bank, or credit union is authorized by the Depository Institutions Deregulation and Monetary Control Act of 1980 (DIDMCA), 12 USC 1735f-7a, to charge the greater of 1 percentage point in excess of the Federal Reserve discount rate or the highest rate permitted by state law to any lender on the type of loan in question (the most favored lender authority). DIDMCA also preempts state usury ceilings by allowing any rate of interest for virtually all first lien mortgages and mobile home loans as well as first lien mobile home installment contracts. Moreover, under DIDMCA, an individual selling his or her home and taking a first lien on the title or a land contract given in exchange for the sale of unencumbered property could be at any rate of interest. The states had the authority to override the federal preemption of the first lien mortgages and mobile home loans but had to act before April 1, 1983. The state of Michigan did not act before the deadline. Regarding other loans, states may override the preemption at any time. DIDMCA, as amended, also preempted certain state usury ceilings applicable to business and agricultural loans. The preemption expired on April 1, 1983.

Further, Title VIII of the Garn-St. Germain Depository Institutions Act of 1982, PL 97-320, entitled "Alternative Mortgage Transaction Parity Act of 1982,"(AMPTA), 12 USC 3801 *et seq.*, authorizes state-chartered banks, credit unions, savings banks, and other housing creditors (including licensees under the Mortgage Brokers, Lenders and Servicers Licensing Act, MCL 445.1651 *et seq.*, and the Secondary Mortgage Loan Act, MCL 493.51 *et seq.*) to make alternative mortgage transactions notwithstanding any provisions of state law which restrict or prohibit the making of such transactions. States had the authority to override the federal preemption but had to act before October 15, 1985. The state of Michigan did not act before the deadline. Effective July 21, 2011, the Dodd-Frank Wall Street Reform and Consumer Protection Act (Dodd-Frank Act), 12 USC 5301 *et seq.*, amended AMTPA to narrow the scope of federal preemption.

The following table is divided into two parts. The first part primarily applies to extensions of credit which, with two exceptions, are made exclusively by, "regulated lenders," as defined under the Credit Reform Act (CRA), MCL 445.1851, *et seq*. The two exceptions are: 1) real estate mortgages and land contracts by all types of lenders and vendors (some not subject to the CRA) and 2) business loans made by all types of lenders (some not subject to the CRA). The second part of the table covers extensions of credit by lenders which are not permitted to extend credit under the CRA. Among the lenders appearing in this part of the table, are licensees under the Credit Card Act (CCA), MCL 493.101 *et seq*. Although the CRA includes licensees under the CCA in the definition of "regulated lenders," CCA licensees cannot exercise powers under the CRA because they remain subject to specific and controlling provisions contained in the CCA.

This document is intended to provide general information regarding state interest rate ceilings and certain loan terms. The information presented is not legal advice, is not to be acted on as such, may not be current, and is subject to change without notice.

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"Business loans," as used in this schedule, includes agricultural loans. Variable Interest rate loans are allowed unless otherwise indicated.

PART I.
LENDERS SUBJECT TO CREDIT REFORM ACT, MORTGAGE LOANS, AND BUSINESS CREDIT EXTENSIONS

LOAN CATEGORY	LEGAL CITATION	MAXIMUM CONTRACT RATE (SIMPLE INTEREST UNLESS INDICATED OTHERWISE)	OTHER TERMS	LATE CHARGE
1. Mortgages, Land Contracts				
a. Conventional first lien or land contract by a regulated lender under CRA and a licensee/registrant under the MBLSLA[1], except as in 1c.[2]	MCL 438.31c[3]	25% per annum	Reasonable loan processing fee by contract.	Reasonable late charge by contract.
b. Conventional first lien or land contract by unregulated lender, except as in 1c.	MCL 438.31c[4]	11% per annum	Loan processing fee not permitted; variable rates not permitted for some lenders.	Reasonable late charge by contract.
c. Loan or land contract in excess of $100,000 secured by first or junior lien on other than single-family dwelling.	MCL 438.31c	No ceiling	Reasonable loan processing fee by contract for regulated lenders.	Reasonable late charge by contract.

[1] MBLSLA is the Mortgage Brokers, Lenders, and Servicers Licensing Act, MCL 445.1651 *et seq.*
[2] FHA/VA loans are exempted from the Michigan Usury Law by MCL 438.31 and MCL 487.751
[3] DIDMCA allows any rate of interest.
[4] DIDMCA allows person selling his/her principal residence, on which there is no prior lien, by first mortgage or land contract to charge any rate.

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d. Loan secured by junior lien, except as in 1c, 1d(ii), 2a, and 2b.				
i. By bank	MCL 445.1854, MCL 445.1857	25% per annum	All fees and charges as agreed to by borrower.	Late fee as agreed to by borrower.
ii. By savings bank (includes certain business loans secured by junior liens.)	MCL 445.1854, MCL 445.1857	25% per annum	All fees and charges as agreed to by borrower.	Late fee as agreed to by borrower.
iii. By credit unions	MCL 445.1854, MCL 445.1857	25% per annum	All fees and charges as agreed to by borrower.	Late fee as agreed to by borrower.
iv. By secondary mortgage licensees (loans may be secured by 1-4 family dwelling)	MCL 493.71, MCL 493.72, MCL 445.1854, MCL 445.1856	25% per annum	Loan processing fee not to exceed 5% of the gross amount of the loan; prepaid finance charge allowed to buy down interest rate; reasonable annual fee on open-end credit.	Greater of $15.00 or 5% of the installment payment.
v. By unlicensed person who is selling home, or a builder (loans may be secured by 1-4 family dwelling)	MCL 438.31c, MCL 493.80, MCL 493.52	11% per annum	Limited: two loans per year; loan processing fee not permitted.	Reasonable late charge by contract.
vi. Realtor representing buyer or self	MCL 438.31c, MCL 493.52	11% per annum	Limited: two loans per year; loan processing fee not permitted.	Reasonable late charge by contract
vii. Other unlicensed person	MCL 438.31, MCL 493.52	7% per annum	Limit: two loans per year; loan processing fee not permitted	Reasonable late charge by contract.

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2. Business Loans				
a. Loan to unincorporated borrower				
i. By depository financial institution insurance company, finance subsidiary of manufacturer, or a related entity (includes business purpose loan secured by junior lien, except as in 1c)	MCL 438.61[5], MCL 438.31a, MCL 445.1854	25% per annum	Reasonable loan processing fee by contract for regulated lenders; Must have sworn statement of business purpose if borrower is a natural person	Reasonable late charge by contract.
ii. By other lender, except as in 1b and 1c	MCL 438.61, MCL 438.41	25% per annum	Must have sworn statement of business purpose if borrower is a natural person; loan processing fee not permitted for certain unregulated lenders.	Reasonable late charge by contract.
b. Loan or other credit extension to a corporation or limited partnership from any source, except as in 1c	MCL 450.1275, MCL 449.1109, MCL 438.41	No ceiling, as long as agreement is in writing	Reasonable loan processing fee by contract.	Reasonable late charge by contract
c. Regulated lenders, as defined under MCL 445.1852[6] may make business loans to the extent authorized by law, except as in 1c	MCL 445.1854, MCL 445.1856	No ceiling, as long as agreement is in writing	Processing fee of 2% of amount of loan.	Greater of $15.00 or 5% of the installment payment.
3. Credit card, auto, and other types of loans				

[5] DIDMCA indicates that credit unions and savings banks may charge the rate allowed for business loans by banks.

[6] Pursuant to MCL 445.1852, "regulated lender" means a depository institution, a licensee under the consumer financial services act, Act No. 161 of the Public Acts of 1988, being sections 487.2051 to 487.2072 of the Michigan Compiled Laws, Act No. 379 of the Public Acts of 1984, being sections 493.101 to 493.114 of the Michigan Compiled Laws, the motor vehicle sales finance act, Act No. 27 of the Public Acts of the Extra Session of 1950, Act No. 125 of the Public Acts of 1981, being sections 493.51 to 493.81 of the Michigan Compiled Laws, or the regulatory loan act of 1963, Act No. 21 of the Public Acts of 1939, being sections 493.1 to 493.26 of the Michigan Compiled Laws, or a seller under the home improvement finance act, Act No. 332 of the Public Acts of 1965.

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a.	Credit card or line of credit agreement by a depository financial institution	MCL 445.1854, MCL 445.1857	No ceiling[7]	All fees and charges as agreed to by borrower.	Late charge as agreed to by borrower.
b.	All other types of loans by depository institutions except as in 1a and 1c	MCL 445.1854, MCL 445.1857	25% per annum[8]	All fees and charges as agreed to by borrower.	Late charge as agreed to by borrower.
4.	Loans by regulatory loan licensees	MCL 445.1854, MCL 445.1856, MCL 493.13	25% per annum	Processing fee of 5% of amount of loan up to $300.00.[9]	As permitted by CRA
5.	Auto financing by licensed auto dealers	MCL 445.1854, MCL 445.1856, MCL 492.113, MCL 492.118	25% per annum	Processing fee not permitted; documentary preparation fee up 5% of cash price or $210.00, whichever is less.[10]	As permitted by CRA
6.	Unsecured loans by unlicensed entity	MCL 438.31	5% without written contract; 7% with written contract	All fees and charges as agreed to by borrower.	Late charge as agreed to by borrower.

[7] Pursuant to MCL 487.14201, a bank is authorized to collect interest and charges on loans and extensions of credit as permitted by the laws of this state or of the United States to any lender. A bank, on a credit card loan, can charge the interest rate and fees allowed to a regulated lender under the CRA. Pursuant to MCL 487.3430, a savings bank is authorized to collect interest and charges on a credit card loan as permitted by the CRA. A credit union is authorized on a credit card loan to charge the rate of interest allowed by the CRA. Also, as a result of the federal most favored lender authority, a federally insured state or national bank, state or federal savings bank, or state credit union, can charge the highest rate of interest allowed under Michigan law to any lender on the type of loan in question.

[8] May charge rate authorized under MCL 445.1854 or 1% plus Federal Reserve Discount.

[9] The documentary preparation fee is adjusted every two years to reflect the cumulative percentage change in the consumer price index for the two immediately preceding calendar years. Please see the applicable bulletin for the permitted documentary preparation fee. Fee of $300.00 is permitted under Bulletin 2018-01-CF and is subject to change every two years.

[10] The documentary preparation fee is adjusted every two years to reflect the cumulative percentage change in the consumer price index for the two immediately preceding calendar years. Please see the applicable bulletin for the permitted documentary preparation fee. Fee of $210.00 is permitted under Bulletin 2017-02-CF and is subject to change every two years.

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PART 2.
CREDITORS REGULATED BUT NOT SUBJECT TO THE CREDIT REFORM ACT

LOAN CATEGORY	LEGAL CITATION	MAXIMUM CONTRACT RATE (SIMPLE INTEREST UNLESS INDICATED OTHERWISE)	OTHER TERMS	LATE CHARGE
1. Loans by non-depository credit card licensees	MCL 493.110	1.5% per month (18% per annum) on the unpaid balance.	Loan processing fee not permitted; annual fee is permitted.	Not permitted.
2. Financed insurance premiums	MCL 500.1509, MCL 500.1510	$12 per $100 plus $18 per contract on premiums of $100 or more; $15 on premiums less than $100 paid in 1-3 installments; $17 on premiums less than $100 paid in 4 or 5 installments.	Add-on interest only; $18 charge need not be refunded upon cancellation or pre-payment.	Delinquency charge of $1 to a maximum of 5% payment not to exceed $5 per installment in default 10 days or more.

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STATE OF MICHIGAN
IN THE CIRCUIT COURT FOR THE COUNTY OF OAKLAND
BUSINESS COURT

SOARING PINE CAPITAL REAL ESTATE AND DEBT FUND II, LLC, a Delaware limited liability company,

Plaintiff/Counter-Defendant,

Case No. 18-163298-CB (On Remand)

Hon. Victoria A. Valentine

v.

PARK STREET GROUP REALTY SERVICES, LLC, a Michigan limited liability company, PARK STREET GROUP, LLC, a Michigan limited liability Company, DEAN J. GROULX, an individual.

Defendants/Counter-Plaintiffs.

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OPINION AND ORDER ON REMAND FROM THE MICHIGAN SUPREME COURT

At a session of Court
held in Oakland County, Michigan
on
October 11, 2024

PRESENT: HON. VICTORIA A. VALENTINE

This matter is before the Court on remand from the Michigan Supreme Court. This Court has reviewed the record; considered the supplemental briefing of the parties; and has heard oral argument.

OPINION

I.

Overview

Summary of Facts and Lower Court Proceedings

The facts and lower court proceedings were summarized by the Michigan Supreme Court as follows:

> Plaintiff, Soaring Pine Capital Real Estate and Debt Fund II, LLC (Soaring Pine), is a nonbank investment group that lent defendant Park Street Group Realty Services, LLC (Park Street) $1,000,000 to "flip" tax-foreclosed homes in Detroit, i.e., to acquire such homes, renovate them, and then sell them for a profit. The mortgage note for this loan had a stated interest rate of 20%, but there were fees and charges associated with the loan that, if considered interest, pushed the effective interest rate above 25%. The mortgage note also contained a provision stating that the note should not be construed to impose an illegal interest rate. The parties and lower courts refer to this provision as a "usury savings clause."
>
> After paying more than $140,000 in interest on the loan, Park Street discontinued further payments. Soaring Pine sued, alleging multiple counts of breach of contract and fraud. The parties eventually filed cross-motions for summary disposition under MCR 2.116(C)(10). Park Street argued that Soaring Pine violated the criminal usury statute by knowingly charging an effective interest rate exceeding 25% and therefore is barred by the wrongful-conduct rule from recovering on the loan. See MCL 438.41. Soaring Pine countered that the fees and charges associated with the loan are not interest and, regardless, the note has a usury savings clause that prevents it from charging a usurious rate. Soaring Pine further argued that, assuming it had engaged in criminal usury, it can still recover the loan principal and would only be precluded from collecting the interest.
>
> The circuit court granted in part and denied in part both parties' motions for summary disposition. The court agreed with Park Street that the purported fees and expenses tied to the loan are really disguised interest and that, with this interest included, Soaring Pine is seeking to collect an interest rate above 25%. The court further held that there was no question of fact that Soaring Pine charged a criminally usurious interest rate in violation of MCL 438.41. However, the court agreed with Soaring Pine that the usury savings clause is enforceable and therefore the note itself is not facially usurious. Finally, the court agreed that the appropriate remedy is to relieve Park Street of its obligation to pay the interest on the loan but not its obligation to repay the principal.

> Both parties filed interlocutory applications for leave to appeal challenging different aspects of the circuit court's decision. The Court of Appeals granted both applications and affirmed. *Soaring Pine Capital Real Estate & Debt Fund II, LLC v Park Street Group Realty Servs., LLC*, 337 Mich App 529, 976 N.W.2d 674 (2021). Relevant for our purposes, the Court of Appeals held that the usury savings clause in the parties' mortgage note is enforceable and that, read together with a stated interest rate below the legal limit, the note is not facially usurious. *Id.* at 540-547, 976 N.W.2d 674. However, it held that Soaring Pine nonetheless violated the criminal usury statute by "seeking to collect ('take or receive') through this lawsuit an effective interest rate above the statutory maximum." *Id.* at 551, 976 N.W.2d 674, quoting MCL 438.41. [*Soaring Pine Capital Real Estate and Debt Fund II, LLC v Park Street Grp Realty Serv, LLC*, 511 Mich 89, 95-99; 999 NW2d 8 (2023) (footnotes omitted).]

The Michigan Supreme Court decision

Both parties sought leave to appeal to the Michigan Supreme Court. In lieu of granting leave, the court ordered oral argument on the applications and directed the parties to address:

> (1) Whether a usury-savings clause is void as a violation of public policy; (2) whether the plaintiff violated the usury statute, MCL 438.41, by seeking to collect on the contract in court or by engaging in any other acts that violated the statute; and (3) if the plaintiff violated MCL 438.41, whether it is barred by the wrongful conduct rule from recovering the principle on the loan. [*Soaring Pine Capital Real Estate & Debt Fund II, LLC v Park Street Grp Realty Serv, LLC*, 509 Mich 875, 875-876; 970 NW2d 676 (2022).]

The above-stated issues were discussed by the Michigan Supreme Court in *Soaring Pine Capital Real Estate and Debt Fund II, LLC v Park Street Grp Realty Serv, LLC*, 511 Mich 89; 999 NW2d 8 (2023). On the first question, the Michigan Supreme Court held that:

> [I]n determining whether a loan agreement imposes interest that exceeds the legal rate, a usury savings clause is ineffective if the loan agreement otherwise requires a borrower to pay an illegal interest rate. This is so even if some of the interest is labeled something else, such as a "fee" or "charge." Enforcing a usury savings clause in this circumstance would undermine Michigan's usury laws because it would nullify the statutory remedies for usury, thereby relieving lenders of the obligation to ensure their loans have a legal interest rate. In short, "[a] lender cannot avoid the consequences of contracting for a usurious interest rate simply by including a savings clause in the contract. [*Id.* at 94-95.]

On the second question, the court stated:

> We hold that seeking to collect an unlawful interest rate in a lawsuit, standing alone, is insufficient to trigger criminal liability under Michigan's criminal usury statute, MCL 438.41. The Legislature did not intend to criminally punish a lender for up to five years in prison for merely invoking the judicial process to collect on a debt. Seeking relief in a court of law—rather than through extrajudicial means—is generally encouraged, not punished with a felony conviction. The appropriate remedy for a lender's abusive lawsuit is success for the borrower in that lawsuit and appropriate civil sanctions, not a criminal conviction for usury. [*Id.* at 95.]

The Supreme Court did not rule on the third question, whether, if Soaring Pine violated the criminal usury statute, it was prevented, under the wrongful conduct rule from recovering the principal on the loan. *See Id.* at 96 n 5.

The Michigan Supreme Court reversed the decision of the Court of Appeals and the decision of this Court's predecessor "to the extent that they are inconsistent with this opinion, vacate[d] the remainder of these decisions, and remand[ed] this case to the Oakland Circuit Court for reconsideration of all aspects of this case in light of this opinion." *Id.* at 133.

II.

Review on Remand

A. Duty on Remand

> The power of the lower court on remand is to take such action as law and justice may require so long as it is not inconsistent with the judgment of the appellate court.'" *People v. Fisher,* 449 Mich. 441, 446–447, 537 N.W.2d 577 (1995) (citations omitted); *Waatti & Sons Electric Co. v. Dehko,* 249 Mich App 641, 646, 644 NW 2d 383 (2002). When an appellate court remands a case without instructions, a lower court has the "same power as if it made the ruling itself." *Fisher, supra* at 447, 537 N W 2d 577. However, when an appellate court gives clear instructions in its remand order, it is improper for a lower court to exceed the scope of the order. *Waatti & Sons, supra* at 646, 644 NW 2d 383. *"It is the duty of the lower court or tribunal, on remand, to comply strictly with the*

> *mandate of the appellate court." Rodriguez v. Gen. Motors Corp. (On Remand),* 204 Mich App 509, 514, 516 NW 2d 105 (1994). [*K & K Const, Inc v Dept of Environmental Quality*, 267 Mich App 523, 544-545; 705 NW2d 365 (2005) (emphasis added).]

B. Michigan Supreme Court instructions on remand

As was stated above, the Michigan Supreme Court remanded this case to this Court "for reconsideration of all aspects of this case in light of this opinion." *Soaring Pine*, 511 Mich at 133. *See also Id.* at 99 n 8 ("we … remand to the circuit court to reconsider this case on a clean slate in light of this opinion.")

In addition to declining to address the effect of the wrongful conduct rule, the Michigan Supreme Court, in discussing the limitations of its holding stated:

> We do not address whether the loan in this case is subject to any usury protections, nor do we address whether the note in this case is facially usurious. Finally, we do not address the effect, if any, of a usury savings clause when determining whether Soaring Pine (or any future lender) has violated the criminal usury statute by "knowingly charg[ing], tak[ing] or receiv[ing]" a usurious rate. These are issues that are best addressed, as necessary, in the first instance by the circuit court in light of this opinion. [*Id.* at 127.]

III.

Standard of Review

The Order on appeal was the Order entered on June 27, 2019 by this Court's predecessor granting in part, denying in part Defendants' Motion for Summary Disposition under MCR 2.116(C)(10).

A motion under MCR 2.116(C)(10) tests the factual support for a claim. *Universal Underwriters Group v Allstate Ins Co,* 246 Mich App 713, 720; 635 NW2d 52 (2001). The court, in reviewing a motion under MCR 2.116(C)(10), "considers affidavits, pleadings, depositions,

admissions, and documentary evidence filed in the action or submitted by the parties in the light most favorable to the party opposing the motion." *Quinto v Cross and Peters Co*, 451 Mich 358, 362; 547 NW2d 314 (1996) (citation omitted). The motion may be granted "if the affidavits or other documentary evidence show that there is no genuine issue in respect to any material fact, and the moving party is entitled to judgment as a matter of law." *Id.*

IV.

Analysis

A. Usury Law

"Usury is, generally speaking, the receiving, securing, or taking of a greater sum or value for the loan or forbearance of money, goods, or things in action that is allowed by law." *Soaring Pine*, 511 Mich at 103 (quotation marks and citation omitted). Michigan has a civil usury statute, MCL 438.31, and a criminal usury statute, MCL 438.41. As the Supreme Court in *Soaring Pine* stated:

> [t]he statutory scheme indicates a legislative intent beyond merely ensuring that the interest actually paid in a particular case is not usurious. Rather, the Legislature is seeking to punish lenders who engage in usurious conduct and prevent future attempts to collect excessive interest. [*Id.* at 113 (citations omitted).]

In this case, only the criminal usury statute, MCL 438.41, is at issue. The criminal usury statute states as follows:

> A person is guilty of criminal usury when, not being authorized or permitted by law to do so, he knowingly charges, takes or receives any money or other property as interest on the loan or forbearance of any money or other property, at a rate exceeding 25% at simple interest per annum or the equivalent rate for a longer or shorter period. Any person guilty of criminal usury may be imprisoned for a term not to exceed 5 years or fined not more than $10,000.00, or both. [MCL 438.41.]

B. Issues on Remand

(1) *Is the loan subject to usury protections?*

Soaring Pine asserts that, regardless of the interest rate charged, the loan is exempt from the application of the criminal usury statute pursuant to MCL 438.31c(11).[1] That statute states as follows:

> The parties to a note, bond, or other indebtedness of $100,000.00 or more, the bona fide primary security for which is a lien against real property *other than a single family residence*, or the parties to a land contract of such amount and nature, may agree in writing for the payment of any interest rate. [MCL 438.31c(11) (emphasis added).]

Soaring Pine asserts that where MCL 438.31c(11) is applicable, parties may agree "to any rate of interest" without being subject to the rate restrictions in Michigan's usury laws. *See e.g. Equine Luxury Props, LLC v Commercial Capital BIDCO, Inc.,* opinion of the United States District Court of the Western District of Michigan, Case No. 1:23-cv-1142, issued May 30, 2024, 2024 WL 2768514 at p 7.[2] However, Defendants argue that MCL 438.31c(11) is not applicable in this case.

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[1] The Defendants argue that this issue is not properly considered on remand because it was not raised in the original motion for summary disposition but was raised for the first time on appeal. This Court disagrees. The Supreme Court stated that it did not address the argument that the loan in this case "is not subject to any usury protections pursuant to MCL 438.31c(11)." *Soaring Pine,* 511 Mich at 115 n 24. As was explained above, the Supreme Court's instructions state that the issue of whether the loan in this case is subject to any usury protections is one of the "issues that are best addressed, as necessary, in the first instance by the circuit court in light of this opinion." *Id.* at 127. The parties have had the opportunity to address the issue in their supplemental briefs and this Court will consider their substantive arguments.

[2] In *Equine Luxury Properties* Chief Judge Jarbou described the authority for this conclusion:

First, it is argued that "the Legislature never intended for the 1973 exception in §c(11) to cover mortgage loans made by private, nonregulated lenders to Michigan business entities." Defendants argue that this intent is expressed in the "business entity exemption" expressed in MCL 438.61 which states, in pertinent part:

> (2) Notwithstanding Act No. 326 of the Public Acts of 1966, being sections 438.31 to 438.33 of the Michigan Compiled Laws, and Act No. 259 of the Public Acts of 1968, being sections 438.41 to 438.42 of the Michigan Complied Laws, but subject to any other applicable law of this state or the United States which regulates the rate of interest, it is lawful in connection with an extension of credit to a business entity by a state or national chartered bank, a state or federal chartered savings bank, a state or federal chartered savings and loan association, a state or federal chartered credit union, insurance carrier, finance subsidiary of a manufacturing corporation or related entity for the parties to agree in writing to any rate of interest.
>
> (3) Notwithstanding Act No. 326 of the Public Acts of 1966, it is lawful in connection with an extension of credit to a business entity by any person other than a state or nationally chartered bank, a state or federal chartered savings bank, a state or federal chartered savings and loan association, a state or federal chartered credit union, insurance carrier, finance subsidiary of a manufacturing corporation, or a related entity for the parties to agree in writing to any rate of interest not exceeding the rate allowed under Act No. 259 of the Public Acts of 1968. [MCL 438.61(2) and (3).]

The argument that the exception in MCL 438.31c(11) is negated by the business entity exception in MCL 438.61(3) was thoroughly addressed and rejected by Judge Jarbou in *Equine Luxury Properties, LLC v Commercial Capital BIDCO, Inc.*, United States District Court for the

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> The exception in § 438.31c(11) expressly allows parties to agree to "any rate of interest" . . .That exception [MCL 438.31c(11)] is not subject to rate restrictions elsewhere in Michigan's usury laws. *See Mac Leod v. Bay Haven Marina, Inc.*, No. 187688, 1997 WL 33347816, at *2 (Mich. Ct. App. June 13, 1997) (holding that § 438.31c(11) is an exception to the 11% cap in § 438.31c(6)); *Kansas City Life Ins. Co. v Durant*, [99 Mich App 754, 761]; 298 N.W.2d 630, 633 (Mich. Ct. App. 1980) (holding that § 438.31c(11), formerly § 438.31c(9), is an exception to the cap in § 438.31c(2)); 1979-1980 Mich. Op. Att'y Gen. 877 (1980) (opining that loans under § 438.31c(11), formerly § 438.31c(9), are not subject to the 25% cap in the criminal usury statute). Indeed, Michigan's criminal usury statute prohibits charging more than 25% interest "when ... not authorized or permitted by law[.]" Mich. Comp. Laws § 438.41. Section 438.31c(11) is a law permitting [the lender] to charge Michigan borrowers any rate of interest for a loan secured by real property that is not a single-family residence. Thus, [the lender] can rely on that law without running afoul of Michigan's criminal usury statute.

Western District of Michigan Case No. 1:23-cv-1142, 2024 WL 2768514 (May 5, 2024) where the court explained:

> Plaintiffs point to the business entity exemption in Mich. Comp. Laws § 438.61(3), contending that because Plaintiffs are business entities who obtained a loan from a nonregulated lender, then [Defendant lender] is subject to "the rate allowed [in the criminal usury statute, Mich. Comp. Laws § 438.41]," which is 25%. *See* Mich. Comp. Laws § 438.61(3). However, the same logic discussed above applies here as well. In other words, § 438.41 prohibits charging rates higher than 25% when not authorized by law, but § 438.31c(11) is a law that permits charging a rate higher than 25%. Thus, the loan in this case does not conflict with the business entity exception in § 438.61(3).
>
> Plaintiffs note that the business entity exception in § 438.61(3) expressly applies "[n]otwithstanding Act No. 326 of the Public Acts of 1966." Mich. Comp. Laws § 438.61(3). Act No. 326 of the Public Acts of 1966 encompasses sections 438.31 to 438.33, and therefore includes § 438.31c(11). According to Plaintiffs, this "notwithstanding" language means that the criminal usury limit referenced in § 438.61(3) supersedes and circumscribes the "any rate of interest" language found in § 438.31c(11). The Court disagrees. As discussed above, applying § 438.31c(11) here is *consistent with* § 438.61(3) because the criminal usury statute permits rates above 25% when authorized by law.
>
> Plaintiffs argue that such an interpretation would render the "notwithstanding" language in § 438.61(3) meaningless. To the contrary, Act No. 326 of the Public Acts of 1966 contains several interest rate restrictions that are lower than the criminal usury rate of 25%. One such rate is the general usury limit of 7% found in § 438.31. Other provisions cap certain mortgage interest rates at 11%. *See* Mich. Comp. Laws §§ 438.31c(6), 438.31c(7), 438.31c(8). Accordingly, the "notwithstanding" language makes clear that business entities obtaining loans from nonregulated lenders are not subject to the foregoing limits; they can obtain loans at a rate as high as 25%.
>
> Plaintiffs also argue that such an interpretation would render meaningless the phrase "any rate of interest not exceeding the rate allowed under [the criminal usury statute]." *See* Mich. Comp. Laws § 438.61(3). Not so. In most circumstances, this phrase sets 25% as the maximum rate for business entities borrowing from nonregulated lenders. After all, many business loans are not secured by real property, so there are many circumstances where § 438.31c(11) would not apply.
>
> Plaintiffs' interpretation is at odds with the purpose of the business entity exemption, which was enacted to "exempt loans to business entities from the provisions of the usury statute." 1970 Mich. Pub. Acts 143. Plaintiffs' interpretation would transform an expansion of lending rights for business entities into a

> contraction of those rights. It would prohibit business entities from relying on exceptions that might apply outside of Mich. Comp. Laws § 438.61.
>
> The history of the business entity exemption also reflects an intent to expand the rights of business entities, not limit them. The original exemption only applied to business entities taking loans from "any state or national chartered bank or insurance carrier[.]" 1970 Mich. Pub. Acts 143. Because that exemption was "subject to the provisions of any other applicable law," it implicitly limited such loans to the criminal usury rate. *See id.* In 1978, the act was amended to include loans by business entities from "any state or national chartered bank, insurance carrier, *or finance subsidiary of a manufacturing corporation*." 1978 Mich. Pub. Acts 42 (emphasis added). An amendment in 1983 added an exemption for business entities taking loans from nonregulated lenders, capping such loans at 15%. 1983 Mich. Pub. Acts 37-38. In 1997, the act was amended to its current form, allowing business entities taking loans from certain regulated lenders to agree to *any* rate of interest, notwithstanding the criminal usury statute, and increasing the 15% cap on loans from other types of lenders to the rate permitted by the criminal usury statute. 1996 Mich. Pub. Acts 2300. At each stage, the legislature expanded the ability of business entities to obtain loans at higher interest rates. Plaintiffs' interpretation runs in the opposite direction.
>
> The exception in Mich. Comp. Laws § 438.31c for loans exceeding $100,000.00 secured by real property other than a single-family residence first appeared in 1973. 1973 Mich. Pub. Acts 21. The language of that exception has remained substantially the same since its adoption, despite multiple amendments to other sections of § 438.31c from 1973 to 1990. There is no indication that the Michigan legislature intended the business entity exemption to circumscribe the exception in § 438.31c(11).
>
> In short, [Defendant lender] can rely on the exception in Mich. Comp. Laws § 438.31c(11) to avoid the usury restrictions in Michigan law. That exception permitted [Defendant lender] to charge Plaintiffs any rate of interest to which they agreed in writing. [*Equine Props,* 2024 WL 2768514 at * 8.]

This Court finds the reasoning in *Equine* to be persuasive and adopts it here to conclude that the business entity exemption, MCL 438.61(3), does not supersede the exception stated in MCL 438.31c(11).[3]

[3] The decisions of lower federal courts are not binding on this Court but may be considered persuasive. *Abela v General Motors Corp*, 469 Mich 603, 606-607; 677 NW2d 325 (2004).

Next, Defendants argue that MCL 438.31c(11) does not apply because the primary security for the Loan in this case was "a single-family residence." Soaring Pine acknowledges that the Loan was secured by a blanket mortgage on forty residential properties but argues that "the use of the singular 'a' before "single family residence" must be given effect because the "clear intent of the Legislature is to protect homeowners from usurious lenders."[4] Soaring Pine argues that the borrower here is not an individual borrower, borrowing against the family home, but rather, a sophisticated borrower who secured a one million dollar loan under a blanket mortgage on multiple single-family residences located in five difference counties.

Defendants argue that the primary indebtedness for the loan "was 'a single family residence.' Park Street pledged 40 single-family residences as security for the loan from Soaring Pine."[5]

As was previously stated, MCL 438.31c(11) provides:

> The parties to a note, bond, or other indebtedness of $100,000.00 or more, the bona fide primary security for which is a lien against real property *other than a single family residence*, or the parties to a land contract of such amount and nature, may agree in writing for the payment of any interest rate. [MCL 438.31c(11) (emphasis added).]

In determining the meaning of the term "single family residence" in MCL 438.31c(11), it is necessary to employ the tools of statutory construction.

> The primary goal of statutory interpretation is to ascertain the legislative intent that may reasonably be inferred from the statutory language. The first step in that determination is to review the language of the statute itself. Unless statutorily

[4]Soaring Pine urges this Court to follow *Equine Luxury*, to determine that "the loan at issue is categorically exempt from usury limits." However, there was no dispute that the loan in *Equine Luxury* was secured "by real property that is not a single-family residence." *Equine Luxury*, at * 7 n 3. Thus, the decision in that case does not entirely dispose of the issues regarding the applicability of MCL 438.31c(11) that are present in this case.

[5] Defendants assert that "the residences were occupied by homeowners purchasing the houses from Park Street via land contract. Each home constituted a single-family residence, and each homeowner filed a principal residence exemption affidavit with the local tax assessor. . . ." Defendants' Response Brief on Remand, p 18 n 12.

> defined, every word or phrase of a statute should be accorded its plan and ordinary meaning, taking into account the context in which the words are used. [The court] may consult dictionary definitions to give words their common and ordinary meaning. When given their common and ordinary meaning, the words of a statute provide the most reliable evidence of its intent. . . . [*Spectrum Health Hosps v Farm Bureau Mut Ins Co of Mich*, 492 Mich 503, 515 (2012) (quotation marks and citation omitted).]

In interpreting a statute, statutory rules of construction must be applied "unless such construction would be inconsistent with the manifest intent of the legislature." MCL 8.3. Pursuant to MCL 8.3b: "[e]very word importing the singular number only may extend to and embrace the plural number, and every word importing the plural number may be applied and limited to the singular number. . . ." Thus, under MCL 8.3b, the meaning of "single family residence" as used in MCL 438.31c(11) may be extended to "single family residences." *See Sclafani v Domestic Violence Escape*, 255 Mich App 260, 268; 660 NW2d 97 (2003) (the use of the term "authority" should embrace the plural under MCL 8.3b); *People v Giovannini*, 271 Mich App 409, 415; 722 NW2d 237 (2006) ("[T]he phrases 'a criminal offense,' or 'the criminal offense,' can be construed to mean 'criminal offenses.")

As Soaring Pine states, MCL 8.3b is a permissive tool of statutory construction. *See Robinson v City of Detroit*, 462 Mich 439, 461 n 18 where the Court explained:

> [T]he statute only states that a word importing the singular number "may extend" to the plural. The statute does not say that such an automatic understanding is required. Moreover, M.C.L. § 8.3; MSA 2.212 provides that the rule stated in § 3b shall be observed "unless such construction would be inconsistent with the manifest intent of the Legislature." Second, the Legislature has directed that
>
> > [a]ll words and phrases shall be construed and understood according to the common and approved usage of the language.... [MCL 8.3a; MSA 2.212(1).]

As was stated above, Soaring Pine argues that the Legislature's "use of the singular 'a' before 'single family residence' must be given effect because the "clear intent of the Legislature is to protect homeowners from usurious lenders." This argument is not persuasive.

First, contrary to Soaring Pine's assertion, the term "a" is an indefinite article with an "indefinite or generalizing" effect. *See Robinson v City of Lansing*, 486 Mich 1, 14; 782 NW2d 171 (2010) quoting *Random House Webster's College Dictionary*, p 1382 ("'The' and 'a' have different meanings. 'The' is defined as 'definite article. 1. (used, [especially] before a noun, with a specifying or particularizing effect, as opposed to the indefinite or generalizing force of the indefinite article a or an). . . .)" Thus, under common usage, the use of the word "a" before "single family residence" supports the application of MCL 8.3b extending the phrase "single family residence" as used in MCL 438.31c(11) to "single family residences."[6]

Soaring Pine also argues that limiting the exception in MCL 438.31c(11) to a loan "the bona fide primary security for which is a lien against real property other than a single-family residence" to loans secured against real property other than those secured by a lien against one single family residence would comport with the intent of the Legislature to protect homeowners not sophisticated business entities. In support of this argument Soaring Pine cites to the Supreme Court's opinion in this case however, the decision does not support Soaring Pine's position. Rather, the Michigan Supreme Court stated that it disagreed with the argument that "the public policies underlying Michigan's usury statutes should only apply to the subset of borrowers that need

[6] As the Defendants point out, Soaring Pine's reliance on the holding in *Robinson v City of Detroit,* 462 Mich 439; 613 NW2d 307 (2000) is misplaced. In that case, the Michigan Supreme Court distinguished between the meaning of "the proximate cause" and "a proximate cause" and determined that "the phrase 'the proximate cause' contemplates *one* cause." *Id.* at 462 (emphasis in original).

protection from exploitation and not to sophisticated borrowers like Defendants." *Soaring Pine*, 511 Mich at 113. The court explained:

> Soaring Pine and amicus, the Business Law Section of the State Bar of Michigan (Amicus BLS), argue that the primary purpose behind Michigan's usury laws—"to protect the *necessitous* borrowers from extortion," *Lee*, 447 Mich. at 556-557, 526 N.W.2d 882 (quotation marks and citation omitted; emphasis added)—does not apply to business entities and sophisticated borrowers involved in high-value commercial transactions. Admittedly, the general purpose of protecting vulnerable borrowers from exploitation is arguably not furthered if the borrower is of comparable bargaining power with the lender. Relatedly, there is a reasonable equitable argument that knowledgeable borrowers should not obtain a windfall and be permitted to skirt the financial obligations they knowingly agreed to by belatedly arguing that the agreement was usurious.
>
> However, when defining the contours of Michigan's public policy, "the focus of the judiciary must ultimately be upon the policies that, *in fact*, have been adopted by the public through our various legal processes, and are reflected in our state and federal constitutions, our statutes, and the common law." *Terrien*, 467 Mich. at 66-67, 648 N.W.2d 602 (emphasis added). *The categorical distinction between "sophisticated" commercial business entities and other borrowers is not clearly reflected in Michigan's usury statutes or the accompanying caselaw. Conceivably, some of the current statutory exemptions from certain usury statutes could be viewed as rough proxies for these types of borrowers. See, e.g., MCL 438.31c(11) (providing that "[t]he parties to a note, bond, or other indebtedness of $100,000.00 or more, the bona fide primary security for which is a lien against real property other than a single family residence, or the parties to a land contract of such amount and nature, may agree in writing for the payment of any rate of interest"); MCL 450.1275 (allowing "[a] domestic or foreign corporation" to agree in writing to an interest rate "in excess of the legal rate"). But the legislative intent on this point is too muddled for us to draw a clear line between "sophisticated" commercial borrowers and other borrowers.* [*Soaring Pine*, 511 Mich at 113-115 (emphasis added).]

Based upon the foregoing, the Court determines that employing the rule of statutory construction stated in MCL 8.3b is not "inconsistent with the manifest intent of the Legislature" under MCL 8.3. Accordingly, the Court concludes that under MCL 8.3b, the meaning of "single family residence" as used in MCL 438.31c(11) may be extended to "single family residences." Because the loan at issue here is not "a note, bond, or other indebtedness of $100,000.00 or more,

the bona fide primary security for which is a lien against real property *other than a single family residence*" the exception in MCL 438.31c(11) does not apply.

2. *Is the Loan "facially usurious?"*

The next question left open by the Michigan Supreme Court is whether the loan is "facially usurious." As was stated above, under the criminal usury statute:

> A person is guilty of criminal usury when, not being authorized or permitted by law to do so, he knowingly charges, takes or receives any money or other property as interest on the loan or forbearance of any money or other property, at a rate exceeding 25% at simple interest per annum or the equivalent rate for a longer or shorter period. . . .[MCL 438.41]

The stated interest rate on the loan is 20%.[7] However, "a court must look []beyond the simple interest rate per annum stated in the contract to determine the *actual* interest rate that plaintiff was seeking to receive from defendants." *Soaring Pine*, 511 Mich 122-123. As the Michigan Supreme Court explained:

> There is good reason for this approach; it would vitiate the usury laws if courts were to blindly accept the stated interest rate in a note, allowing a lender to smuggle in a usurious rate through fees, charges, and the like. The obligation to look beyond the labels in determining whether a note is usurious is well established in Michigan law and is consistent with the public policy of protecting borrowers reflected in usury statutes. [*Id.* at 123.]

While the usury statute does not define the term "interest," the Michigan Supreme Court has defined interest as "compensation allowed by law or fixed by the respective parties for the use or forbearance of money, 'a charge for the loan or forbearance of money,' or a sum paid for the

[7] The Court of Appeals determined that the effective interest rate on the Loan "is slightly above 20%." *Soaring Pine Capital Real Estate and Debt Fund II, LLC v Park Street Group Realty Servs, LLC*, 337 Mich App 529, 548; 976 NW2d 674 (2021) rev'd in part, vacated in part by 511 Mich 89 (2023).

use of money or the delay in payment of money." *Town and Country Dodge, Inc v Dept of Treasury*, 420 Mich 226, 242; 362 NW2d 618 (1984).

(a) The parties' arguments on interest

Soaring Pine argues that the determination of the actual interest rate is limited to charges referenced on the face of the Loan and that consideration of the 20% interest per annum together with the $25,000 commitment fee result only in a rate in the amount of 22.5%, well below the 25% rate specified in the criminal usury statute. Defendants argue that the criminal usury statute prohibits a lender knowingly "charging, taking or receiving" more money as interest on a loan that the law allows. Thus, the inquiry is not limited to the amount the lender charges under the terms of the loan but also includes the amount the lender takes or receives as interest. Therefore, according to the Defendants "in addition to the loan documents, the court must also inquire into the closing or disbursement statements to determine the actual amount of interest the lender charged, took or received at the outset of the loan."

This Court agrees with Defendants that a determination of "the actual amount of interest that [Soaring Pine] was seeking to receive from Defendants" includes a review of the Note(s), Loan Agreement(s), and the corresponding closing statements. *See Soaring Pine*, 511 Mich at 122-123. *See also Wilcox v Moore*, 354 Mich 499, 504; 93 NW2d 288 (1958) (in order to "protect the necessitous borrower from extortion . . . a court must look squarely at the real nature of the transaction."); *Ableoff v Ohio Finance Co*, 313 Mich 568, 577; 21 NW2d 856 (1946) (In determining whether a purported sale was, in reality, a usurious loan the court is "confronted with the requirement of examining the entire transaction. . . It is elementary that in such an examination we are not bound by the form of the transaction and that, notwithstanding how it may be

characterized by the parties in their written agreement, its real nature must be determined from all of the facts and circumstances.")

b. The Note(s) and the "Loan Documents"

A total of $1,000,00.00 was loaned by Soaring Pine to Defendants in August and September 2016. The Mortgage Note dated August 12, 2016 stated a principal amount of $500,000 and stated that "Interest on the outstanding principal amount of the Loan shall accrue interest at the Interest Rate of Twenty Percent (20.00%) per annum.[8] The parties entered into a Loan Agreement dated August 12, 2016.[9] The parties entered into an Amended and Restated Mortgage Agreement Note dated September 23, 2016 stating the principal amount of $1,000,000.00 and a 20% interest rate.[10] Under the terms of the Note, for "Months 1 & 2 – Interest accrues and will be capitalized and added to the loan balance, but no payments will be due."[11]

The Loan Agreement stated that a $25,000 "Commitment Fee" "is due and payable to lender at closing from the Loan."[12] The Loan Agreement also provided for a "Success Fee" stating:

> The Borrower shall provide Lender with five (5) days prior written notice of a sale of any home purchased with the Loan (a "Home Sale"). Upon consummation of a Home Sale, Borrower shall pay to Lender a success fee in the amount of in the amount of One Thousand and 00/100 Dollars ($1,000.00) per home sold ("Success Fee.) [Loan Agreement, § 9.2]

Additionally, the Loan Agreement provided for "Payment of Costs" under Section 8.8.

[8] Second Amended Complaint, Exhibit 1, 8/12/16 Note.
[9] *Id.* Exhibit 2, 8/12/16 Loan Agreement.
[10] *Id.* Exhibit 3, 9/23/17 Amended and Restated Mortgage Note.
[11] *Id.* Exhibit 1 and 3.
[12] *Id.* Exhibit 2, § 1.6.

c. The CPA Affidavit

Defendants reference the affidavit of John Fioritto, CPA, in support of the assertion that the actual amount of interest that [Soaring Pine] was seeking to receive from Defendants exceeds 25% at simple interest per annum. The affidavit states that "total interest, loan commitment fees, success fees, legal fees, title insurance, title examination and search fees and recording fees total $365,851.56."[13] Further, the CPA states the following:

> The effective annual interest rate of the loan if all interest, fees, and expenses are included as interest, exceeds 25% at simple interest per annum.
>
> The amount of money that could be charged as interest on a $1,000,000.00 at a rate 25% at simple interest per annum, is $250,000.00. The $205,642.81 in interest and "capitalized interest" of the loan, plus $50,000.00 in loan commitment fees, alone totaling $255,642.81, would exceed 25% per annum. If accrued interest from August 12, 2016, thru September 23, 2016, success fees, legal fees, and title related fees were also included as interest on the loan, the rate of return would be more than 36.5% with an effective interest rate averaging 33.0% per annum.[14]

d. Determination of the Actual Interest Rate

i. Rate stated on Note

First, the Court of Appeals determined in its opinion that under the terms of the Note, the effective interest rate for the purposes of MCL 438.41 "is slightly above 20%." *Soaring Pine Capital Real Estate and Debt Fund II, LLC v Park Street Group Realty Servs, LLC*, 337 Mich App 529, 548; 976 NW2d 674 (2021) rev'd in part, vacated in part by 511 Mich 89 (2023). The Court of Appeals in this case determined that because the "contract provides for a time period shorter than an actual year, the rate of 20% must be adjusted under the statute to determine 'the equivalent

[13] Defendants' Motion for Summary Disposition, Exhibit G, Fioritto Affidavit, ¶ 4. The calculations were based on "the loan documents, closing statements, and Soaring Pine's principal and interest amortization schedule." *Id.* at ¶ 3.
[14] Defendants' Motion, Exhibit G, Fioritto Affidavit, ¶¶ 6-7.

rate for a longer or shorter period.'"[15] The Court of Appeals concluded that the effective interest rate for the purposes of MCL 438.41 "is slightly above 20%." *Id.*

As far as this Court can discern, Soaring Pine does not challenge this determination and, in any event, this Court has no reason not to accept the Court of Appeals' reasoning in this regard.

ii. Commitment Fees

It is not disputed that $50,000 in Commitment Fees were charged. As was previously discussed, the loan agreement provided for a $25,000 "Commitment Fee" "due and payable to lender at closing from the Loan."[16] Soaring Pine argues that the $25,000 Commitment Fee was stated in the Original Loan Agreement for $500,000.00 but was not included in the Amended Loan Agreement for the additional $500,000.00. Soaring Pine argues that the loan agreement only provides for a $25,000 Commitment Fee and that the fee was mistakenly charged twice.

Defendants argue that the Loan Amendment stated that "[a]ll other terms of the Loan Agreement dated August 12, 2016 remain in full force and effect" and therefore, Defendants were required to pay a second $25,000.00 fee at closing. Defendants also argue that a Soaring Pine Investor Presentation for September is evidence that the second charge of $25,000 was not a mistake and that Soaring Pine intended to treat the $50,000.00 commitment fee as a 5% upfront fee.[17]

Regardless of whether the second commitment fee of $25,000.00 was *mistakenly* charged, there is no dispute that a total of $50,000.00 was charged and was paid by the Defendants at closing. This Court agrees with the Court of Appeals' assessment that the $50,000.00 fee was

[15] Under the terms of the note, interest was calculated "on the basis of a three hundred sixty (360) day year."
[16] *Id.* Exhibit 2, § 1.6.
[17] Defendants' Motion, Exhibits A and C.

interest at a rate of 5% simple per annum.[18] *Soaring Pine*, 337 Mich App at 550. This Court also agrees that "when taking the fee into account as interest as explained [in the Fioritto Affidavit] the rate sought by plaintiff moves to over 25% simple interest per annum, as proscribed by the criminal-usury statute, MCL 438.41."[19] *Id.* at 551. As the Court of Appeals stated, "considering the earlier conclusion that the stated rate of 20% per annum in the contract was actually *slightly above* 20% in light of the fact that the contract used 360 days as the length of a year, the additional 5% from the 'commitment fees' puts the total effective rate above 25%." *Id.* This is a sufficient finding because any rate above 25% is considered usurious under the statute. "Usury is a binary state; either a loan is usurious, or it is not . . .Once the legal rate [for usury] is exceeded, the extent of the advantage, or the amount of the surplus, in excess of legal interest is wholly inconsequential." *Soaring Pine*, 511 Mich at 126 n 37 (quotation marks and citations omitted).

iii. Other Fees/Hidden Interest

Based upon this Court's finding that the Commitment Fees constituted interest at 5% per annum and therefore, the actual rate of interest was above 25%, it is unnecessary to determine whether the other fees and costs constitute hidden interest. However, in the interest of completeness on remand, this Court will address certain other fees alleged to be hidden interest.[20]

[18] The Michigan Supreme Court declined to address the Court of Appeals' ruling on the $50,000 commitment fee. *Soaring Pine*, 511 Mich at 14 n 8.

[19] The Court of Appeals rejected the argument now made by Soaring Pine that the commitment fee could not be considered "interest." The Court of Appeals distinguished the circumstances in the instant case from those in *Fed Deposit Ins Corp v Kramer*, 100 Mich App 495, 497; 298 NW2d 755 (1980), the case relied on by Soaring Pine, and determined "'a commitment fee' that was not paid in advance of the loan, did not bind the lender to give the loan at a future date, and was not a separate transaction from the actual loan would be considered hidden interest." *Soaring Pine*, 337 Mich App at 549.

[20] The Court will not address the "capitalized interest" and the "accrued interest" arguments as these arguments are given cursory treatment by the parties and where, in any event the amount of "hidden interest," if any, would not affect this Court's analysis. For example, the "accrued interest" amount of $11,506.85 would translate into a 1% interest rate.

iv. Legal Fees and Title Costs

Defendants assert that closing documents demonstrate that they were charged $14,000 in legal fees incurred by Soaring Pine in closing on the loan and $14,701.90 in costs of title insurance, title examination, search fees and recording fees.[21] Section 8.8 of the Loan Agreement states, in part, that "[i]t is understood and agreed that Borrower shall pay, now or hereafter, all closing costs, including by way of description and not limitation, reasonable attorneys' fees incurred by Lender in connection with the consummation and closing of the Loan."[22]

Under MCL 438.31a (emphasis added):

> A state or national bank, except as federal law and regulation provide otherwise, insurance company, or lender approved as a mortgagee under the national housing act, 12 USC 1701 to 1750g, or regulated by a federal agency, may require a borrower to pay reasonable and necessary charges which are the actual expenses incurred by the lender in connection with the making, closing, disbursing, extending, readjusting, or renewing of a loan. *The charges shall be in addition to interest authorized by law and are not a part of the interest collected or agreed to be paid on the loan within the meaning of a law of this state which limits the rate which may be exacted in a transaction. Reasonable and necessary charges shall consist of recording fees; title examination or title insurance; the preparation of a deed, appraisal, or credit report; plus a loan processing fee*. . . .

Defendants argue that while regulated lenders such as banks are authorized to charge the borrower for fees "in additional to interest authorized by law" unregulated lenders are not, and where an unregulated lender does require the payment of fees, it is to be treated as additional

[21] Defendants' Motion, Exhibit G, Fioritto Affidavit, Table I.
[22] Second Amended Complaint, Exhibit 2, Loan Agreement, § 8.8.

interest. In support of this argument, Defendants cite OAG, 1975-1976, No. 5085.[23] In OAG 1975-1976. No. 5085, the Attorney General opined that:

> [S]ince interest is, by definition, compensation paid for the use of money, any fee imposed upon the borrower, other than the reasonable and necessary charges, such as recording fees, title insurance, deed preparation, and credit reports recognized in Section 1(a) of the Usury Statute [MCL 438.31a], in exchange for the lending of money must be taken into consideration in determining the rate of interest being charged. [*Id.* at p 717.]

Soaring Pine argues that "the identification of certain charges in MCL 438.31a that are not included as interest for regulated lenders. . . does not mean that all loan charges count as interest for unregulated lenders." Soaring Pine argues that "Michigan has long recognized that fair and reasonable charges may be made by a lender for services actually rendered."

The Court is not persuaded by the authority cited by Soaring Pine and agrees with the Defendants that the cases cited by discuss fees for "services rendered" other than the making of the loan. *See e.g. Barras v Youngs*, 185 Mich 496, 512; 152 NW 219 (1915) (trustee services); *Tierney v Collen*, 272 Mich 200; 261 NW 298 (1935) (bail surety).[24]

Rather, the Court finds the holding in *Miller v Ashton*, 241 Mich 46, 51; 216 NW 448 (1927) persuasive. In *Miller*, the court distinguished another case, *Bond & Mortgage Co v Burstein*, 222 Mich 88; 192 NW 549 (1923) where services made in connection in disposing of a

[23] Attorney General opinions are not binding but can be persuasive authority. *Williams v City of Rochester Hills*, 243 Mich App 539, 557; 625 NW2d 64 (2000).

[24] Likewise, the Court is not persuaded by the unpublished decision of the United States District Court for the Eastern District of Michigan MoneyForLawsuits *v Rowe*, Case No. 4:10-cv-11537 (January 23, 2012). First, the court in that case determined that New York law applied so that its discussion of Michigan usury law was mere dicta. Additionally, the court in *MoneyForLawsuits* was not addressing whether fees associated with a real estate loan such as those at issue here could be considered interest. Rather, *MoneyforLawsuits* involved a purchase agreement for a legal claim which assigned a portion of the proceeds from the claim to the lender. The court found that this was not "interest" under Michigan law because there was no guarantee of repayment, but in fact was a negotiated return on investment.

bond issue, overseeing payments for materials and labor and "rendering other services to protect the purchasers of the bond were not found to be "mere subterfuge" for the purpose of collecting an illegal rate of interest. The court in *Miller* stated that *Bond* "in no way supports the claims that a mortgagee may charge a service fee for examining the property to be mortgaged, or passing upon the sufficiency of title, or for any expense deemed necessary and incurred by him in determining whether he will make the loan. These are but the usual incidents to the mortgaging of real estate and are included in the rate of interest stipulated for in the mortgage." *Miller*, 241 Mich at 51.

While MCL 438.31a provides that for regulated lenders such "reasonable and necessary charges" are not considered interest, this exception to the common law rule as explained by *Miller* has not been extended to non-regulated lenders such as Soaring Pine. Accordingly, the Court concludes that the legal fees and the title costs may be taken into consideration in determining the rate of interest being charged.[25]

v. Success Fees

As was stated, the Loan Agreement also provided for a "Success Fee" stating:

> The Borrower shall provide Lender with five (5) days prior written notice of a sale of any home purchased with the Loan (a "Home Sale"). Upon consummation of a Home Sale, Borrower shall pay to Lender a success fee in the amount of in the amount of One Thousand and 00/100 Dollars ($1,000.00) per home sold ("Success Fee.) [Loan Agreement, § 9.2]

[25] The $14,000 in legal fees incurred by Soaring Pine in closing on the loan and $14,701.90 in title fees amount to $28,701.90 in fees and an approximate 2.9% interest rate per annum. Thus, even if the Court were not to consider the $25,000.00 in commitment fees that Soaring Pine claims was mistakenly charged, the actual interest rate would still be above 25%. Calculated as follows: 20%(+)+2.5%(commitment fee)+2.9%(legal and title fees)= +25.4%.

The Defendants assert that Soaring Pine demanded the payment of $70,000.00 in success fees. Soaring Pine asserts that although success fees were projected to be $70,000.00, no homes were sold, and the success fees never became due and cannot be considered interest.

Both parties rely on a Michigan Attorney General Opinion, OAG 2015, No. 7283 (May 4, 2015) to support their arguments. In OAG 7283, the question posed was whether the lender's total return on a loan including interest payments plus royalty payments might exceed the legal limit for interest. The Attorney General noted that although there was little development in this area of the law in Michigan, other courts have applied a common law exception called the "interest contingency rule." The rule was described as follows:

> [A] loan that will give the creditor a greater profit than the highest permissible rate of interest upon the occurrence of a condition [] is not usurious if the repayment promised on failure of the condition to occur is materially less than the amount of the loan . . . with the highest permissible interest, unless a transaction is given this form as a colorable device to obtain a greater profit than is permissible. Thus, interest that exceeds the legal maximum is not usurious when its payment is subject to a contingency so that the lender's profit is wholly or partially put in hazard, provided the parties are contracting in good faith and without the intent to avoid that statute against usury. [OAG 7283 quoting *WRI Opportunity Loans II, LLC v Cooper*, 154 Cal App 4th 525, 534 (2007) (citations omitted).]

The OAG opinion also noted that while the Michigan Supreme Court has not expressly discussed the "interest contingency rule" it has approved an agreement to use profits as payment on interest. *Id.* citing *Scripps v Crawford*, 123 Mich 173; 81 NW2d 1098 (1900). The OAG opinion concluded that "a financing agreement in which the borrower agrees to repay the principal with interest and a percentage of future revenues or profits, will not violate usury laws so long as the lender's profit is contingent and the parties contract in good faith and without the intent to avoid usury laws."

This Court agrees with Soaring Pine that, assuming the parties contracted in good faith and without the intent to avoid usury laws, the interest contingency rule applies to exempt the "success fees" of $1,000 per home sold. Soaring Pine's profit under the success fee provision is contingent on the sale of the homes.[26]

Based upon the foregoing analysis, the Court determines the Loan to be facially usurious.

3. *Does the Wrongful Conduct Rule Apply?*

Defendants, arguing that Soaring Pine violated the Criminal Usury Statute, assert that Soaring Pine "is barred from enforcing the loan and from recovering loan principal, interest, fees, or other damages, under the Wrongful Conduct Rule." Soaring Pine argues that the existence of the savings clause in the loan documents demonstrates, as a matter of law, that it did not violate the criminal usury statute because it did not "knowingly charge[s], take[s] or receive[s] any money or other property as interest on the loan or forbearance of any money or other property, at a rate exceeding 25% at simple interest per annum." Soaring Pine also argues that, even if the criminal usury statute were violated, the appropriate remedy is the waiver of interest only.

Under the wrongful conduct rule a plaintiff may not maintain an action if the cause of action is based, in whole or in part on its own illegal conduct. *Orzel v Scott Drug Co,* 449 Mich 550,558; 537 NW2d 208 (1995). The rule is only applicable when the conduct is prohibited or almost entirely prohibited under a penal or criminal statute. *Id.* at 561. Moreover, the wrongful-

[24] Defendants, relying on *Maze v Sycamore Homes, Inc,* 230 Cal App 2d 746 (1964), argue that because the "success fee" was a sum certain, $1,000 per house, the interest-contingency rule does not apply. However, *Maze* is distinguishable. In *Maze* the agreement provided the developer was to repay $24,000.00 in principal plus the sum of $4,800.00 "representing a return based on a profit participation concerning the construction and sale of certain lots." *Id.* at 748-749. Thus, in that case a definite sum, $4,800, was to be paid in one year. *Id.* at 752. In this case, however, there is no definite amount to be repaid. Rather, the amount of the "success fee" is dependent on the number of homes sold.

conduct rule only applies if there is a sufficient causal nexus between the plaintiff's illegal conduct and the asserted damages. *Id.* at 564.

i. Was there a violation of MCL 438.41?

As has been discussed, the statute allegedly violated in this case is the criminal usury statute, MCL 438.41 which states:

> A person is guilty of criminal usury when, not being authorized or permitted by law to do so, *he knowingly charges, takes or receives any money or other property as interest on the loan or forbearance of any money or other property, at a rate exceeding 25% at simple interest per annum* or the equivalent rate for a longer or shorter period. Any person guilty of criminal usury may be imprisoned for a term not to exceed 5 years or fined not more than $10,000.00, or both. [MCL 438.41 (emphasis added).]

In interpreting a criminal statute such as MCL 438.41 the Court "must be mindful of the due-process requirements of fair notice and the related well-established rule of interpretation that the scope of a criminal offense must be clearly stated." *Soaring Pine*, 551 Mich at 129. Criminal liability will not be upheld through a" strained … interpretation" of statutory language. *Id.* at 130.

With regard to the application of the wrongful-conduct rule in this case the Michigan Supreme Court instructed "to invoke the wrongful-conduct rule in this case [Defendants] must demonstrate on remand that Soaring Pine committed a criminal act by 'knowingly' charging a usurious rate." *Soaring Pine*, 511 Mich at 112 n 20. The Michigan Supreme Court recognized that "there appears to be no binding appellate authority before this case addressing the standard for determining whether a lender committed a crime by 'knowingly' seeking a usurious interest rate in violation of MCL 438.51." *Id.* As was stated previously, the Michigan Supreme Court determined that "seeking to collect a usurious rate in a civil collection action, standing alone, is not a criminal offense for usury under MCL 438.41, and therefore cannot form the basis for

invoking the wrongful conduct rule when defending a civil action." *Soaring Pine*, 511 Mich at 133. The Supreme Court did not address the question of the effect, if any, of a usury savings clause when determining whether Soaring Pine (or any future lender) has violated the criminal usury statute by "knowingly charg[ing], tak[ing] or receiv[ing]" a usurious rate *Id.* at 127. It also did "not address to what extent the closeness of the actual rate to the legal rate is relevant to whether a lender acted 'knowingly' under MCL 438.41. *Id.*at 126 n 37.

Defendants urge this Court to conclude that a borrower can meet his burden of proof on a criminal usury violation by showing that the loan is either 'facially usurious,' or the lender 'knew' the interest rate charged exceeded 25% per annum. This Court is not persuaded that the existence of a usurious rate, on its own is sufficient establish criminal liability under MCL 438.41. Such conclusion would ignore the "knowingly" language of the statue. *See Robinson v City of Detroit*, 462 Mich at 318 ("Each word of a statute is presumed to be used for a purpose, and, as far as possible, effect must be given to every clause and sentence.") *See also People v Nasir*, 255 Mich App 38, 40; 662 NW2d 29 (2003) (strict liability criminal offenses are disfavored.)

In support of their argument, Defendant rely on certain Michigan authority as well as caselaw from states which have similar criminal usury statutes. This Court agrees with Soaring Pine that the case law relied on by the Defendants does not support their argument. Defendants quote from the case of *Paul v U.S. Mut Financial Corp*, 150 Mich App 773; 389 NW2d 487 (1986) where the court stated "[w]here as here, the instrument is patently in violation of the usury statute, there is no need to determine usurious intent." *Id.* at 781 citing *Union Trust Co v Radford*, 176 Mich 50; 141 NW2d 1091 (1913) But *Paul* was discussing the civil usury statute, MCL 438.31 which does not have the "knowingly" requirement of MCL 438.41. The same distinction is present

in *Osinski v Yowell*, 135 Mich App 279, 285; 354 NW2d 318 (1984), another case relied on by Defendants.

In *Scalici v Bank One, NA,* unpublished per curiam opinion of the Court of Appeals, issued September 20, 2005 (Docket Nos. 254632,254633,254634) the court was addressing the allegation that the criminal usury statute was violated. However, *Scalici* involved a promissory note with stated terms that on the maturity date, the lender would receive the principal along with a financing fee. *Id.* at 1. Additionally, the notes contained notations clearly identifying the portion of the payment that constitutes repayment of principal and the portion that constitutes the payment of interest. The Court of Appeals rejected the lender's argument that it was unaware that the financing fee referenced in the promissory note was interest. The court found that the "financing fee" was "synonymous with the charging of interest on the loan" and that it was "self-evident" from the notes that the 25% rate was exceeded. *Id.* 4.

In this case, the rate listed on the note is 20% and the loan contained a savings clause. Thus, it cannot be said that it was "self-evident" from the Note that a usurious rate was being charged. As was explained, a review of the entire transaction, demonstrates an actual rate above 25%. However, this finding does not mandate the conclusion that Soaring Pine knowingly charg[ed], [took] or [received] a usurious rate.[27]

[27] Additionally, the New York case cited by Defendants does not support its argument. In *Freitas v Geddes Sav & Loan Ass'n*, 63 NY2d 254, 262 (NY 1984) the court stated:

> Usurious intent, an essential element of usury, which is embodied in the statutory requirement that an unlawful rate of interest be knowingly taken is a question of fact. It is the prevailing view that where usury does not appear on the face of the note, usury is a question of fact. . . . [*Id.* at 262.]

The court went on to state: "[w]here the rate of interest on the face of the note, as here, is not in excess of the legal rate, it must be shown that the separate one-time bank charge denominated as 'Commitment Fee' was knowingly received by the bank as a ruse to collect additional interest in excess of that allowed by law." *Id.* at 264.

Charging, taking, or receiving an actual interest rate which exceeds 25% does not as a matter of law establish a violation of MCL 438.41 where the plain language of the statute requires "knowing" conduct. Defendants point to loan projections made by Soaring Pine referring to "up-front fees" of $50,000.00 and projecting that the Loan would yield a cash-on-cash return of 31.4% as evidence that Soaring Pine knew that the rate exceeded 25%. Soaring Pine presented evidence that it sought legal counsel as to whether fees could be deemed interest. [28] *See Soaring Pine,* 511 Mich at 123 ("We recognize that it might not always be clear to a lender acting in good faith whether a particular fee or charge will be considered interest.")

The presence of the saving clause is also relevant to the inquiry of whether Soaring Pine "knowingly [charged], [took], or [received] any money or other property as interest on the loan or forbearance of any money or other property, at a rate exceeding 25% at simple interest per annum." The enforceability of such clause was an issue of first impression under Michigan usury law when addressed by the Michigan Supreme Court in this case. *See Soaring Pine*, 511 Mich at 94.

Based on the foregoing, the Court concludes that a question of fact remains as to whether Soaring Pine violated the criminal usury statute, MCL 438.41.[29] Therefore, a question of fact exists was to whether the wrongful conduct rule is applicable.[30] Additionally, should a determination be

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[28] *See* Soaring Pine Brief on Remand, Exhibit 4, 6/30/16 email.

[29] The Court recognizes that this conclusion is contrary to the pre-remand decisions of this Court's predecessor and the Court of Appeals which did not have the benefit of the Supreme Court's analysis and instruction regarding the saving clause.

[30] Soaring asserts that the wrongful conduct rule cannot apply because Defendants fraudulently induced it to enter into the Loan and therefore, is without clean hands. As was previously stated, the Michigan Supreme Court did not rule on the applicability of the wrongful conduct rule in this case. The Court of Appeals, however, rejected the argument now made by Soaring Pine, as does this Court. As the Court of Appeals explained:

> [I]n analyzing the exception to the wrongful-conduct rule, the Court in [*Orzel v Scott Drug Co*, 449 Mich 550, 558; 537 NW2d 208 (1995)] began with the premise that both "the plaintiff and defendant have engaged in illegal conduct . . ." Considering that plaintiff has not alleged illegal conduct by defendants . . . this exception does not apply. [*Soaring Pine*, 337 Mich App at 556.]

made that there was a violation of MCL 438.41, the Court agrees that the wrongful conduct rule does not preclude Soaring Pine from recovering the principal of the loan. As the Court of Appeals stated, under *Orzel* "[f]or the wrongful-conduct rule to apply, a sufficient casual nexus must exist between the plaintiff's illegal conduct and the plaintiff's asserted damages." *Soaring Pine*, 337 Mich App at 554-555. The alleged illegal act in this case is Soaring Pine's "knowingly" charging, taking or receiving interest at a rate exceeding 25% at simple interest per annum. As was explained by the Court of Appeals "the subject matter of the contract was clearly legal, as was the stated interest rate of 20% per annum." *Id.* at 555. It is only the additional fees which potentially create an illegal interest rate. Therefore, the causal nexus between the any illegal conduct and the damages asserted by Soaring Pine relates to the interest only and Defendants would not be excused from the payment of the principal amount. *See Soaring Pine*, 511 Mich at 114 ("there is a reasonable equitable argument that knowledgeable borrowers should not obtain a windfall and be permitted to skirt the financial obligations they knowingly agreed to by belatedly arguing that the agreement was usurious.")

V.

Conclusion

On remand this Court concludes: (1) MCL 438.41 applies to the Loan; (2) the Loan was facially usurious; (3) a question of fact remains as to whether there was a violation of MCL 438.41; (4) a question of fact remains as to whether the wrongful conduct rule applies; and (5) if the wrongful conduct rule does apply it does not preclude Soaring Pine from recovering the principal of the loan.

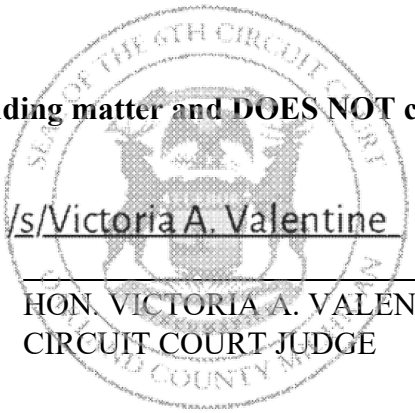
ORDER

Based upon the foregoing opinion, the Court hereby orders that:

Defendants' Motion for Summary Disposition under MCR 2.116(C)(10) is hereby **DENIED**.

IT IS SO ORDERED.

This Order DOES NOT resolve the past pending matter and DOES NOT close the case.



/s/Victoria A. Valentine

HON. VICTORIA A. VALENTINE
CIRCUIT COURT JUDGE

Dated: 10/11/24

Equine Luxury Props. v. Commercial Capital Bidco, Inc.

Decided May 30, 2024

1:23-cv-1142

05-30-2024

EQUINE LUXURY PROPERTIES, LLC, et al., Plaintiffs, v. COMMERCIAL CAPITAL BIDCO, INC., et al., Defendants.

HALA Y. JARBOU, CHIEF UNITED STATES DISTRICT JUDGE

OPINION

HALA Y. JARBOU, CHIEF UNITED STATES DISTRICT JUDGE

Plaintiffs Equine Luxury Properties, LLC ("Equine") and 138 River Street, LLC ("138 River"), brought this action in state court for declaratory and injunctive relief against Defendants Commercial Capital BIDCO, Inc. ("CCB") and Trott Law, P.C. ("Trott Law"), seeking to prevent Defendants from foreclosing on two properties located in Michigan. Defendants removed the action to this Court on the basis of diversity jurisdiction. Before the Court is Plaintiffs' motion to remand the case for lack of subject matter jurisdiction (ECF No. 16) and Plaintiffs' motion for summary judgment (ECF No. 18). The Court will deny both motions.

I. BACKGROUND

In their complaint, Plaintiffs allege that they entered into a loan agreement[1] in July 2022 with CCB, secured by two properties in Michigan owned by Plaintiffs. (Verified Compl. ¶ 7, ECF No. 7.) A Michigan loan broker proposed the loan to Plaintiffs and CCB's CEO traveled to Michigan to meet with Plaintiffs and to inspect the properties. (*Id.* ¶¶ 16, 18.) CCB agreed to give Plaintiffs a one-year loan for $1,834,000 at 18% interest, including fees. (*Id.* ¶ 19.) The loan also *2 included a "referral fee" from CCB to the mortgage broker that was charged against the loan proceeds. (*Id.* ¶ 20.) Plaintiffs allegedly signed the promissory note and mortgage in Michigan, and CCB allegedly funded the loan in Michigan and disbursed the funds to Plaintiffs in Michigan. (*Id.* ¶¶ 21-22.)

[1] The loan agreement has multiple parts: a promissory note, two mortgages, and a personal guaranty. For simplicity's sake, the Court will refer to all of them, collectively, as the loan agreement.

Plaintiffs made interest-only payments on the loan from September 2022 to July 2023. (*Id.* ¶ 24.) In August 2023, the parties agreed to extend the maturity date of the loan from July 28, 2023, to January 28, 2024, entering into an amended and restated promissory note that set forth the relevant terms. (*Id.* ¶ 26.) Plaintiffs signed the amended promissory note in Michigan.

The six-month loan extension allegedly charged more than 26% in interest on an annual basis, and after CCB declared default, the interest rate increased to "more than 32%." (*Id.* ¶¶ 12, 27.) The stated rate was 14%, but when accounting for a 6% origination fee, as well as processing and underwriting fees, Plaintiffs allege the actual rate of annual interest was 26%. (*Id.* ¶ 30.)

When CCB declared default, it triggered "default interest," which was 20%, resulting in an effective annual rate of more than 32% when accounting for the fees mentioned above. (*Id.* ¶ 31.)

Plaintiffs objected to the interest rate because Michigan's criminal usury statute makes it unlawful for lenders to charge more than 25% interest per year "or the equivalent rate for a longer or shorter period." Mich. Comp. Laws § 438.41. On August 18, 2023, Trott Law sent a notice of default "on behalf of CCB" and demanded payment. (Compl. ¶ 32.) A few days later, CCB sent a payoff statement to 138 River, demanding full payment of the debt. Plaintiffs objected on the basis of the Michigan and Tennessee usury statutes.

CCB allegedly attempted to foreclose on the mortgaged properties by advertisement, under Michigan law and a "power of sale" clause in the loan agreement. (*Id.* ¶ 7.) "Through its attorneys, Trott Law," CCB allegedly published notice of foreclosure and Trott Law scheduled a foreclosure
3 *3 sale for October 2023. (*Id.* ¶ 14.) Plaintiffs believe that CCB sold its interests in the loan to Cogent Bank ("Cogent") in 2022 and that CCB is the servicing agent for Cogent. (*Id.* ¶ 41.) Because the foreclosure by advertisement did not identify Cogent, Plaintiffs believe that the scheduled foreclosure was improper under Michigan law.

Plaintiffs filed this action seeking a declaration that the loan is illegal and unenforceable under "Michigan's wrongful-conduct rule" because it violates "Michigan's criminal usury act[.]" (*Id.* ¶ 11.) Plaintiffs also seek an injunction against Defendants barring them from taking action to enforce the loan. While the case was pending in state court, the state court granted a temporary injunction preventing Defendants from foreclosing on Plaintiffs' properties. Defendants then removed the case to this Court.

II. MOTION TO REMAND

The Court must remand the case to state court if the Court lacks subject matter jurisdiction. Diversity jurisdiction requires complete diversity of the parties. The parties do not dispute that complete diversity is lacking here because Plaintiffs and Defendant Trott Law are all citizens of Michigan. However, Defendants argue that the Court can ignore the citizenship of Trott Law because it is not a proper party. In other words, Defendants contend that Trott Law has been fraudulently joined to the action. Without Trott Law, there would be complete diversity because CCB, the only other defendant, is a citizen of Tennessee. Also, the amount in controversy exceeds $75,000.

"[F]raudulent joinder of non-diverse defendants will not defeat removal on diversity grounds." *Cline v. Dart Transit Co.*, 804 Fed.Appx. 307, 310 (6th Cir. 2020) (quoting *Saginaw Hous. Comm'n v. Bannum, Inc.*, 576 F.3d 620, 624 (6th Cir. 2009)). "Fraudulent joinder occurs when the non-removing party joins a party against whom there is no colorable cause of action." *Id.* (quoting *Saginaw Hous. Comm'n*, 576 F.3d at 624). "The
4 removing party has the burden to *4 prove fraudulent joinder, and it 'must present sufficient evidence that a plaintiff could not have established a cause of action against non-diverse defendants under state law.'" *Tennial v. Bank of Am., N.A.*, No. 17-6377, 2020 WL 2530872, at *2 (6th Cir. Apr. 15, 2020) (quoting *Coyne v. Am. Tobacco Co.*, 183 F.3d 488, 493 (6th Cir. 1999)). "[A]ny disputed questions [of] fact and ambiguities in the controlling state law [should be resolved] . . . in favor of the nonremoving party." *Roof v. Bel Brands USA, Inc.*, 641 Fed.Appx. 492, 496 (6th Cir. 2016) (quoting *Alexander v. Elec. Data Sys. Corp.*, 13 F.3d 940, 949 (6th Cir. 1994) (second and third alterations in original)). More broadly, "[a]ll doubts as to the propriety of removal are resolved in favor of remand." *Coyne*, 183 F.3d at 493.

The Court must decide whether Plaintiffs have any colorable claim against Trott Law. In Michigan,

> [t]he purpose of a declaratory judgment is to enable the parties to obtain adjudication of rights before an actual injury occurs, to settle a matter before it ripens into a violation of the law or a breach of contract, or to avoid multiplicity of actions by affording a remedy for declaring in expedient action the rights and obligations of all litigants.

Mich. Republican Party v. Donahue, No. 364048, 2024 WL 995238, at *9 (Mich. Ct. App. Mar. 7, 2024) (quoting *Rose v. State Farm Mut. Auto. Ins. Co.*, 732 N.W.2d 160, 162 (Mich. Ct. App. 2006)). Here, Plaintiffs seek a declaration as to their obligations under their loan agreement with CCB. They contend that the loan charges a usurious rate of interest, in violation of Michigan law, rendering the agreement illegal and unenforceable.

"The basic rule in Michigan is that usury is a *defense* and that there is no right to repayment of usurious interest by means of an independent action." *Thelen v. Ducharme*, 390 N.W.2d 264, 268 (Mich. Ct. App. 1986) (emphasis added). "Where a loan violates the [civil] usury statutes, lenders are . . . barred from recovering any interest, late fees, court costs, or attorney fees." *Meklir v. J.C. Penney Co.*, No. 253089, 2005 WL 1579658, at *7 (Mich. Ct. App. July 5, 2005). "A
5 *5 borrower may rely on the [usury] statute only when a lender brings an action to enforce such a [usurious] contract." *Sand v. Borrowers Network, LLC*, Nos. 285807, 290326, 2010 WL 99004, at *3 (Mich. Ct. App. Jan. 12, 2010).

Furthermore, "[u]nder Michigan's wrongful conduct rule, a plaintiff's claim will be barred if it is based, in whole or in part, on the plaintiff's own illegal conduct." *Scalici v. Bank One, NA*, Nos. 254632, 254633, 254634, 2005 WL 2291732, at *2 (Mich. Ct. App. Sept. 20, 2005). "This is true even where the defendant has participated equally in the illegal activity." *Id.* Charging a rate of interest higher than that permitted by Michigan's *criminal* usury statute, Mich. Comp. Laws § 438.41, can trigger the wrongful conduct rule. *Id.* at *5. Plaintiffs invoke this rule as the basis for their request to declare the loan agreement unenforceable.

As indicated, Plaintiffs' declaratory judgment action is focused solely on its obligations to CCB under the loan agreement. Plaintiffs' arguments regarding usury and wrongful conduct are defenses to enforcement of that agreement. Trott Law is not a party to that agreement. According to the complaint, Trott Law's only connection to the case is its role as counsel for CCB. Indeed, Plaintiffs expressly allege that when Trott Law sent them a notice of default and initiated the foreclosure by advertisement, it acted on behalf of CCB. In other words, Trott Law was not attempting to enforce its own rights against Plaintiffs. Thus, as to Trott Law, there is no colorable claim because there are no rights to adjudicate between Plaintiffs and Trott Law. Whatever the Court decides about CCB's rights will necessarily apply to Trott Law to the extent it acts on behalf of CCB.

In other cases where a debtor challenging a foreclosure sued the lender and the lender's foreclosure attorneys, courts in Michigan have not hesitated to conclude that the foreclosure attorneys were fraudulently joined. *See, e.g.*, *Fuller v. Select Portfolio Servicing, Inc.*, No. 1:19-CV-28, 2019 WL 13102132, at *2 (W.D. Mich. Nov. 13, 2019)
6 *6 ("In cases challenging mortgage foreclosures such as this one, a plaintiff does not have a cause of action against foreclosure counsel, who serves as an agent for the bank." (quoting *Conlin v. Mortg. Elec. Registration Sys., Inc.*, No. 11-15352, 2011 WL 6440705, at *1 (E.D. Mich. Dec. 16, 2011))); *Morton v. Bank of Am., N.A.*, No. 1:12-CV-511, 2013 WL 3716841, at *2 (W.D. Mich. July 12, 2013) ("As a general rule, a party has no claim against the attorney representing his opponent because the attorney does not owe the plaintiff a legal duty."); *Lyons v. Trott & Trott*, 905 F.Supp.2d 768, 772 (E.D. Mich. 2012) ("Other courts in this district have concluded that a

plaintiff in a foreclosure action has no independent state law claim against Trott (or any other similarly situated attorney/local designee) for conduct related to an alleged wrongful foreclosure where Trott is acting solely as the attorney/agent for the lender or loan servicer[.]"). "The duties owed to a client by an attorney are not the 'functional equivalent of a duty of care owed to the client's adversary.'" *Edwards v. Standard Fed. Bank, N.A.*, No. 08-12146, 2009 WL 92157, at *3 (E.D. Mich. Jan. 14, 2009) (quoting *Friedman v. Dorzoc*, 312 N.W.2d 585, 591 (Mich. 1981)). "Furthermore, courts have been reluctant to allow actions by third parties against attorneys, who were engaged in the representation of their clients, because of 'the potential for conflicts of interest that could seriously undermine counsel's duty of loyalty to the client.'" *Id.* (quoting *Beaty v. Hertzberg & Golden, P.C.*, 571 N.W.2d 716, 720 (Mich. 1997)). The same logic applies here.

Plaintiffs rely on *Allan v. M & S Mortgage Co.*, 359 N.W.2d 238 (Mich Ct. App. 1984), in which homeowners filed a complaint for declaratory relief and for relief under Michigan's Consumer Protection Act (MCPA), Mich. Comp. Laws § 445.901 et seq., against the holder of a mortgage on their home and against the mortgage holder's attorney, Goldwyn Robinson, who had initiated a foreclosure on the plaintiffs' home on behalf of the mortgagee. *Id.* at 240. But Robinson [*7] was not a typical foreclosure attorney. He had previously represented the plaintiffs when they entered into the mortgage; he helped them form a corporation so that they could borrow money at a higher interest rate than would be permissible for a loan to individuals. *Id.* Plaintiffs sought a declaration that the interest rate in their mortgage violated Michigan's usury laws and that the corporation was a sham created to circumvent those laws. *Id.* at 241. They also asserted a claim under the MCPA to the effect that "the entire process by which they were incorporated to obtain the loan involved violations of the act." *Id.* at 244-45.

The court in *Allan* held that the plaintiffs stated a claim for declaratory relief because there was an "actual controversy" at stake in that the lender had initiated foreclosure on the mortgage. In those circumstances, the plaintiffs were "entitled to a declaration of the exact amount of money due under the note[.]" *Id.* at 244. The court also held that the plaintiffs stated a claim against the defendants under the MCPA. *Id.*

Plaintiffs argue that *Allan* recognizes that a mortgagor in Michigan threatened by foreclosure can seek declaratory relief against both the mortgagee pursuing foreclosure and the mortgagee's foreclosure attorney. *Allan* does not support that premise. The critical distinction between *Allan* and Plaintiffs' case is that the foreclosure attorney in *Allan* had represented the property owners before the foreclosure. They retained him to create the corporation that they used to obtain then loan. *Id.* at 240. As such, he owed them a legal duty. Later, the homeowners ostensibly brought a claim against him under the MCPA due to his involvement in the process to create the sham corporation. Thus, unlike Plaintiffs, they did not rely solely on a claim for declaratory relief regarding their obligations under the mortgage. Indeed, deciding how much Plaintiffs owe CCB does not require the court to adjudicate a dispute between Plaintiffs and Trott Law, who does not owe them a legal duty. Thus, *Allan* is inapposite. [*8]

Plaintiffs' request for injunctive relief does not change the analysis. A request for an injunction is not an independent claim; "an injunction is a remedy, not a claim." *Madej v. Maiden*, 951 F.3d 364, 369 (6th Cir. 2020); *accord Mettler Walloon, LLC v. Melrose Twp.*, 761 N.W.2d 293, 317 (Mich. Ct. App. 2008). And although Trott Law took steps to begin the foreclosure process, Plaintiffs allege that it did so *on behalf of* CCB. Thus, an injunction against CCB alone would prevent Trott Law from proceeding with foreclosure. There is no need for Trott Law to be a party to the case.

In short, Plaintiffs assert no colorable claim against Trott Law. Consequently, the Court can ignore Trott Law's citizenship because it was fraudulently joined to this action. Without Trott Law, the parties are diverse, so the Court has subject matter jurisdiction over the case and will deny Plaintiffs' motion to remand the case to state court.

III. MOTION FOR SUMMARY JUDGMENT

Plaintiffs ask the Court to grant summary judgment on their claim that the loan agreement with CCB is unenforceable under Michigan law because it charged a rate of interest that exceeded the 25% rate in Michigan's criminal usury statute, Mich. Comp. Laws § 438.41.

Summary judgment is appropriate "if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed.R.Civ.P. 56(a). The Court must determine "whether the evidence presents a sufficient disagreement to require submission to a jury or whether it is so one-sided that one party must prevail as a matter of law." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 251-52 (1986). Summary judgment is not an opportunity for the Court to resolve factual disputes. *Id.* at 249. The Court "must shy away from weighing the evidence and instead view all the facts in the light most favorable to the nonmoving party and draw all justifiable inferences in their favor." *Wyatt v. Nissan N. Am., Inc.*, 999 F.3d 400, 410 (6th Cir. 2021). *9

9

A. Summary of Permissible Interest Rates Under Michigan Law

Michigan's criminal usury statute provides, in relevant part:

> A person is guilty of criminal usury when, not being authorized or permitted by law to do so, he knowingly charges, takes or receives any money or other property as interest on the loan or forbearance of any money or other property, at a rate exceeding 25% at simple interest per annum or the equivalent rate for a longer or shorter period.

Mich. Comp. Laws § 438.41.

Apart from the criminal usury statute, Michigan law generally allows parties to agree in writing to any rate of interest "not exceeding 7% per annum." Mich. Comp. Laws § 438.31(1). But there are various exceptions to the foregoing limits. One is the "business entity" exception, which provides as follows:

> (1)(a) "Business entity" means a corporation, trust, estate, partnership, cooperative, or association or a natural person who furnishes to the extender of the credit a sworn statement in writing specifying the type of business and business purpose for which the proceeds of the loan or other extension of credit will be used....
>
> ...

> (2) Notwithstanding Act No. 326 of the Public Acts of 1966, being sections 438.31 to 438.33 of the Michigan Compiled Laws, and Act No. 259 of the Public Acts of 1968, being sections 438.41 to 438.42 of the Michigan Compiled Laws, but subject to any other applicable law of this state or of the United States which regulates the rate of interest, it is lawful in connection with an extension of credit to a business entity by a state or national chartered bank, a state or federal chartered savings bank, a state or federal chartered savings and loan association, a state or federal chartered credit union, insurance carrier, finance subsidiary of a manufacturing corporation, or a related entity for the parties to agree in writing to any rate of interest.
>
> (3) Notwithstanding Act No. 326 of the Public Acts of 1966, it is lawful in connection with an extension of credit to a business entity by any person other than a state or nationally chartered bank, a state or federal chartered savings bank, a state or federal chartered savings and loan association, a state or federal chartered credit union, insurance carrier, finance subsidiary of a manufacturing corporation, or a related entity for the parties to agree in writing to any rate of interest not exceeding the rate allowed under Act No. 259 of the Public Acts of 1968.

10 Mich. Comp. Laws § 438.61. *10

In other words, Mich. Comp. Laws § 438.61(2) permits business entities to agree to *any rate of interest* when borrowing money from certain regulated lenders. And Mich. Comp. Laws § 438.61(3) permits business entities to agree to any rate of interest *up to the amount permitted by the criminal usury statute* when borrowing money from nonregulated lenders.

Another exception relevant here permits a loan at any rate of interest when the loan is secured by real property that is not a single-family residence:

> The parties to a note, bond, or other indebtedness of $100,000.00 or more, the bona fide primary security for which is a lien against real property other than a single family residence, or the parties to a land contract of such amount and nature, may agree in writing for the payment of any rate of interest.

Mich. Comp. Laws § 438.31c(11).

B. Choice of Law

CCB responds that Michigan law does not apply here because the parties agreed that Tennessee law would govern their loan agreement. The amended promissory note provides as follows:

> The validity, enforceability, and construction of this Note, and the rights and obligations of Borrower and Holder hereunder shall be governed by, construed under, and determined according to, the laws of the State of Tennessee applicable to contracts executed and performed within this State ....

(Am. & Restated Promissory Note, ECF No. 7, PageID.271.)

Plaintiffs contend that there are conflicting choice-of-law provisions because the mortgages reference Michigan law with respect to various rights and obligations of the parties, including foreclosure, the assignment of rents and leases, waste, and security agreements. (*See, e.g.*, Commercial Mortgage, ECF No. 7, PageID.248, 250-252, 254.) At issue in this case, however, is CCB's ability to enforce Plaintiffs' obligations in the note. According to the promissory note, Tennessee law governs that issue. Nothing in the mortgages says otherwise. Thus, the applicable agreement chooses

11 Tennessee law. *11

To determine whether to enforce the parties' choice of law, a federal court sitting in diversity applies the choice of law rules of the forum state. *Wallace Hardware Co. v. Abrams*, 223 F.3d 382, 391 (6th Cir. 2000). Thus, Michigan's rules apply. Michigan courts follow § 187 of the Second Restatement on Conflict of Laws. *Chrysler Corp. v. Skyline Indus. Servs., Inc.*, 528 N.W.2d 698, 703-04 (Mich. 1995). Under that section, the Court applies the law chosen by the parties unless one of two exceptions applies. *Id.* at 704. First, the parties' choice will not be followed "if the chosen state has no substantial relationship to the parties or the transaction, or when there is no reasonable basis for choosing that state's law." *Id.* Second, the parties' choice will be disregarded when the chosen state's law "would be contrary to a fundamental policy of a state which has a materially greater interest than the chosen state in the determination of the particular issue and which, under the rule of § 188, would be the state of the applicable law in the absence of an effective choice of law by the parties." *Id.* (quoting Restatement (Second) of Conflict of Laws § 187 (1971)).

1. Exception One: Substantial Relationship

The first exception does not apply here because Tennessee has a substantial relationship to the parties or the transaction. Although Plaintiffs are Michigan entities who allegedly entered into the loan agreement in Michigan to support their businesses operating in Michigan, the loan originated from a Tennessee lender licensed under Tennessee law.

2. Exception Two: Fundamental Policy

The second exception potentially applies because Michigan's usury laws embody a "public policy . . . to protect borrowers from excessive interest rates imposed by lenders." *Soaring Pine Capital Real Estate & Debt Fund II, LLC v. Park St. Grp. Realty Servs., LLC*, 999 N.W.2d 8, 16 (Mich. 2023). This protection is so strong that "the burden [is] on the lender to charge a lawful interest rate .... By contrast, a borrower has no
12 obligation-statutory or otherwise-to ensure *12 the agreed-upon interest rate is not usurious." *Id.* at 20. "[L]enders cannot avoid civil remedies for usury through creative contracting or by claiming ignorance." *Id.* at 21. Moreover, unlike many other states, Michigan has a criminal usury statute. That statute seeks "to punish lenders who engage in usurious conduct and prevent future attempts to collect excessive interest." *Id.* Even sophisticated borrowers are entitled to protection from usury, as there is no "categorical distinction between 'sophisticated' commercial business entities and other borrowers . . . clearly reflected in Michigan's usury statutes or the accompanying caselaw." *Id.* at 22. In short, these protections reflect a fundamental policy of Michigan to protect Michigan borrowers, including businesses like Plaintiffs, from excessive interest rates. *See* Restatement (Second) of Conflict of Laws § 187 cmt. g (noting that "a fundamental policy may be embodied in a statute which makes one or more kinds of contracts illegal").

Like Michigan, Tennessee also has usury laws whose purpose is to protect borrowers "from the rapacity of money lenders." *Caldwell & Co. v. Lea*, 272 S.W.2d 715, 716 (Tenn. 1925). Tennessee law also allows borrowers to raise usury as a defense to collection. Tenn. Code § 4714-110. However, CCB is not subject to many of Tennessee's interest rate restrictions because it is a special entity formed under Tennessee's BIDCO Act, which authorizes CCB to charge rates as high as 30%, i.e., the "maximum rate that may be charged or received by any other lender in Tennessee." Tenn. Code § 45-8-210(b)(6)(A); *see* Tenn. Code § 45-2-1904(a) (permitting a registered bank to charge interest at up to 30% per year). The stated purpose of the BIDCO Act is to make financial assistance more readily available to businesses "in the state" and to promote economic development "in the state." *See* Tenn. Code § 45-
13 8-202. In other words, its focus is on *13 loans to in-state borrowers for the development of business

in Tennessee, rather than on loans to out-of-state borrowers for the development of business outside Tennessee.[2]

> [2] To clarify, the Court does not hold that CCB lacked authority under the BIDCO Act to issue the loan, as Plaintiffs imply. Instead, the Court is simply noting that the stated purposes of the BIDCO Act suggest that Tennessee has less of an interest in enforcing loans permitted by that statute against out-of-state borrowers than Michigan has in protecting its local borrowers from usury.

Michigan has a materially greater interest in protecting its local borrowers from the collection of usurious rates of interest than Tennessee has in ensuring its local BIDCO lenders can recover from out-of-state borrowers, particularly where that loan transaction occurred in Michigan and is secured by property located in Michigan.

But "[i]n order for the chosen state's law to violate the fundamental policy of [the other locale], it must be shown that there are significant differences between the application of the law of the two states." *Tele-Save Merch. Co. v. Consumers Distrib. Co., Ltd.*, 814 F.2d 1120, 1123 (6th Cir. 1987). Plaintiffs have not made that showing here because their loan agreement falls under a longstanding exception to Michigan's usury restrictions for parties to a loan greater than $100,000.00 that is secured by a lien on real property that is not a single-family residence. *See* Mich. Comp. Laws § 438.31c(11).

The exception in § 438.31c(11) expressly allows parties to agree to "any rate of interest." *Id.* As required by that section, the loan at issue here is more than $100,000.00 and was secured by real property that is not a single-family residence.[3] That exception is not subject to rate restrictions elsewhere in Michigan's usury laws. *See Mac Leod v. Bay Haven Marina, Inc.*, No. 187688, 1997 WL 33347816, at *2 (Mich. Ct. App. June 13, 1997) (holding that § 438.31c(11) is an exception to the 11% cap in § 438.31c(6)); *Kansas City Life Ins. Co. v. Durant*, 298 N.W.2d 630, 633 (Mich. Ct. App. 1980) (holding that § 438.31c(11), formerly § 438.31c(9), is an
14 exception *14 to the cap in § 438.31c(2)); 1979-1980 Mich. Op. Att'y Gen. 877 (1980) (opining that loans under § 438.31c(11), formerly § 438.31c(9), are not subject to the 25% cap in the criminal usury statute). Indeed, Michigan's criminal usury statute prohibits charging more than 25% interest "when . . . not authorized or permitted by law[.]" Mich. Comp. Laws § 438.41. Section 438.31c(11) is a law permitting CCB to charge Michigan borrowers any rate of interest for a loan secured by real property that is not a single-family residence. Thus, CCB can rely on that law without running afoul of Michigan's criminal usury statute.

> [3] One of the properties is an unimproved lot; the other is a "mixed-use" building. (Commercial Mortgage, ECF No. 7, PageID.258; Pls.' Mot. for TRO, ECF No. 7, PageID.319.)

For similar reasons, the provision of Michigan's LLC statute regarding interest rates is not implicated here. That provision provides that a limited liability company "may agree in writing to pay any rate of interest as long as that rate of interest is not in excess of the rate set forth in [Mich. Comp. Laws § 438.41]." Mich. Comp. Laws § 450.4212. Because § 438.31c(11) authorizes a rate of interest higher than 25%, and because § 438.41 only prohibits interest rates above 25% when "not authorized" by law, Plaintiffs did not agree to an interest rate in excess of what §§ 438.41 and 450.4212 allow.

Plaintiffs point to the business entity exemption in Mich. Comp. Laws § 438.61(3), contending that because Plaintiffs are business entities who obtained a loan from a nonregulated lender, then CCB is subject to "the rate allowed [in the criminal usury statute, Mich. Comp. Laws § 438.41]," which is 25%. *See* Mich. Comp. Laws § 438.61(3). However, the same logic discussed

above applies here as well. In other words, § 438.41 prohibits charging rates higher than 25% when not authorized by law, but § 438.31c(11) is a law that permits charging a rate higher than 25%. Thus, the loan in this case does not conflict with the business entity exception in § 438.61(3).

Plaintiffs note that the business entity exception in § 438.61(3) expressly applies "[n]otwithstanding Act No. 326 of the Public Acts of 1966." Mich. Comp. Laws § 438.61(3). Act *15 No. 326 of the Public Acts of 1966 encompasses sections 438.31 to 438.33, and therefore includes § 438.31c(11). According to Plaintiffs, this "notwithstanding" language means that the criminal usury limit referenced in § 438.61(3) supersedes and circumscribes the "any rate of interest" language found in § 438.31c(11). The Court disagrees. As discussed above, applying § 438.31c(11) here is *consistent with* § 438.61(3) because the criminal usury statute permits rates above 25% when authorized by law.

Plaintiffs argue that such an interpretation would render the "notwithstanding" language in § 438.61(3) meaningless. To the contrary, Act No. 326 of the Public Acts of 1966 contains several interest rate restrictions that are lower than the criminal usury rate of 25%. One such rate is the general usury limit of 7% found in § 438.31. Other provisions cap certain mortgage interest rates at 11%. *See* Mich. Comp. Laws §§ 438.31c(6), 438.31c(7), 438.31c(8). Accordingly, the "notwithstanding" language makes clear that business entities obtaining loans from nonregulated lenders are not subject to the foregoing limits; they can obtain loans at a rate as high as 25%.

Plaintiffs also argue that such an interpretation would render meaningless the phrase "any rate of interest not exceeding the rate allowed under [the criminal usury statute]." *See* Mich. Comp. Laws § 438.61(3). Not so. In most circumstances, this phrase sets 25% as the maximum rate for business entities borrowing from nonregulated lenders. After all, many business loans are not secured by real property, so there are many circumstances where § 438.31c(11) would not apply.

Plaintiffs' interpretation is at odds with the purpose of the business entity exemption, which was enacted to "exempt loans to business entities from the provisions of the usury statute." 1970 Mich. Pub. Acts 143. Plaintiffs' interpretation would transform an expansion of lending rights for business entities into a contraction of those rights. It would prohibit business entities from relying on exceptions that might apply outside of Mich. Comp. Laws § 438.61. *16

The history of the business entity exemption also reflects an intent to expand the rights of business entities, not limit them. The original exemption only applied to business entities taking loans from "any state or national chartered bank or insurance carrier[.]" 1970 Mich. Pub. Acts 143. Because that exemption was "subject to the provisions of any other applicable law," it implicitly limited such loans to the criminal usury rate. *See id.* In 1978, the act was amended to include loans by business entities from "any state or national chartered bank, insurance carrier, *or finance subsidiary of a manufacturing corporation*." 1978 Mich. Pub. Acts 42 (emphasis added). An amendment in 1983 added an exemption for business entities taking loans from nonregulated lenders, capping such loans at 15%. 1983 Mich. Pub. Acts 37-38. In 1997, the act was amended to its current form, allowing business entities taking loans from certain regulated lenders to agree to *any* rate of interest, notwithstanding the criminal usury statute, and increasing the 15% cap on loans from other types of lenders to the rate permitted by the criminal usury statute. 1996 Mich. Pub. Acts 2300. At each stage, the legislature expanded the ability of business entities to obtain loans at higher interest rates. Plaintiffs' interpretation runs in the opposite direction.

The exception in Mich. Comp. Laws § 438.31c for loans exceeding $100,000.00 secured by real property other than a single-family residence first appeared in 1973. 1973 Mich. Pub. Acts 21. The language of that exception has remained substantially the same since its adoption, despite multiple amendments to other sections of § 438.31c from 1973 to 1990. There is no indication that the Michigan legislature intended the business entity exemption to circumscribe the exception in § 438.31c(11).

In short, CCB can rely on the exception in Mich. Comp. Laws § 438.31c(11) to avoid the usury restrictions in Michigan law. That exception permitted CCB to charge Plaintiffs any rate of interest to which they agreed in writing. Accordingly, Plaintiffs have not shown that
17 Michigan *17 law prohibits the loan between them and CCB. As such, Plaintiffs have not shown that the Court should disregard Plaintiffs' selection of Tennessee law in their loan agreement with CCB. For similar reasons, Plaintiffs have not shown that their agreement with CCB is unenforceable.

IV. CONCLUSION

For the reasons herein, the Court has subject matter jurisdiction because Trott Law was fraudulently joined to the action. Accordingly, the Court will deny Plaintiffs' motion to remand and dismiss Trott Law due to fraudulent joinder.

Furthermore, the Court is not persuaded that Plaintiffs are entitled to a declaration that their loan agreement with CCB is unenforceable or that it violates Michigan's usury laws. Accordingly, the Court will deny Plaintiffs' motion for summary judgment.

Macklin v. Brown

Court of Appeals of Michigan

June 4, 1981, Submitted ; November 3, 1981, Decided

Docket No. 53853

Reporter
111 Mich. App. 110 *; 314 N.W.2d 538 **; 1981 Mich. App. LEXIS 3406 ***

NORMA KAY MACKLIN, and GLORIA JEAN BERRY, Plaintiffs-Appellees, v. DAVID L. BROWN, CAROL DAWN BROWN, his wife, and COLDWATER AIRPORT INN, INC., jointly and severally, Defendants-Appellants, and EDWIN SPRAGG, Defendant

Disposition: [*1]** Affirmed.

Core Terms

novation, parties, deficiency judgment, fixtures, checks, interest rate, trust officer, leased land, trial judge, sale price, bona fide, per annum, defendants-appellants, indebtedness, defendants'

Case Summary

Procedural Posture
Defendants, individuals and corporation, appealed a decision of the trial court (Michigan), which granted a deficiency judgment in favor of plaintiff noteholders.

Overview

The individuals purchased a business and its assets from an estate, with a portion of the purchase price paid in the form of a promissory note. At the closing, the individuals told the estate's trustee that they intended to form a corporation. The trust officer informed them that he was looking to the parties as individuals for payment. Upon a default in payment under the note, the noteholders, assignees of the note from the estate, obtained a deficiency judgment against the individuals and the corporation. On appeal, the court affirmed. The court held that acceptance of the corporation's checks in payment of the note was not a novation of the individuals' obligation under the note because the individuals did not have the consent of the trustee or the noteholders for the individuals' release on the note. The court also held that the interest rate charged was not usurious because the fact that the primary security was the building and fixtures of the business enabled a higher interest rate to be charged under Mich. Comp. Laws § 438.31c(2) (Mich. Stat. Ann. § 19.15(1c)(6)).

Outcome
The court affirmed the judgment of the trial court, which granted a deficiency judgment in favor of the noteholders.

LexisNexis® Headnotes

Contracts Law > Defenses > Novation
Business & Corporate Compliance > Contracts > Standards of Performance > Novation

HN1 **Standards of Performance, Novation**

Payment on a debt by a third party which is accepted by a creditor does not establish a novation.

Contracts Law > Types of Contracts > Lease Agreements > General Overview

Contracts Law > Defenses > Usury

HN2 **Types of Contracts, Lease Agreements**

Mich. Comp. Laws § 438.31c(2) (Mich. Stat. Ann. § 19.15(1c)(6)) provides in part: For the period ending on December 31, 1981, it is lawful for the parties to a note, bond, or other evidence of indebtedness, executed after August 11, 1969, the bona fide primary security for which is a first lien against real property, or a land lease if the tenant owns a majority interest in the

improvements thereon, or the parties to a land contract, to agree in writing for the payment of any rate of interest. This section is further limited so that such loans may not exceed 11 percent interest per annum. *Mich. Comp. Laws § 438.31c(6)* (Mich. Stat. Ann. § 19.15(1c)(6)).

Contracts Law > Defenses > Usury

HN3[] **Defenses, Usury**

The words primary security in *Mich. Comp. Laws § 438.31c(2)* (Mich. Stat. Ann. § 19.15(1c)(6)) mean that security which the creditor would sell first and to which he would look to obtain the greatest yield to pay the indebtedness due.

Headnotes/Summary

Headnotes

1. Contracts -- Novation.

The elements necessary to a finding of a novation are: (1) parties capable of contracting; (2) a valid obligation to be displaced; (3) the consent of all parties to the substitution based upon sufficient consideration; and (4) the extinction of the old obligation and the creation of a valid new one.

2. Contracts -- Novation -- Payment by Third Party.

Payment on a debt by a third party, which payment is accepted by the creditor, does not establish a novation.

3. Secured Transactions -- Primary Security -- Usury -- Statutes.

A "primary security", as used in a statutory exception to the general usury statute, is not required to be a security whose value is any particular percentage of the debt; rather, it is that security which the creditor would sell first and to which he would look to obtain the greatest yield to pay the indebtedness (*MCL 438.31c[2]*; MSA 19.15[1c][2]).

Syllabus

David L. Brown, Carol D. Brown and Edwin Spragg purchased a business and its assets (a building and fixtures) from an estate being administered by the Southern Michigan National Bank and formed a corporation known as Coldwater Airport Inn, Inc. The purchase was **[***2]** made by means of downpayment and a promissory note providing for monthly payments. Upon distribution of the estate the note was assigned to Norma K. Macklin and Gloria J. Berry but the bank continued to collect the payments. Twenty-one payments were made on the note, then the business was closed. The bank brought an action on the note against the Browns, Spragg, and Coldwater Airport Inn, Inc. The property was sold, the defendants received credit, and the bank was granted a deficiency judgment against the defendants, Branch Circuit Court, Thomas C. Megargle, J. Defendants Brown and the corporation appeal, alleging that the bank's acceptance of corporate checks in payment of the note created a novation and that the interest rate on the note was usurious. *Held*:

1. The elements of a novation were not established. Even though the corporation's checks were accepted there was no consent by the bank or by the plaintiffs for the release of the individual defendants on the note. The trial court did not err by granting a deficiency judgment against all the defendants.

2. The building and fixtures, regardless of their appraised value in relation to the price the defendants paid **[***3]** for the business, were the "primary security" for the note within the meaning of a statutory exception to the general usury statute. Under this exception, the agreed-upon rate of interest was not usurious.

Counsel: *Biringer, Jacox & Hutchinson, P.C.*, for plaintiffs.

Richard F. Baker, for defendants Brown and Coldwater Airport Inn, Inc.

Judges: R. B. Burns, P.J., and Allen and T. Gillespie, * JJ.

Opinion by: PER CURIAM

Opinion

[*111] **[**539]** Mack's Airport Inn in Coldwater,

* Circuit judge, sitting on the Court of Appeals by assignment.

Michigan, in 1977 consisted of a building and fixtures on leased land. It was in the estate of Wesley O. Macklin, deceased, which was being administered by the trust department of Southern Michigan National Bank.

In January 1977 the defendants, David L. Brown, Carol Dawn Brown and Edwin Spragg, purchased the business and its assets from the estate for $ 110,000, the terms of payment being $ 27,500 down and $ 82,500 in a promissory note with payments of $ 1,000 a month including interest **[*112]** at 8% per annum. At the closing, or shortly thereafter, the trust officer of the bank was informed that the defendants intended to form a corporation **[***4]** known as Coldwater Airport Inn, Inc. The trust officer informed them that he was looking to the parties as individuals for payment. The plaintiffs are assignees of the note on distribution of the estate for whom the bank still collected the payments. There were 21 payments made with Coldwater Airport Inn checks before the defendants closed the business. The bank sold the property and sought a deficiency judgment. The defense was novation and usury. In a bench trial, the trial judge granted a deficiency judgment for $ 26,276.04. Defendants Brown and the corporation appeal.

The first argument of the defense was that, by acceptance of the corporate checks **[**540]** in payment of the note, there was a novation and, therefore, the granting of a deficiency judgment against the defendants-appellants was erroneous.

We cannot agree. The court used the yardstick which has been repeated verbatim by our appellate courts for 70 years to measure whether a novation has been established:

(1) parties capable of contracting;

(2) a valid obligation to be displaced;

(3) the consent of all parties to the substitution based upon sufficient consideration; and

(4) the extinction of the old **[***5]** obligation and the creation of a valid new one.

In re Dunneback's Estate, 302 Mich 73; 4 NW2d 472 (1942), *George Realty Co v Gulf Refining Co, 275 Mich 442; 266 NW 411 (1936)*, *Harrington-Wiard Co v Blomstrom Manufacturing Co, 166 Mich 276, 286-288; 131 NW 559 (1911)*, *Devitt v Quirk, 105 Mich App 94, 97; 306 NW2d 405 (1981),* **[*113]** *National Premium Budget Plan Corp v Siegel Agency, Inc, 43 Mich App 29, 35; 204 NW2d 30 (1972)*.

HN1[⬆] Payment on a debt by a third party which is accepted by a creditor does not establish a novation. *Hutchings v Securities Exchange Corp, 287 Mich 701; 284 NW 614 (1939)*.

The defendants did not have the consent of the bank or the plaintiffs for defendants' release on the note, even though the corporation checks were accepted. The defendants-appellants did not, therefore, meet elements three and four of the rule governing the establishment of a novation and the trial judge was correct in so ruling.

Failing to establish a novation, the individual defendants then maintain that if they are liable as individuals rather than the debts being a corporate liability, then the creditor is bound by the Michigan usury statute, *MCL 438.31*; **[***6]** MSA 19.15(1), which limits interest to 7% and that the court erred by allowing plaintiffs to recover the agreed-upon rate of 8%.

The plaintiffs set up an exception to the statute which is found in ***HN2***[⬆] *MCL 438.31c(2)*; MSA 19.15(1c)(2) and reads in part:

"For the period ending on December 31, 1981, it is lawful for the parties to a *note*, bond, or other evidence of indebtedness, executed after August 11, 1969, the *bona fide primary security for which is a first lien against real property, or a land lease if the tenant owns a majority interest in the improvements thereon*, or the parties to a land contract, to agree in writing for the payment of any rate of interest * * *." (Emphasis supplied.)

This section is further limited so that such loans may not exceed 11% interest per annum. *MCL 438.31c(6)*; MSA 19.15(1c)(6).

[*114] The defendants' argument at this point is that this statute does not apply because the sale was for $ 110,000 and the appraisal in the estate valued the building and fixtures at $ 47,500 and, therefore, it could not be the "bona fide primary security" because it was not more than 50% of the sale price.

"Primary security" is not defined by the statute **[***7]** or case law. We believe ***HN3***[⬆] the words to mean that security which the creditor would sell first and to which he would look to obtain the greatest yield to pay the indebtedness due. "Primary" is defined as "First in order of time, or development, or in intention". Black's Law Dictionary (4th ed), p 1354. We do not believe the

Legislature intended to tie the security to any fractional percentage of the debt.

Certainly in this case the sale price of the business was irrelevant and the building and fixtures on the leased land were the "primary security" for the $ 82,500 note.

The court did not err in finding that any interest rate of 11% or less was not usurious.

Affirmed, with costs to the appellees.

FICC TELEBRIEFING

January 28 and 29, 2025

Recent Developments

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Recent Developments

AML/BSA

OFAC Sanctions. On December 16, 2024, OFAC added nine individuals and seven entities to the SDN list that have provided financial and military support to North Korea, and the State Department add three entities to the SDN list that are related to the DPRK's ballistic missile program. On December 17, 2024, OFAC added 12 individuals and eight entities, located across seven countries, to the SDN list who are linked to the global illicit drug trade. On December 17, 2024, OFAC added two individuals and one entity to the SDN list that are involved in a network that launders millions of dollars of illicit funds generated by North Korea information technology workers and cybercrime to support the North Korean government. On December 18, 2024, an unnamed individual paid a fine of $45,179 for making six payments totaling $45,179 on behalf of a blocked individual, with knowledge that the individual was sanctioned. On December 19, 2024, OFAC added two Georgian officials from Georgia's Ministry of Internal Affairs to the SDN list for engaging in brutal crackdowns on media members, opposition figures, and protesters. On December 27, 2024, OFAC added one more Georgian individual to the SDN list. On January 3, 2025, OFAC added Integrity Technology Group, Incorporated, a Beijing-based cybersecurity company, to the SDN list for its role in multiple computer intrusion incidents against U.S. victims. These incidents have been publicly attributed to Flax Typhoon, a Chinese malicious state-sponsored cyber group that has been active since at least 2021, often targeting organizations within U.S. critical infrastructure sectors. On January 7, 2025, OFAC added Antal Rogan, a senior Hungarian government official, to the SDN list for his involvement in corruption in Hungary. On January 10, 2025, OFAC added eight Venezuelan officials to the SDN list for leading key economic and security agencies enabling Nicolas Maduro's repression and subversion of democracy in Venezuela.

On January 7, 2025, OFAC added Mohammad Hamdan Daglo Mousa, the leader of Sudan's Rapid Support Forces (RSF), and eight individuals and entities related to RSF, to the SDN list for engaging in a brutal armed conflict with the Sudanese Armed Forces for control of Sudan, killing tens of thousands, displacing 12 million Sudanese, and triggering widespread starvation. The list of entities includes Capital Tap Holding L.L.C., a UAE-based holding company that manages 50 companies over ten countries, that has provided the RSF with money and military equipment. On January 13, 2025, OFAC added three individuals and one entity to the SDN list, and removed 13 individuals and 12 entities from the SDN list that were related to Venezuela.

On January 8, 2025, the White House issued Executive Order (E.O.), "Taking Additional Steps with Respect to the Situation in the Western Balkans" to authorize OFAC to expand the scope of individuals and entities sanctioned Western Balkan. On January 13, 2025, OFAC published its Memorandum of Understanding with the United Kingdom's Office of Financial Sanctions Implementation (OFSI).

On January 20, 2025, the White House issued an Executive Order to designate international drug cartels and other organizations as Foreign Terrorist Organizations or Specially Designated Global Terrorists.

Middle East Sanctions. On December 19, 2024, OFAC added a dozen individuals and entities based in multiple jurisdictions, including the head of the Houthi-aligned Central Bank of Yemen branch in Sana'a, to the SDN list for their roles in trafficking arms, laundering money, and shipping illicit Iranian petroleum for the benefit of the Houthis. On December 19, 2024, OFAC added four entities and three vessels to the SDN list that are involved in the trade of Iranian petroleum and petrochemicals. On December 30, 2024, OFAC published its Quarterly Reports of Licensing Activities covering OFAC export licensing activities for Sudan and Iran from October 2022 through September 2024. On December 31, 2024, OFAC added Cognitive Design Production Center, a subsidiary organization of the Iran Revolutionary Guard Corp., to the SDN list for actions to influence the U.S. electorate during the 2024 U.S. election. On January 6, 2025, OFAC issued Syria General License 24, "Authorizing Transactions with Governing Institutions in Syria and Certain Transactions Related to Energy and Personal Remittances." This license permits some humanitarian aid and aid to some government offices in Syria. Additionally, OFAC issued eight new Syria Frequently Asked Questions (FAQs 1205 - 1212), and one amended Syria Frequently Asked Question (FAQ 227).

Reuters published an informative article explaining how Iran moves sanctioned oil around the world.

On January 20, 2025, the President signed a new Executive Order (E.O.), "Initial Rescissions Of Harmful Executive Orders And Actions," which, among other actions, revoked E.O. 14115, "Imposing Certain Sanctions on Persons Undermining Peace, Security, and Stability in the West Bank." To implement the President's revocation of E.O. 14115, OFAC removed the West Bank-Related Sanctions program from its website and removed all persons designated under E.O. 14115 from the SDN List. All property and interests in property blocked under E.O. 14115 are unblocked.

Russia Sanction. On December 27, 2024, OFAC issued Russia-related General License 116, "Authorizing Transactions Involving Entities Owned by Bidzina Ivanishvili." OFAC also issued one new, Russia-related Frequently Asked Question (FAQ 1204) and added Georgian Bidzina Grigoris Dze to the SDN list. On December 31, 2024, OFAC added Russian judge Olesya Mendeleeva to the SDN list for her role in the arbitrary detention of Moscow city councilor and human rights defender, Alexei Gorinov. On December 31, 2024, OFAC added the Center for Geopolitical Expertise to the SDN list for actions to influence the U.S. electorate during the 2024 U.S. election. On January 7, 2025, OFAC issued Russia-related General License 13L, "Authorizing Certain Administrative Transactions Prohibited by Directive 4 under Executive Order 14024." On January 10, 2025, OFAC added two large Russian oil producing conglomerates and all of their subsidiaries to the SDN list. OFAC also added dozens of Russian oil shipping companies and dozens of oil tankers that belong to the Russian "shadow" oil fleet to the SDN list.

On January 15, 2025, OFAC added 17 Russian individuals and 15 Russian and Chinese banks and insurance companies, and trading companies, to the SDN list for assisting Russia to evade sanctions. In addition, OFAC and the State Department added more than 150 additional entities and individuals to the SDN list, including a wide range of companies in Russia's defense industry and those supporting its military industrial base. Dozens of companies across multiple

countries continue to support Russia's efforts to evade U.S. sanctions, particularly in China, which remains the largest supplier of dual use items and enabler of sanctions evasion in support of Russia's war effort.

On January 15, 2025, OFAC issued Russia-related General License 122, "Authorizing the Wind Down of Transactions Involving Certain Entities Blocked on January 15, 2025;" Russia-related General License 123, "Authorizing Certain Transactions Related to Debt or Equity of, or Derivative Contracts Involving, Wafangdian Bearing Company Limited;" and Russia-/Ukraine-related General License 26A, "Transactions Authorized Pursuant to the Russian Harmful Foreign Activities Sanctions Regulations."

Maximum Penalties Adjusted. OFAC increased its maximum penalties according to the rate of inflation.

Applying to Release Blocked Funds. OFAC released the third video in its "OFAC Basics" video series, "Applying for a License to Release Blocked Funds." This video provides guidance and the recommended steps for how to submit a specific license application for the release of blocked funds. The "OFAC Basics" series serves as a companion series to the "Introduction to the OFAC" series. For more information on this video series, please see this blog post. In addition, OFAC has updated the OFAC Licensing landing page as part of its ongoing modernization effort. In addition to improving the user experience, OFAC issued best practices on applying for a license and a case status guide for specific license application status checks.

Licensing Activity. OFAC released its Quarterly Reports of Licensing Activities pursuant to Section 906(b) of the Trade Sanctions Reform and Export Enhancement Act of 2000 (TSRA), covering activities undertaken by OFAC under Section 906(a)(1) of the TSRA from October 2022 through September 2024.

Updated General License Rule. OFAC adopted a final rule amending multiple CFR parts to update general licenses authorizing payments for legal services from funds originating outside the United States. Specifically, OFAC is replacing the reporting requirement in the general license with a recordkeeping requirement in applicable parts of 31 CFR chapter V.

Treasury Dept. Hacked. PC Magazine reported (here and here) that Chinese hackers breached OFAC and other Treasury Department computer workstations which contained unclassified documents. CRN reported that this breach is tied to the compromise of BeyondTrust's remote support tool. BeyondTrust is a Treasury Department identity and access security vendor.

On January 3, 2025, OFAC added Integrity Technology Group, Incorporated (Integrity Tech) to the SDN list. Integrity Tech is a Beijing-based cybersecurity company, that played a role in multiple computer intrusion incidents against U.S. victims by Flax Typhoon, a China sponsored hacking group that attacks US and other countries' infrastructures.

North Korea Cryptocurrency Thefts. The State Department reported on January 14, 2025, that North Korean government sponsored hackers stole $308 million of Bitcoin, $50 million of Upbit, and $16.13 million of Rain Management tokens in 2024. The United States and Republic of

Korea additionally attribute to North Korea, based on detailed industry analysis, thefts last year against WazirX for $235 million and Radiant Capital for $50 million. As recently as September 2024, the United States government observed aggressive targeting of the cryptocurrency industry by North Korea with well-disguised social engineering attacks that ultimately deploy malware, such as TraderTraitor, AppleJeus and others. This report details other hacking efforts by North Korea.

FinCEN

BOI Reporting On and Off. On Tuesday, December 3, 2024, in the case of Texas Top Cop Shop, Inc., et al. v. Garland, et al., No. 4:24-cv-00478 (E.D. Tex.), the U.S. District Court for the Eastern District of Texas, Sherman Division, issued an order granting a nationwide preliminary injunction. The Department of Justice, on behalf of the Department of the Treasury (Treasury), filed a Notice of Appeal on December 5, 2024 and separately sought of stay of the injunction pending that appeal.

On December 23, 2024, a panel of the U.S. Court of Appeals for the Fifth Circuit granted a stay of the district court's preliminary injunction entered in Texas Top Cop Shop, Inc., pending the outcome of Treasury's ongoing appeal of the district court's order. Treasury immediately issued an alert notifying the public of this ruling and extended reporting deadlines. However, on December 26, 2024, a different panel of the U.S. Court of Appeals for the Fifth Circuit issued an order vacating the Court's December 23, 2024 order granting a stay of the preliminary injunction. On December 31, 2024, the Department of Justice, on behalf of Treasury, sought a stay of the injunction pending the ongoing appeal from the Supreme Court of the United States.

On January 23, 2025, the Supreme Court granted the government's motion to stay a nationwide injunction issued by the Texas district judge in the Texas Top Cop Shop, Inc. case. As a separate nationwide order issued by a different federal judge in Texas (Smith v. U.S. Department of the Treasury) still remains in place, reporting companies are not currently required to file beneficial ownership information with FinCEN. However, reporting companies may continue to voluntarily submit beneficial ownership information reports.

One other District Court held that the Corporate Transparency Act was unconstitutional while three other courts denied preliminary injunctions to stop BOI reporting. You may follow the litigation trail challenging CTA and BOI reporting on the Fin CEN BOI page.

Maximum Penalties Raised. FinCEN published a final rule to reflect inflation adjustments to its civil monetary penalties.

FinCEN Alert on Fraud Schemes. FinCEN issued an Alert (11 pages) describing fraud schemes abusing FinCEN's name, insignia, and authorities for financial gain. These FinCEN-specific fraud schemes include scams that exploit beneficial ownership information reporting; misuse of FinCEN's Money Services Business Registration tool; or involve the impersonation of, or misrepresent affiliation with, FinCEN and its employees. The Alert provides explicit examples of these types of frauds, red flags to watch for, and a reminder to file SARs if these schemes are suspected.

Fines, Settlements, and Orders

Transgressor	Fine or Order, and Date	Wrongful Action
SkyGeek Logistics, Inc.	$22,172 OFAC fine; 12-31-2024	SkyGeek attempted two refunds and sent four shipments to the United Arab Emirates for entities on the SDN list who are connected with Russia's aerospace and technology sectors.
CBW Bank, Weir, Kansas	$20,448,000 FDIC fine requested in administrative adjudication; 11-19-2024	This $90 million asset bank allegedly had an insufficient AML/CFT program for their international money transfer business, and conducted business recklessly. The bank is suing the FDIC claiming that the proposed fine is unreasonable and that the bank is entitled to a jury trial.
Deutsche Bank Securities Inc.	$4 million SEC fine; 12-20-2024	The firm failed to file SARs in a timely manner from 2019 to 2024.
C.H. Robinson International Inc.	$257,690 OFAC fine; 12-13-2024	Five of Robinson's foreign subsidiaries provided freight brokerage or transportation services for 82 shipments, to or from Iran (in two instances), of Iranian- or Cuban origin goods (in 73 and six instances, respectively), or by dealing with an Iranian airline.
Córdoba Music Group LLC	$41,591 OFAC fine; 12-18-2024	Córdoba indirectly and knowingly shipped musical instruments and related accessories to Iran.

CFPB

Financial Data Transparency. The CFPB announced that it issued an order recognizing Financial Data Exchange, Inc. as a standard setting body under the CFPB's Personal Financial Data Rights rule. The order of recognition is the first to be issued under the rule. The Personal Financial Data Rights rule, which was released in October 2024, requires financial institutions, credit card issuers, and other financial providers to unlock an individual's personal financial data and transfer it to another provider at the consumer's request for free. The CFPB approved the application, subject to a number of conditions, including a ban on "pay-to-play" and other conflicts of interest; mandatory reporting on market adoption; and transparency and availability of standards.

Expansion of Regulation E Interpretations. The CFPB published an Interpretive Rule to assist companies, investors, and other market participants evaluating existing statutory and regulatory requirements governing electronic fund transfers. Comments must be received by March 31, 2025. The rule provides, in part:

- The CFPB interprets the term "funds" subject to EFTA to include assets that act or are used like money, in the sense that they are accepted as a medium of exchange, a measure of value, or a means of payment. Under this interpretation, the term "funds" would include stablecoins, as well as any other similarly-situated fungible assets that either operate as a medium of exchange or as a means of paying for goods or services (e.g., Bitcoin and other cryptocurrencies). The fact that the asset may fluctuate in value does not exempt it from this definition.
- Depending on the facts and circumstances, the following could be considered "accounts" under EFTA: video game accounts used to purchase virtual items from multiple game developers or players; virtual currency wallets that can be used to buy goods and services or make person-to-person transfers; and credit card rewards points accounts that allow consumers to buy points that can be used to purchase goods from multiple merchants.
- The exception for ETF accounts regulated by the SEC or CFTC is limited to EFTs which have as their primary purpose the purchase or sale of commodities or securities, and does not reach instances where securities or commodities are used as "funds" in an "account" to purchase goods or services.

Regulation E FAQ Updated. The CFPB added a FAQ to its 2021 EFTA and Regulation E FAQs to answer the question of whether the compulsory use prohibition applies to tips. "[E]mployers are prohibited by EFTA and Regulation E from requiring workers to establish an account with a particular financial institution to receive tips."

Financial Data Privacy. The CFPB published a Request for Comment (16 pages) asking how companies that offer or provide consumer financial products or services collect, use, share, and protect consumers' personal financial data, such as data harvested from consumer payments. This document contains 15 questions plus multiple subparts. The submissions in response to this request for information will serve to assist the CFPB and policymakers in further understanding the current state of the business practices at these companies and the concerns of consumers as the CFPB exercises its enforcement, supervision, regulatory, and other authorities, and perhaps seeks to amend Regulation P. Comments must be received on or before April 11, 2025.

The FTC recently issued a proposed Decision and Order against General Motors and OnStar, LLC, requiring these companies to (among other things) delete the location data obtained from the cars they sell or lease (except when needed for litigation or research), require affirmative consumer consent to collect this data, prohibit sending this data to credit bureaus, and restrict the type of data and time frame for collecting, using and retaining data to match the company's legitimate purposes. Consumers will be allowed to request copies of the data collected and to disable location settings. It is worth reading the proposed Order to gain a sense of what federal regulators will require for a bank to collect and retain private consumer data of any nature.

The major threat to consumer data privacy remains external and internal data breaches. For example, Gov Info Security reports that a breach at educational software-maker PowerSchool in December 2024 resulted in the theft of information from school districts across the U.S., Canada, and other countries. Unauthorized access to the software maker led to infiltration of 18,000 educational institutions through a remote maintenance tool (a back door), and exposure or theft of consumer information of 60 million students and teachers. PowerSchool is facing 23 national

class action lawsuits so far. The 2025 Specops Breached Password Report states that about a billion passwords have been stolen. Synthetic identity fraud is on the rise (see https://socure.drift.click/state-of-synthetic-fraud for a decent primer on synthetic ID fraud). Ransomware is also a problem (see https://www.axios.com/visuals/companies-ransomware-attack-affected-lockbit for a scrolling primer on how a ransomware attack works). USDOJ announced on January 14, 2025, that a court-authorized operation removed PlugX malware from more than 4,200 infected U.S. computers. CNN reported that Chinese hackers breached US government office that assesses foreign investments for national security risks. Bloomberg and ALM ThinkAdvisor report that bank workers are leaking data on client accounts as scams surge. Forbes reports that AI is making it impossible to determine whether an email is from a trusted party or a scammer. There is growing concern that modern farm equipment, which is dependent on multiple computer processors and software programs to operate, could be disabled by malicious hackers. More examples of cyberthreats to businesses and infrastructure are discussed in the podcasts at https://www.cybereason.com/blog/authors/malicious-life-podcast .

For better or worse, Acting Homeland Security Secretary Benjamine Huffman terminated "all current memberships on advisory committees within DHS, effective immediately," including the CISA cybersecurity advisory committee.

Credit Card Reward Program Changes. In a circular to other law enforcement agencies, the CFPB warned that some credit card companies operating rewards programs may be breaking the law by illegally devaluing rewards points and airline miles, and by other means. The CFPB also published new research finding that retail credit cards—which typically offer store-specific rewards and loyalty programs—charge significantly higher interest rates than traditional cards. The CFPB further launched a new tool, ***Explore Credit Cards***, to help consumers find the best credit card rates across both rewards cards and traditional cards. This first-of-its-kind tool enables consumers to compare more than 500 credit cards using unbiased, comprehensive data.

Consumer Financial Protection Circular 2024-07 states:

> **Question presented**
> Can credit card issuers violate the law if they or their rewards partners devalue earned rewards or otherwise inhibit consumers from obtaining or redeeming promised rewards?
>
> **Response**
> Yes. Covered persons that offer, provide, or operate credit card rewards programs, and their service providers, may violate the prohibition against unfair, deceptive, or abusive acts or practices in a variety of circumstances, including instances where some of the conduct in question may be attributable to a third party, such as a merchant partner, and regardless of whether covered persons or service providers are taking actions consistent with rewards program terms. This circular provides some examples where covered persons that offer, provide, or operate credit card rewards programs, and their service providers, may violate the prohibition against unfair, deceptive, and abusive acts or practices, where: (1) the redemption values of rewards that consumers have already earned or purchased are devalued; (2) consumers' receipt of rewards is revoked, canceled, or prevented based on buried or vague conditions, such as criteria disclosed only in fine print or up to the operator's discretion; or (3) consumers have reward points

deducted from their balance without receiving the corresponding benefit of the rewards, including due to technical failures when redeeming rewards points on merchant partners' systems.

PACE Financing. The CFPB published its final amendment to Regulation Z to prescribe ability-to-repay rules for Property Assessed Clean Energy (PACE) financing, and to apply the civil liability provisions of the Truth in Lending Act for violations. PACE financing is financing to cover the costs of home improvements that results in a tax assessment on the real property of the consumer. This final rule is effective March 1, 2026.

Proposed Rule to Prohibit Waivers of Consumer Protections. The CFPB published a proposed rule (99 pages) to amend Regulation AA to prohibit covered persons from including in their contracts any provisions purporting to waive substantive consumer legal rights and protections (or their remedies) granted by State or Federal law. The proposal would also prohibit contract terms that limit free expression, including with threats of account closure, fines, or breach of contract claims, as well as other contract terms. The proposal would also codify certain longstanding prohibitions under the FTC's Credit Practices Rule. In essence, the proposed rule will codify the FTC's Credit Practices Rule, and also codify prior CFPB Guidance (see Consumer Financial Protection Circular 2024-03) that forbids covered persons from including in their consumer contracts any terms or conditions that purport to waive substantive legal rights and protections, that reserve to the covered person the right to unilaterally amend a material term of the contract, or that restrain a consumer's lawful free expression (See Subpart C of the proposed Regulation AA). Comments must be received on or before April 1, 2025. Note that:

- The proposed rule would apply retroactively to agreements entered into prior to the effective date of the rule, but applicability would be delayed by 180 days.
- Subpart C will not apply to any "small business," "small organization," or "small governmental jurisdiction" as those terms are defined in 5 U.S.C. 601.
- Subpart C will not apply to auto dealers and other entities outside of CFPB jurisdiction.

Proposed Rule Withdrawn. The CFPB withdrew its proposed rule to prohibit banks and other financial institutions from charging certain NSF fees, such as those for declined debit card purchases, ATM withdrawals, and some person-to-person payments. The CFPB will determine whether a more comprehensive approach to prohibit NSF fees charged for additional types of transactions will better protect consumers from potentially unlawful fees.

Requests for No Action Letters. The CFPB issued updated procedures for how companies can request special regulatory treatment, such as a no-action letter. The procedures seek to increase transparency and reduce favoritism for individual companies. See the updated Policy Statement on No-Action Letters and Policy Statement on Compliance Assistance Sandbox Approvals for more information.

Supervisory Highlights: Advanced Technologies Special Edition. This edition of Supervisory Highlights concerns select examinations of auto lenders that use credit scoring models, including models built with advanced technology (commonly marketed as AI/ML technology), when making credit decisions. The exam teams found disparities in underwriting and pricing outcomes for Black or African American and Hispanic applicants, as well as deficient compliance

management systems, at some financial institutions. Examiners then suggested and identified appropriate less discriminatory alternative models that would meet the institutions' legitimate business needs, and requested improvements to fair lending compliance management systems. Some of the credit scoring models used "alternative data" that had no direct bearing on credit worthiness. These systems made it impossible to disclose the specific reasons for credit denial in adverse action statements.

Compendium of Recent CFPB Guidance. The CFPB published a Compendium of Recent CFPB Guidance (363 pages), all of which were published in the Federal Register over the last three years. We suggest that you skim over the Table of Contents to refresh your recollection of the issues covered by CFPB Guidance, and review the guidance documents that you are not familiar with.

Consumer Use of Buy Now, Pay Later and Other Unsecured Debt. The CFPB published a report, Consumer Use of Buy Now, Pay Later (BNPL) and Other Unsecured Debt, finding that more than one-fifth of consumers used BNPL, most BNPL borrowers took out multiple simultaneous BNPL loans, nearly two-thirds of BNPL loans went to borrowers with lower credit scores, BNPL borrowers were more likely to hold higher balances on other credit accounts, and younger borrowers held more BNPL debt as a percentage of their total consumer debt. These findings are not surprising, but the inference is that these loans have a predatory tilt.

Social Security Offsets and Defaulted Student Loans. The CFPB issued a Spotlight Report, Social Security Offsets and Defaulted Student Loans, highlighting how the Department of Education is permitted to offset social security benefits to collect student loan debt. This report describes the circumstances and experiences of student loan borrowers affected by the forced collection of Social Security benefits. It also describes how forced collections can push older borrowers into poverty, undermining the purpose of the Social Security program. More than one-third of Social Security recipients with student loan debt depend on these benefits for 90% of their income, but only $750 per month of social security benefits are exempt from offset (the $750 exemption has not been adjusted since 1996).

The High Cost of Retail Credit Cards. The CFPB published a Spotlight Report, The High Cost of Retail Credit Cards, describing how store credit cards charge higher rates and have lower underwriting standards than other credit cards. Four large banks issue over 80% of retail store credit cards. Some consumers feel confused over pressure marketing to accept these credit cards. Some issuers now charge paper statement fees. The CFPB believes that these credit card programs deserve heightened attention.

Surviving Spouse Mortgage Problems. The CFPB issued a Spotlight Report detailing how homeowners face problems with mortgage companies after divorce or death of a loved one. Homeowners face improper pressure to refinance their mortgage, servicing delays, refusals to release the divorced or deceased borrower, and physical risks when servicers continue to send statements to an abusive former spouse. The CFPB believes that investors and servicers can do more to reduce the risk of harm to surviving and successor homeowners:

- Ensure that servicers are complying with all applicable law and guidance, including the guidance provided by the federal mortgage agencies.

- Ensure their policies are not unnecessarily pushing successor homeowners to refinance their mortgages.
- Examine whether their underwriting requirements are posing an undue obstacle to mortgage assumptions where the successor demonstrates an ability and willingness to pay.
- Develop, with mortgage servicers, policies and procedures to assist successors in interest who are survivors of domestic violence, with a goal of protecting the safety and property interests of the survivor.

Do You Want to Take a Survey? The CFPB published a notice that invited credit card issuers to voluntarily submit credit card price and availability data through the CFPB's Terms of Credit Card Plans Survey. This notice is part of CFPB efforts to invite a broader range of credit card issuers to include price and availability information on their credit card offerings in the data set collected from the largest credit card issuers.

Inflation Adjustments. The CFPB increased the HMDA asset-size exemption threshold for banks, savings associations, and credit unions by 2.9% to $58 million. The asset size is measured as of December 31, 2024 for the exemption from collecting HMDA data in 2025.

The CFPB adjusted the maximum amount of each civil penalty within the CFPB's jurisdiction by 2.598%, according to the rate of inflation. See the table in the final rule for the maxi\mum penalty adjustments. Both adjustments were effective January 1, 2025.

The CFPB adjusted its asset size threshold exempting certain creditors from the requirement to establish an escrow account for a higher-priced mortgage loan (HPML). The exemption threshold for creditors and their affiliates that regularly extended covered transactions secured by residential first liens is adjusted to $2.717 billion and the exemption threshold for certain insured depository institutions and insured credit unions with assets of $10 billion or less is adjusted to $12.179 billion.

It's HMDA Time. The HMDA reporting platform is open. Beginning January 1, 2025, users logging into the HMDA Platform to file their data will need to login with Login.gov. Users will no longer have the option to sign in using the existing processes. The Login.gov account must be associated with a business email address of your institution. For assistance on setting up your Login.gov account please utilize the Quick Reference Guide. Please note that HMDA Help cannot assist with Login.gov technical questions. All Login.gov queries should be directed to the Login.gov contact.

Excluding Medical Bills from Credit Reports. The CFPB issued a final rule that will remove an estimated $49 billion in medical bills from the credit reports of about 15 million Americans. The CFPB's action will ban the inclusion of medical bills on credit reports used by lenders and prohibit lenders from using medical information in their lending decisions. The rule will increase privacy protections and prevent debt collectors from using the credit reporting system to coerce people to pay bills they don't owe. The rule is effective 60 days after publication in the Federal Register.

Report on College Banking and Credit Cards. The CFPB published its annual report (42 pages) to Congress, College Banking and Credit Card Agreements, containing data from 2022 and 2023 for 919,000 student accounts. Overall, account fees dropped significantly from 2022 to 2023.

Auto Repos. The CFPB published a report, Auto Repossession Trends and Consumer Impact, showing that vehicles eligible for repossession in 2022 exceeded pre-pandemic levels, repossessions completed using forwarders had higher costs charged to borrowers, and consumers still owed on average $11,000 after repossession.

Payday Lenders Will Be Limited to Two Attempted Withdrawals. The delayed CFPB rule requiring covered lenders to obtain borrower authorization to attempt more than two withdrawals from the borrower's account will finally take effect on March 30, 2025. This 2017 rule was temporarily stayed by litigation. The CFPB published a second reminder of the effective date of this rule.

Blogs. This month's blogs include:

- Holding Government Contractors Accountable for Wrongdoing
- Back from the Dead: Zombie Second Mortgages
- Strengthening Appraisal Oversight: Progress at the Appraisal Subcommittee
- Holding Credit Reporting Companies Accountable for Junk Data
- What We're Watching: Language Access in Consumer Finance
- Mortgage Lenders Must Comply with the Law, Not Invent Loopholes
- Strengthening State-Level Consumer Protections
- New protections for payday and installment loans take effect March 30
- LFG (Looking for gamers): CFPB wants to hear about your video game loot
- Protecting you from unlawful debt collection at work
- New tactics from companies trying to charge illegal junk fees

FRB

Extension of the Revised Statement Regarding Status of Certain Investment Funds and their Portfolio Investments for Purposes of Regulation O and Reporting Requirements under Part 363 of FDIC Regulations. The FDIC, OCC and FDIC issued a revised No Action Statement dealing with the application of Regulation O strict lending limits and other restrictions on investment funds that acquire 10% of the voting stock of a bank. The 2023 Statement was set to expire on January 1, 2025. This revised Statement sets new thresholds of ownership for some investment funds that own bank shares.

This Statement supersedes previous statements issued by the federal banking agencies that established a no-action position for banks and principal shareholder fund complexes concerning extensions of credit by banks to fund complex-controlled portfolio companies that otherwise would have violated Regulation O. Unless amended, extended, or superseded in writing, this Statement will cease to be effective on the sooner of January 1, 2026, or the effective date of a

final FRB rule having a revision to Regulation O that addresses the treatment of extensions of credit by a bank to fund complex-controlled portfolio companies that are insiders of the bank.

Regulations A and D Amended. The FRB revised the rates paid on loans to banks (Regulation A) and interest paid on deposits by banks (Regulation D) to match the recent target interest changes by the FRB Open Market Committee.

FDIC

Maximum Penalties Adjustments. The FDIC published a table of its various maximum penalties, adjusted according to the rate of inflation.

CRA Reporting Thresholds. The FDIC and FRB announced 2.91% increases in the CRA "small bank" and "intermediate small bank" asset thresholds for CRA reporting purposes. A small bank is an institution that, as of December 31 of either of the prior two calendar years, had assets of less than $1.609 billion. An intermediate small bank is a small institution with assets of at least $402 million as of December 31 of both of the prior two calendar years and less than $1.609 billion as of December 31 of either of the prior two calendar years.

Call Report Instructions. The FDIC announced that it published Supplemental Instructions - December 2024 Call Report Materials. The revisions to the Call Report relate to (i) the reporting of loans to nondepository financial institutions (NDFIs) and (ii) structured financial products guaranteed by U.S. Government agencies or sponsored agencies, were included in the final 30-day Federal Register notice published on May 22, 2024 (89 FR 45046) and are effective this quarter. Institutions that require additional time to implement these changes should report loans to NDFIs on a best-efforts basis as of the December 31, 2024, and March 31, 2025, report dates, and comprehensively no later than June 30, 2025. See the announcement for further information.

There is a New Sherrif in Town. Travis Hill was appointed as the Acting FDIC Chairman. In an initial publication as Vice Chair, he proposed a different approach to bank examinations:

> "We will need to make adjustments to how we implement the CAMELS rating system and to our examination manuals, and we will need to modify how we train examiners. Basic controls and risk management infrastructure still matter, but should not be the overwhelming focus.
>
> I also expect the FDIC to take a more open-minded approach to innovation and technology adoption, while still promoting core safety and soundness principles. There is a healthy balance between (1) allowing banks to evolve with the times and (2) ensuring banks continue to manage risks prudently, and in recent years the FDIC has done a poor job striking that balance."

Mr. Hill also suggested that he would establish a private standard setting organization for fintech companies, establish new guidelines for banks to engage in cryptocurrency transactions, eliminate the right to close accounts or refuse banking services to certain entities that are BSA/AML risks. Mr. Hill suggested de-emphasizing climate risks for banks, and re-evaluating

capital requirements (e.g., credit risk transfers and the supplementary leverage ratio). Other policies that may change include merger policy, de novo policy, resolution readiness and planning, liquidity, FDIC disclosures to the public and what the FDIC shields or prohibits from disclosure, deposit insurance, and the FDIC's workforce culture.

Upon elevation to Acting Chair, Travis Hill issued a Statement of his priorities for changes at the FDIC:

- Conduct a wholesale review of regulations, guidance, and manuals to ensure our rules and approach promote a vibrant, growing economy.
- Adopt a more open-minded approach to innovation and technology adoption, including (1) a more transparent approach to fintech partnerships and to digital assets and tokenization, and (2) engagement to address growing technology costs for community banks.
- Improve the bank merger approval process and replace the 2024 Statement of Policy to ensure that merger transactions that satisfy the Bank Merger Act are approved in a *timely* way.
- Withdraw problematic proposals from the past three years, such as proposals on brokered deposits and corporate governance.
- Improve the supervisory process to focus more on core financial risks and less on process, and reevaluate the supervisory appeals process.
- Enhance our readiness and preparedness for resolving large financial institutions, incorporating lessons from the far-too-costly failures of 2023, including the need to be much more proactive and nimbler and to improve the bidding process.
- Pursue adjustments to our capital and liquidity rules to appropriately balance driving economic growth with ensuring safety and soundness and resilience to shocks.
- Encourage more de novo activity so there is a healthy pipeline of new entrants in the banking sector.
- Work to ensure law-abiding customers have, and do not lose, access to bank accounts and banking services.
- Modernize implementation of the Bank Secrecy Act.
- Study deposit behavior to develop a more sophisticated understanding of the relative stability of different types of deposits and depositors.
- Reevaluate our disclosure practices, and expand transparency in areas that do not impact safety and soundness or financial stability.
- Ensure the FDIC remains within our statutory mandates, and stops coloring outside the lines.
- Pursue internal efficiencies to ensure we are serving as responsible stewards of the Deposit Insurance Fund.
- Reestablish a strong workforce culture, where misconduct is not tolerated and those who engage in misconduct are held accountable.

Manual Updates. The FDIC updated eleven sections of its Consumer Compliance Examination Manual in December 2024.

OCC

Maximum Penalties Adjustments. The OCC published a table of its various maximum penalties, adjusted according to the rate of inflation.

Enforcement Action Search Tool. The OCC updated its Enforcement Action Search Tool to allow subject matter searches for actions since 2012.

Risk Assessment. The OCC Semiannual Risk Perspective for Fall 2024 includes a special section discussing external fraud activity targeting the federal banking system. Operational risk is elevated due to cyber threats by sophisticated malicious actors. The document also discusses commercial and retail credit risks, operational resilience, innovation and adoption of new products and services, third party risk management, fraud risk management, BSA/AML compliance risk, consumer compliance risk, CRA and fair lending, market risk, and (for large banks) climate risk.

NCUA

Overdraft and NSF Fees. NCUA released a Research Note that provides an analysis of statistics for overdraft and non-sufficient funds fees, and observations on the relationship between overdraft and non-sufficient funds fees and other revenues. The Research Note highlights two observations:

- Credit unions with higher combined overdraft and NSF fees per member do not seem to have lower fees per member for other services.
- Credit unions with higher combined overdraft and NSF fee revenues do not seem to be using those fees to "subsidize" better interest rates.

Succession Planning. NCUA issued a final rule to further strengthen succession planning efforts for all consumer federally insured credit unions (FICUs). This final rule requires that a FICU board of directors establish a written succession plan that addresses specified positions and contains certain information. In addition, the board of directors is required to regularly review the succession plan. The final rule also requires that newly appointed members of the board of directors have a working familiarity with the succession plan no later than six months after appointment. The directors of a credit union must review its succession plan no less than every 24 months. Loan officers, credit committee members, and supervisory committee members need not be covered by the succession plans. The final rule also streamlines the required contents of the succession plans and no longer requires that deviations from approved succession plans be documented in the FICU board's meeting minutes. Further, to help ensure that FICUs have the necessary time to develop their succession plans, the Board is delaying the effective date of the final rule until January 1, 2026.

OTHER

FTC Amends COPPA Rules. The FTC issued a final rule that requires parents to opt in to third-party advertising, and includes other changes to address the emerging ways that consumers' data

is collected and used by companies, in particular how children's data is being shared and monetized. Amendments to the rule include:

- **Requiring opt-in consent for targeted advertising and other disclosures to third parties:** Website and online service operators covered by COPPA will be required to obtain separate verifiable parental consent to disclose children's personal information to third-party companies related to targeted advertising or other purposes.
- **Limits on data retention:** The rule requires covered operators to only retain personal information for as long as reasonably necessary to fulfill a specific purpose for which it was collected. This provision explicitly states that operators cannot retain the information indefinitely.
- **Increasing Safe Harbor programs' transparency:** The FTC-approved COPPA Safe Harbor programs, which are self-regulatory programs that implement the protections of the COPPA Rule, will be required to publicly disclose their membership lists and report additional information to the FTC as part of efforts to increase accountability and transparency in the programs.

"Junk Fees Rule". The FTC issued a final rule entitled ''Rule on Unfair or Deceptive Fees" to prohibit bait-and-switch pricing and other tactics used to hide total prices and bury junk fees in the live-event ticketing and short-term lodging industries. The final rule specifies that it is an unfair and deceptive practice for businesses to offer, display, or advertise any price of live-event tickets or short-term lodging without clearly, conspicuously and prominently disclosing the total price. The rule also requires businesses to clearly and conspicuously make certain disclosures before a consumer consents to pay. The rule further specifies that it is an unfair and deceptive practice for businesses to misrepresent any fee or charge in any offer, display, or advertisement for live-event tickets or short-term lodging.

Housing News. CNN reports that California changed its insurance rules to allow homeowner insurance companies to pass the costs of large disasters to homeowners through premium increases, rather than being required to absorb the losses from disasters. The rule requires state homeowner insurance companies to cover the losses of the state sponsored insurance program, California FAIR, and to pass all but $500 million of the cost to policyholders in the form of higher premiums. Please be aware of the increases in premiums in California and other states with significant natural disasters, how these premium increases will impact escrow analyses and payments, and changes in housing affordability.

The White House announced that a Presidential Memorandum will reduce housing costs:

> "I hereby order the heads of all executive departments and agencies to deliver emergency price relief, consistent with applicable law, to the American people and increase the prosperity of the American worker. This shall include pursuing appropriate actions to: lower the cost of housing and expand housing supply; eliminate unnecessary administrative expenses and rent-seeking practices that increase healthcare costs; eliminate counterproductive requirements that raise the costs of home appliances; create employment opportunities for American workers, including drawing discouraged workers into the labor force; and eliminate harmful, coercive "climate" policies that increase the costs of food and fuel. Within 30 days of the date of this memorandum, the Assistant to

the President for Economic Policy shall report to me and every 30 days thereafter, on the status of the implementation of this memorandum."

The U.S. Department of the Treasury (Treasury) and the Federal Housing Finance Agency (FHFA) announced that they entered into a letter agreement and side letter to amend the Preferred Stock Purchase Agreements (PSPAs) between Treasury and each of Fannie Mae and Freddie Mac (the GSEs) to help ensure that the eventual release of the GSEs from conservatorship will be orderly and to reflect certain existing practices. Among other things, the agreement restores Treasury's previous right to consent to a release of the GSEs from conservatorship. In addition, under a separate side letter from FHFA to Treasury, FHFA will solicit public input, before releasing a GSE from conservatorship, regarding the potential impacts on the housing market and the GSEs.

FNMA Servicing Guide Announcement SVC-2024-07 announces an increase in allowable attorney fees, and an updated Reverse Mortgage Loan Servicing Manual.

VA Circular 26-23-6 (Change 2) announced updates to the funding fee table.

FHA Mortgagee Letter 2025-06 updates FHA's requirements for the servicing of FHA-insured Mortgages, including those in default, and the filing of associated claims. This ML also extends the COVID-19 Recovery Loss Mitigation Options (COVID-19 Recovery Option) through February 1, 2026. FHA Mortgagee Letter 2025-05 updates the application and recertification requirements for nonprofit entities seeking approval to participate in Single Family nonprofit programs. FHA Mortgagee Letter 2025-04 implements flexibilities for documenting and calculating income from boarders of the subject property beyond the current standard. FHA Mortgagee Letter 2025-03 updates FHA's Multifamily Housing Programs' underwriting standards and guidelines. FHA Mortgagee Letter 2025-2 proposes to create a new set of underwriting thresholds for Middle Income Housing as part of FHA's Multifamily Housing Programs' underwriting standards and guidelines. FHA Mortgagee Letter 2025-01 updates the FHA Defect Taxonomy (see the ML Appendix for the complete revision) with revised introductory sections and new content focused on Title II servicing loan reviews.

Michigan Legislation. Senate Bills 205 (2024 PA 178), 206 (2024 PA 179), and 207 (24 PA 180) prohibit a landlord or a person engaging in real estate transactions from discriminating against a person based on that person's source of income. Source of income would include specified benefits and subsidies, such as public assistance and social security. In addition, House Bill 4062 (2024 PA 199) and House Bill 4063 (2024 PA 200) amend the Landlord Tenant Act and the Elliot Larsen Act, respectively, to allow a person to seek relief or damages in court because of a landlord's source of income discrimination. These bills are effective April 2, 2025.

Community Financial Institution Threshold. FHFA adjusted the cap on average total assets that is used in determining whether a Federal Home Loan Bank member qualifies as a "community financial institution" to $1,500,000,000, based on the annual percentage increase in the Consumer Price Index. This change was effective on January 1, 2025.

Risks of AI in Financial Services. The Treasury Department released a report following the issuance of its 2024 Request for Information on the Uses, Opportunities, and Risks of Artificial Intelligence (AI) in Financial Services, which summarizes key themes from respondent feedback and recommends several next steps. The report highlights increasing AI use throughout the financial sector and underscores the potential for AI – including Generative AI – to broaden opportunities while amplifying certain risks, such as risks related to data privacy, bias, and third-party providers. The report builds on Treasury's work on AI-related cybersecurity risks in the financial sector, including its March 2024 report. Specifically, the report recommends:

- Continuing international and domestic collaboration among governments, regulators, and the financial services sector to promote consistent and robust standards for uses of AI in the financial services sector;
- Further analysis and stakeholder engagement to explore solutions for any gaps in the existing regulatory frameworks, and to address the potential risk of AI causing consumer harm;
- Financial regulators continue coordinating to identify potential enhancements to existing risk management frameworks and working with other government agencies to clarify supervisory expectations on the application of frameworks and standards, where appropriate;
- The financial services sector and government agencies further facilitate financial services-specific AI information sharing, alongside the AI cybersecurity forum recommended in Treasury's AI Cybersecurity report, to develop data standards, share risk management best practices, and enhance understanding of emerging AI technologies in financial services; and
- Financial firms prioritize their review of AI use cases for compliance with existing laws and regulations before deployment and that they periodically reevaluate compliance as needed.

Non-Bank Leverage Risks. The Financial Stability Board published a consultation report proposing policy recommendations (requests for comments) to address financial stability risks arising from leverage in non-bank financial institutions, through improved risk identification and monitoring, a combination of policy measures, and enhanced cross-border collaboration. See the announcement of the report if you wish to comment on this issue.

Other Fines and Enforcement Actions:

- On November 20, 2024, the FDIC fined Spring Valley Bank, Wyoming, Ohio, $19,800 for failing to follow HMDA reporting requirements.
- On November 20, 2024, the FDIC fined Rockland Trust Company, Rockland Mass., $10,000 for failing to require borrowers to obtain flood insurance covering contents pledged as security for the loan when contents are owned by a guarantor who is not the borrower.
- On November 26, 2024, the FDIC fined Citizens State Bank, Hudson, Wisconsin, $6000 for failing to require adequate flood insurance when originating 5 loans, and failing to force place flood insurance in 4 loans.
- On December 18, 2024, the OCC issued a Cease and Desist order to USAA Federal Savings Bank to require the bank to correct a range of deficiencies. This order replaces prior cease-and-desist orders issued against the bank in 2019 and 2022.

- The FRB announced on December 19, 2024, that it terminated enforcement actions against the National Bank of Pakistan and its New York affiliate.
- On December 18, 2024, FINRA fined UBS Financial Services, Inc. $500,000, ordered restitution of $343,914.66 plus interest, and ordered disgorgement of $2,645,537 plus interest, for recommending inappropriate short sales of certain preferred stocks held as long term investments.
- On December 19, 2024, the FRB announced an enforcement action against Lineage Financial Network, the parent company of Lineage Bank, that is subsequent to the FDIC action against the bank arising out of the collapse and bankruptcy of Synapse Financial Technologies, Inc.
- On December 20, 2024, the OCC blacklisted David Wu, a former loan officer at Sterling Bank and Trust, for originating fraudulent loans through his outside mortgage brokerage.
- On December 20, 2024, the CFPB Sues JPMorgan Chase, Bank of America, and Wells Fargo for failing to take action to protect customers from fraud when they used the Zelle peer to peer funds transfer service. Customers of the three banks lost more than $870 million over the network's seven-year existence due to these failures.
- On December 20, 2024, New York obtained a $4.375 million settlement in a *qui tam* action against retailer H&M for retaining $36 million in dormant gift cards that should have been escheated to the state.
- On December 20, 2024, FINRA fined Wells Fargo Clearing Services, LLC $900,000 and censured the firm for submitting approximately 22,000 "blue sheets" (trade data in an automated format) to FINRA that contained inaccurate information.
- On December 23, 2024, the CFPB sued Rocket Homes to stop the company from providing incentives to real estate brokers and agents in exchange for steering homebuyers to Rocket Mortgage, LLC for loans. The CFPB also sued Jason Mitchell, his real estate brokerage firm, JMG Holding Partners LLC (which does business as The Jason Mitchell Group), and the individual real estate brokerage companies in the 41 states and the District of Columbia where it does business, for their role in the unlawful scheme. Rocket Homes allegedly pressured real estate brokers and agents not to share valuable information with their clients concerning products not offered by Rocket Mortgage, such as the availability of down payment assistance programs.
- On December 23, 2025, the CFPB sued Walmart and Branch Messenger for violating EFTA by forcing delivery drivers to use costly deposit accounts to get paid, and for deceiving drivers in Walmart's Spark Driver program about how they could access their earnings. The CFPB's lawsuit alleges that Walmart and Branch opened Branch accounts for Spark Drivers, and Walmart then deposited drivers' pay into these accounts, without the drivers' consent. Spark Drivers paid more than $10 million in fees to Branch to instantly transfer their earnings to an account of their choice. Many drivers experienced delays when accessing their wages or paid fees to transfer their money elsewhere. Branch also deceived the drivers about their ability to stop payments or make certain transfers using the accounts.
- The OCC announced on December 23, 2024, that it issued a cease-and-desist order (43 pages) against Bank of America, N.A. for deficiencies related to its Bank Secrecy Act and sanctions compliance programs. The order requires extensive revisions to bank policies and procedures, hiring independent consultants, and a "look back" plan to review past transactions.

- On December 23, 2024, FINRA fined J.P. Morgan Securities LLC $3 million and censured the firm for failing to accurately report short interest positions to FINRA, and for failing to have a supervisory system in place to assure compliance with short interest reporting requirements.
- On December 30, 2024, the FTC added CEO Jason Wilk to its lawsuit against cash advance lender Dave, Inc.
- On December 31, 2024, FINRA fined Citigroup Global Markets $100,000 and censured the firm for allowing unqualified persons to act as municipal securities representatives.
- On December 31, 2024, FINRA fined Barclays Capital, Inc. $1 million and censured the firm for failing to distinguish between committed offerings of securities and "best efforts" offerings of securities.
- On December 31, 2024, FINRA fined UBS Financial Services, Inc. $1.1 million and censured the firm because UBS did not take reasonable or timely steps to ensure that trade confirmations correctly included or omitted average price disclosures from 2014 to 2024. Additionally, UBS FSI did not review whether confirmations correctly included or omitted average price disclosures.
- On January 2, 2025, FINRA fined BofA Securities, Inc. $250,000 and censured the company for failing to timely report transactions and failing to include required information in trade transaction reports.
- On January 2, 2025, the Sixth Cir. Court of appeals overturned the FCC "net neutrality" rule (the FCC Safeguarding and Securing the Open Internet Order).
- On January 3, 2025, the FTC fined software provider accessiBe $1 million to settle allegations that it misrepresented the ability of its AI-powered web accessibility tool to make any website compliant with the Web Content Accessibility Guidelines (WCAG) for people with disabilities.
- On January 6, 2025, the CFPB sued Vanderbilt Mortgage & Finance, a unit of Clayton Homes, Inc., alleging that Vanderbilt's business model ignored clear and obvious red flags that the borrowers could not afford their manufactured home loans. As a result, many families found themselves struggling to make payments and meet basic life necessities. Vanderbilt charged many borrowers additional fees and penalties when their loans became delinquent, and some eventually lost their homes.
- On January 7, 2025, the CFPB sued Experian for unlawfully failing to properly investigate consumer disputes. The CFPB alleges that Experian does not take sufficient steps to intake, process, investigate, and notify consumers about consumer disputes, resulting in the inclusion of incorrect information on credit reports.
- On January 14, 2025, the CFPB sued Capital One Financial Corp. and Capital One, N.A. for failing to notify customers invested in its 360 Savings product that it was lowering and freezing the interest rate paid on the 360 Savings product while offering a higher interest rate product called 360 Performance Savings. The bank had advertised the 360 Savings product as having one of the nation's "best" and "highest" interest rates, which was no longer true after establishing the new product.
- On January 14, 2025, the OCC announced enforcement actions against three former senior executives of Wells Fargo Bank, N.A. These actions were taken in response to the former executives' unsafe or unsound banking practices related to Wells Fargo Community Bank's systemic and widespread sales practices misconduct: Claudia Russ Anderson, former Community Bank Group Risk Officer, is subject to a Prohibition Order

and a $10 million fine; David Julian, former Chief Auditor is subject to a Personal Cease & Desist Order and a $7 million fine; and Paul McLinko, former Executive Audit Director is subject to a Personal Cease & Desist Order and a $1.5 million fine. Ms. Anderson failed to credibly challenge the bank's incentive compensation program, failed to institute effective controls to manage risks posed by sales practices misconduct, failed to escalate known or obvious risks, and repeatedly and consistently downplayed the sales practices misconduct, and provided false, incomplete, or misleading information to the OCC during its 2015 examinations. Mr. Julian and Mr. McLinko failed to plan and manage audit activity that would detect and document sales practices misconduct, and failed to adequately escalate the sales practices misconduct, and Mr. McLinko failed to maintain professional independence from the division he audited.

- On January 14, 2025, the NY AG announced a settlement with Equifax Information Services, LLC (Equifax) for inaccurately reporting tens of thousands of New Yorkers' credit scores to lenders, which inflated costs for loans and other products, between March and April 2022. Due to a coding error, Equifax falsely lowered consumers' credit scores, leading lenders and insurers to price some of their loans and policies higher than they would have if Equifax had provided accurate credit reports. As a result of the settlement, Equifax will pay $725,000 and implement more safeguards to prevent future errors that raise costs for consumers.
- On January 15, 2025, the Treasury Department reported that it prevented and recovered more than $31 million in fraud and improper payments during a five-month pilot with the Social Security Administration's Full Death Master File. This is a pilot program that will be expanded.
- On January 16, 2025, The American Express Company (AMEX) entered into a non-prosecution agreement (NPA) that imposed a criminal fine of $77,696,000. AMEX also will forfeit a total of $60,700,000 (the revenue from their illegal actions), and pay a $108.7 million civil fine (including a credit of $30.35 million for the amount AMEX agreed to forfeit). AMEX allegedly (i) misrepresented small business credit card rewards or fees, and wire transfer products known as Payroll Rewards and Premium Wire (ii) misrepresented whether credit checks would be done without a customer's consent, (iii) submitted falsified financial information for prospective customers, such as overstating a business's income, (iv) allowed certain small business customers to acquire American Express credit cards without the required employer identification numbers, and (v) promoted an illegal tax scheme for small businesses.
- Reuters and CNN reported on January 16, 2025, that the FDIC sued 17 former executives and directors of Silicon Valley Bank for gross negligence and breaches of fiduciary duty that caused billions of dollars of losses for the bank.
- On January 16, 2025, the CFPB entered into a preliminary agreement with National Collegiate Student Loan Trusts to resolve allegations of unlawful debt collection, including suing when a debt could not be proven, filing false and misleading affidavits, and collecting time barred debts. The Trusts will pay $2.25 million in consumer redress, and dismiss all claims for time barred or undocumented loans.
- On January 16, 2025, the CFPB ordered Block, the operator of peer-to-peer payment app Cash App, to refund and pay other redress to consumers up to $120 million, and to pay a fine of $55 million. In addition, 48 states fined Block a total of $80 million for BSA/AML violations. Block's weak security protocols led to fraudulent transfers of

customer funds, and Block investigations of these frauds were woefully incomplete. Block directed users — who had suffered financial losses as a result of fraud — to ask their bank to attempt to reverse transactions, which Block would subsequently deny. Block also deployed a range of tactics to suppress Cash App users from seeking help, reducing its own costs. Cash App agreed last year to pay as much as $2,500 to each user whose personal data had been stolen in breaches.

- On January 17, 2025, the CFPB fined Equifax $15 million for its failure to conduct proper investigations of consumer disputes. The CFPB found that Equifax ignored consumer documents and evidence submitted with disputes, allowed previously deleted inaccuracies to be reinserted into credit reports, provided confusing and conflicting letters to consumers about the results of its investigations, and used flawed software code which led to inaccurate consumer credit scores.
- On January 17, 2025, the CFPB fined American Honda Finance Corporation $2.5 million and ordered the corporation to pay $10.3 million in restitution to 300,000 Honda owners because the corporation reported borrowers whose loan payments were deferred as delinquent borrowers rather than current on their loans. The corporation also failed to investigate consumer disputes or send corrections to credit bureaus.
- On January 17, 2025, a multistate coalition of 45 securities regulators, together with the SEC secured $106 million from Vanguard Group, Inc., an investment advisory firm, and its subsidiary Vanguard Marketing Corporation, for Vanguard's failure to notify investors of changes to its target date retirement funds that resulted in higher capital gains tax bills for hundreds of thousands of investors. An investigation by the NY AG found that Vanguard lowered the minimum requirements on one of its retirement funds without telling investors that the changes would result in higher tax bills.
- On January 21, 2025, the President said he issued a full and unconditional pardon to Ross Ulbricht, the founder of the dark web Silk Road marketplace of illicit drugs. The website allowed people to buy and sell illegal goods, including narcotics, with the use of Bitcoin. Prosecutors said hundreds of kilograms of illegal drugs, and other unlawful goods and services, were distributed to more than 100,000 buyers during the website's short life. It also laundered hundreds of millions of dollars.
- On January 21, 2025, Argus Information and Advisory Services, a subsidiary of TransUnion, agreed in writing that it will not seek any government contract with the CFPB for three years. Argus previously paid a $37 million fine for allegedly using credit card data obtained pursuant to contracts with various federal regulators to create synthetic (proxy) data that it incorporated into the products and services it sold to some commercial customers.
- On January 21, 2025, CLS Global FZC LLC plead guilty to conspiracy to commit market manipulation and wire fraud. CLS Global participated in a scheme known as cryptocurrency "wash trading," a sham trading activity intended to fraudulently attract investors. The company will pay a total of $428,059, representing both seized cryptocurrency and a fine, and will be prohibited from participating in U.S. cryptocurrency markets.
- On January 21, 2025, a federal court in New York partially approved summary judgment in a lawsuit by New York against Citibank, N.A. related to alleged violations of EFTA arising from the theft of consumer funds held in Citibank accounts in connection with

wire transfers. However, the court held that EFTA applied to unauthorized wire transfers made through Citi's consumer accounts.

- On January 22, 2025, New York obtained a nationwide judgment against Yellowstone Capital LLC and its officers for $534 million in cancelled small business loans and $16 million in restitution. The company owes another $514 million in restitution that has not yet been paid. Yellowstone used contracts that fraudulently described each transaction as a purchase of a portion of a small business's future revenues, with flexible payment amounts and open-ended terms. In reality, predatory lenders collected fixed amounts directly from small businesses' bank accounts every day during short repayment periods that often lasted just 60 or 90 days. These daily collections had little connection to the portion of the businesses' revenues the lenders supposedly purchased. While the lenders promised to "reconcile" or refund small businesses' daily payments to ensure they never rose above an agreed-upon percentage of their revenue, they used numerous fraudulent measures to ensure borrowers almost never qualified for these payment refunds. As a result, the transactions actually functioned as short-term loans with ultra-high interest rates of up to 820% per year. Litigation continues against other entities and individuals involved in this scheme.
- On January 23, 2025, USDOJ indicted two Americans, a Mexican, and two North Koreans for engaging in a fraudulent scheme to obtain remote IT work with ten U.S. companies that generated $866,255 for North Korea. The money was laundered through a Chinese bank. The defendants used forged and stolen identity documents, including U.S. passports containing the stolen personally identifiable information of a U.S. person, to hide the identity of the North Korean IT workers. The IT work was routed through a North Carolina "laptop farm" that hid the location of the remote workers.