PUBLICATION UPDATE

Route to: ☐ ____ ☐ ____ ☐ ____ ☐ ____
☐ ____ ☐ ____ ☐ ____ ☐ ____

Checks, Drafts and Notes

Publication 74 Release 81 May 2025

HIGHLIGHTS

Updated Chapters

- This release contains updates and revisions to provide the current status of the law, including recent developments in case, statutory, and regulatory law. The release includes discussion of several important recent developments and adds new and revised material on a number of significant topics.

Chapter 112—Characteristics of Checks and Other Negotiable Instruments. *Commercial paper.* A reference to a transaction for information is not a condition to payment that would destroy negotiability. *Eli Glob., LLC v. Cieutat*, 2023 Ala. LEXIS 134 (Ala. Sup. Ct. 2023). See § 112.02[1].

Unconditional order or promise. It was unclear whether an "Automatic Payment Transfer program" referenced in a promissory note was a condition to payment. The court found that once the amount of fees was deducted from the interest and principal amount due on the notes, the outstanding amount due was not obvious on the face of the note. Due to the lack of clarity, the promissory notes could not be considered negotiable instruments. *JTH Tax LLC v. Irving*, 654 F. Supp. 3d 501 (D. Md. 2023). See § 112.06[2].

Payable on demand or at definite time. The notes at issue were not demand notes. Based upon the language of the notes, they were actually installment contracts with an optional acceleration clause. The court emphasized that if the promissory notes were payable on demand, then there would be no practical need for the acceleration clause. *Schmidt v. Sportsman's Gallery, LLC*, 2022 Neb. App. LEXIS 1 (Neb. Ct. App. 2022). See § 112.10[1]. A court, interpreting Texas law, indicated that an installment agreement is breached

each time a payment is missed. *In re Wenstrom*, 649 B.R. 492 (Bktcy. Ct. N.D. Tex. 2023). See § 112.10[1].

Chapter 115—Transfer and Negotiation. *Transfer of possession.* Although a plaintiff alleged that there was a transfer/negotiation of two notes so that it became the holder, there was no endorsement of the notes in issue made by the payee (either an endorsement on the notes or on an allonge). For the plaintiff to prove that it acquired the notes by negotiation, it had to prove possession of the notes and an indorsement by the payee. *Rock Creek Cap., LLC v. Stewart*, 681 S.W.3d 799 (Tex. Ct. App. 2023). See § 115.03[2].

Chapter 118—Holder in Due Course: Defenses. *Illegality.* A California court explained that usury did not exist under common law; usury laws are purely and solely creatures of modern statutory and state constitutional provisions. The usurious character of a transaction is determined by the amount agreed to be paid at the time of making the loan. *Hart v. Hart*, 2024 Cal. App. Unpub. LEXIS 14 (Cal. Ct. App. 2024). See § 118.04[1].

Fraud. A plaintiff can assert a claim under a "fraud by omission" theory; a duty to speak arises when one party has information that the other party is entitled to know because of a fiduciary or other similar relation of trust and confidence between them. *Speicher v. Rocket Mortg., LLC*, 2024 U.S. Dist. LEXIS 414 (E.D. Pa. 2024). See § 118.05[1]. Under Missouri law, representations of future acts are insufficient to establish a negligent misrepresentation claim; a party is not entitled to rely on representations as to expectations or predictions for the future. *Sonderegger v. Specialized Loan Servicing, LLC*, 2022 U.S. Dist. LEXIS 6779 (E.D. Mo. 2022). See § 118.05[1].

Chapter 120—Contract of the Parties. *Contract of maker or acceptor.* A credit reporting agency such as Experian, Equifax, Transunion and Innovis is not a debt collector under the FDCPA. *Witt v. United States Dep't of Educ.*, 2024 U.S. Dist. LEXIS 37738 (D. Conn. 2024). In California, the "one action rule" compels a secured creditor to exhaust its security in a single judicial action before obtaining a monetary deficiency judgment against the debtor. *Citrus El Dorado, LLC v. Stearns Bank*, 2023 Cal. App. Unpub. LEXIS 3881 (Cal. Ct. App. 2023). See § 120.02.

Contract of guarantor. A guarantor of a loan is without standing to sue the lender for alleged fraudulent misconduct in making a loan to the borrower, absent an independent harm to the guarantor; the status of being a guarantor of a fraudulently obtained loan is not itself an injury for the purposes of standing. *Sol v. M&T Bank*, 2024 U.S. Dist. LEXIS 15344 (D. Md. 2024). See § 120.07[1].

Accrual of cause of action. A lender can unilaterally abandon an acceleration; abandonment of acceleration resets the statute of limita-

tions for the foreclosure cause of action and restores the loan to its original maturity date. *In re Wenstrom*, 649 B.R. 492 (Bktcy. Ct. N.D. Tex. 2023). See § 120.08[1].

Chapter 134—Bank Collections. *Electronic check processing.* The situation as "duplicate presentment fraud" is addressed by Regulation CC. It occurs when the holder of a check deposits it remotely with one bank via a mobile device, and then deposits the physical check again with a second bank. If the second bank makes funds available to the payee before the check is dishonored by the paying institution (drawee bank), the second bank may suffer a loss. Recent cases include: *Garfield-Dan Ryan Currency Exch., Inc. v. Citibank, N.A.*, 2024 U.S. Dist. LEXIS 83725 (N.D. Ill. 2024); *63rd & Morgan Currency Exchange, Inc. v. Citibank, N.A.*, 2024 U.S. Dist. LEXIS 12035 (N.D. 2024); *Triffin v. Jumpinjax Kids Corp.*, 2023 N.J. Super. Unpub. LEXIS 2123 (N.J. Super. Ct. 2023). See § 134.02[3].

Variation by agreement. A provision in an account agreement that provided that the Bank may close any account with or without cause at any time and that the bank had discretion to close an account without prior notice if necessary to protect the bank, its employees or others from risk, harm or loss was enforceable. *Gent Row, LLC v. Truist Bank*, 2024 U.S. Dist. LEXIS 7725 (S.D. Fla. 2024). See § 134.06[1]. Analyzing the principles of unconscionability, the court concluded that even assuming the subject Deposit Agreement was a non-mutual adhesion contract, the contractual limitations period was not substantively unreasonable. *Christensen v. Bancorporation*, 2023 U.S. Dist. LEXIS 32106 (S.D. Cal. 2023). See § 134.06[1].

Ordinary care. In a case that addressed the issue of whether a depositary bank exercised ordinary care in connection with its defense under the fictitious payee rule, The court concluded that the plaintiffs had met their burden to plead facts that make it plausible defendant owed a duty to inspect remotely deposited checks to ensure they were payable to the depositor. *H.G. Silverman Litig. Grp., P.C. v. TD Bank, N.A.*, 622 F. Supp. 3d 15 (E.D. Pa. 2022). See § 134.07[2].

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VOLUME 1

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☐	Title page.	Title page
☐	111-5 thru 111-31	111-5 thru 111-32.1
☐	111-47 thru 111-58.2(25).	111-47 thru 111-58.2(25)
☐	112-6.1 thru 112-30.3	112-7 thru 112-30.3
☐	112-45	112-45 thru 112-46.1
☐	112-57 thru 112-58.1	112-57 thru 112-58.1
☐	112-69 thru 112-84.8(3)	112-69 thru 112-84.8(3)
☐	112-84.19 thru 112-84.21	112-84.19 thru 112-84.22(1)
☐	112-99 thru 112-107.	112-99 thru 112-108.1
☐	112-123 thru 112-135	112-123 thru 112-136.1
☐	112-145 thru 112-146.1	112-145 thru 112-146.1
☐	112-157 thru 112-185	112-157 thru 112-186.17
☐	112-197 thru 112-198.9	112-197 thru 112-198.10(1)
☐	112-198.13 thru 112-198.20(1)	112-198.13 thru 112-198.20(2)(a)
☐	112-198.26(1).	112-198.26(1)
☐	112-198.36(5) thru 112-198.36(31)	112-198.36(5) thru 112-198.36(33)
☐	112-207 thru 112-220.1	112-207 thru 112-220.3
☐	112-227 thru 112-229	112-227 thru 112-230.1
☐	113-12.1 thru 113-13	113-13 thru 113-14.1
☐	114-45 thru 114-47	114-45 thru 114-48.1
☐	115-5 thru 115-22.1	115-5 thru 115-22.1
☐	115-39 thru 115-54.30(19)	115-39 thru 115-54.30(20)(g)
☐	115-54.30(29) thru 115-54.30(40)(e)	115-54.30(29) thru 115-54.30(40)(e)
☐	115-54.35 thru 115-54.39	115-54.35 thru 115-54.39
☐	115-67 thru 115-69	115-67 thru 115-70.1
☐	116-5 thru 116-51.	116-5 thru 116-52.5
☐	116-61 thru 116-68.2(2)(a).	116-61 thru 116-68.2(2)(a)
☐	117-55 thru 117-57	117-55 thru 117-57
☐	117-93 thru 117-94.9	117-93 thru 117-94.11
☐	118-9.	118-9 thru 118-10.1
☐	118-17 thru 118-20.3	118-17 thru 118-20.3
☐	118-33 thru 118-60.27.	118-33 thru 118-60.29
☐	118-75 thru 118-94.2(14)(s)	118-75 thru 118-94.2(14)(t)(v)
☐	118-100.1 thru 118-102.1	118-101 thru 118-102.2(9)
☐	118-111 thru 118-113	118-111 thru 118-114.1
☐	118-141 thru 118-170.13.	118-141 thru 118-170.14(3)
☐	118-170.25	118-170.25 thru 118-170.26(1)

Check As Done	*Remove Old Pages Numbered*	*Insert New Pages Numbered*
☐	118-181 thru 118-199	118-181 thru 118-200.1
☐	118-207 thru 118-213	118-207 thru 118-213
☐	119-21 thru 119-25	119-21 thru 119-26.1

VOLUME 2

Revision

☐	Title page.	Title page
☐	120-17 thru 120-21	120-17 thru 120-22.1
☐	120-41 thru 120-68.4(97)	120-41 thru 120-68.4(98)(i)
☐	120-68.4(113) thru 120-68.4(119).	120-68.4(113) thru 120-68.4(120)(a)
☐	120-101	120-101 thru 120-102.1
☐	120-108.5 thru 120-108.11	120-108.5 thru 120-108.11
☐	120-127 thru 120-141	120-127 thru 120-142.1
☐	120-146.5 thru 120-146.9	120-146.5 thru 120-146.9
☐	120-161 thru 120-178.1	120-161 thru 120-178.2(11)
☐	120-178.23 thru 120-232.5	120-179 thru 120-232.6(7)
☐	120-232.21 thru 120-233.	120-233 thru 120-234.15
☐	121-15 thru 121-17	121-15 thru 121-18.1
☐	121-26.1 thru 121-37	121-27 thru 121-38.1
☐	121-95 thru 121-101.	121-95 thru 121-102.1
☐	121-115 thru 121-122.15.	121-115 thru 121-122.16(1)
☐	121-122.24(3) thru 121-122.26(3)	121-122.25 thru 121-122.26(4)(e)
☐	121-122.26(13)	121-122.26(13)
☐	121-122.41 thru 121-122.44(1)	121-122.41 thru 121-122.44(1)
☐	122-43 thru 122-48.1	122-43 thru 122-48.1
☐	122-77 thru 122-87	122-77 thru 122-88.1
☐	124-17 thru 124-19	124-17 thru 124-20.1
☐	124-27	124-27 thru 124-28.1
☐	124-50.11 thru 124-50.35	124-50.11 thru 124-50.37
☐	125-24.1 thru 125-25	125-25 thru 125-26.3
☐	126-7.	126-7 thru 126-8.1
☐	126-23 thru 126-27	126-23 thru 126-28.1
☐	126-32.2(1) thru 126-32.3	126-32.3 thru 126-32.4(1)
☐	126-64.1	126-64.1
☐	127-29 thru 127-31	127-29 thru 127-32.1
☐	127-38.4(5) thru 127-39	127-39 thru 127-40.13
☐	128-25 thru 128-26.3	128-25 thru 128-26.3
☐	128-55 thru 128-59	128-55 thru 128-60.1
☐	130-9 thru 130-10.1	130-9 thru 130-10.1
☐	130-23	130-23 thru 130-24.1
☐	130-55 thru 130-67	130-55 thru 130-68.1

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☐	130-95 thru 130-99	130-95 thru 130-100.1

VOLUME 3

Revision

☐	Title page.	Title page
☐	132-47 thru 132-49	132-47 thru 132-50.1
☐	132-63 thru 132-65	132-63 thru 132-66.1
☐	132-70.2(5) thru 132-70.2(9)	132-70.2(5) thru 132-70.2(9)
☐	132-129 thru 132-145	132-129 thru 132-146.1
☐	133-65 thru 133-70.1	133-65 thru 133-70.1
☐	133-85 thru 133-93	133-85 thru 133-94.1
☐	134-7 thru 134-12.1	134-7 thru 134-12.1
☐	134-21 thru 134-23	134-21 thru 134-24.3
☐	134-32.1 thru 134-35	134-33 thru 134-36.3
☐	134-47	134-47 thru 134-48.1
☐	134-59 thru 134-87	134-59 thru 134-88.11
☐	134-106.3 thru 134-113	134-107 thru 134-114.25
☐	134-133 thru 134-155	134-133 thru 134-156.1
☐	134-167 thru 134-175	134-167 thru 134-176.1
☐	134-191 thru 134-192.3	134-191 thru 134-192.3
☐	134-201 thru 134-208.19.	134-201 thru 134-208.20(7)
☐	134-208.33 thru 134-208.54(3)	134-208.33 thru 134-208.54(21)
☐	134-208.67 thru 134-208.82(7)	134-208.67 thru 134-208.82(8)(a)
☐	134-208.82(18)(a) thru 134-218.25	134-209 thru 134-218.26(27)
☐	134-218.41 thru 134-218.45	134-218.41 thru 134-218.45
☐	134-227 thru 134-231	134-227 thru 134-231
☐	135-115	135-115 thru 135-116.1
☐	135-125 thru 135-139	135-125 thru 135-140.1
☐	136-21	136-21 thru 136-22.1
☐	137-13 thru 137-14.1	137-13 thru 137-14.1
☐	137-47 thru 137-53	137-47 thru 137-53
☐	138-21 thru 138-23	138-21 thru 138-23
☐	138-83	138-83 thru 138-84.1
☐	138-93 thru 138-94.7	138-93 thru 138-94.7
☐	138-193	138-193 thru 138-194.1
☐	138-198.15 thru 138-200.1	138-199 thru 138-200.1
☐	I-1 thru I-65	I-1 thru I-65

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