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U P D A T E

News of Developments in the Financial Sector and Related Areas

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Preemption of West Virginia Insurance Law

The Office of the Comptroller of the Currency ("OCC") has issued its opinion as to whether federal law preempts certain provisions of the West Virginia Insurance Sales Consumer Protection Act (the "West Virginia Act") holding that the Gramm-Leach-Bliley Act (the "Federal Act") preempts some, but not all of the provisions of the West Virginia Act. In particular, it is the OCC's opinion that the Federal Act does not preempt the following provisions of the West Virginia Act with respect to national banks:

- the West Virginia Act's prohibition against requiring or implying that the purchase of an insurance product from a financial institution is required as a condition of law;
- the West Virginia Act's provision prohibiting a financial institution from offering an insurance product in combination with other products unless all of the products are available separately; and
- the West Virginia Act's requirement that, where insurance is required as a condition of obtaining a loan, the insurance and credit transactions be completed independently and through separate documents.

With respect to the West Virginia Act's disclosure requirements, the OCC concluded that the provisions prescribing the content of the disclosures that a financial institution is required to make in connection with the solicitation of an insurance product, and the requirement that a financial institution that sells insurance obtain a written acknowledgment, in a separate document, from its insurance customer that certain disclosures were provided were not preempted; but that the West Virginia Act's provisions regarding the manner and timing of certain required disclosures are preempted. Finally, the OCC found that the Federal Act does preempt the West Virginia Act with respect to national banks as follows:

- the West Virginia Act's provisions requiring financial institutions to use separate employees for insurance solicitations;
- the West Virginia Act's restrictions on the timing of bank employees' referral or solicitation of insurance business from customers who have loan applications pending with the bank;
- the West Virginia Act's restrictions on sharing with bank affiliates information acquired by a financial institution in the course of a loan transaction to solicit or offer insurance; and
- the West Virginia Act's requirement that financial institutions segregate the place of solicitation or sale of insurance so that

it is readily distinguishable as separate and distinct from the deposit-taking and lending areas.

In reaching its conclusions, the OCC applied Section 104(d)(2)(A) of the Federal Act which provides: "In accordance with the legal standard for preemption set forth in the decision of the Supreme Court of the United States in *Barnett Bank of Marion County, N.A. v. Nelson*, 517 U.S. 25 (1996), no State may, by statute, regulation, order, interpretation, or other action, prevent or significantly interfere with the ability of a depository institution, or an affiliate thereof, to engage, directly or indirectly, either by itself or in conjunction with an affiliate or any other person, in any insurance sales, solicitation, or crossmarketing activity." Since the issuance of the OCC's opinion, two insurance agent trade groups have filed a lawsuit alleging that the OCC exceeded its authority when it overrode the West Virginia Act which forbids banks from offering insurance to a customer until after a loan transaction is completed; requiring banks to have different individuals handling banking and insurance transactions; and mandating that insurance sales take place in a separate part of the bank.

Arkansas Usury Law

A supplement to this issue of UPDATE covering the decisions involving the Arkansas usury law as interpreted by the courts in *Evans v. Harry Robinson Pontiac-Buick, Inc.*, *In re Jones* and *Johnson v. Bank of Bentonville* is available free of charge from our firm.

Investment Adviser Website

The Securities and Exchange Commission and the North American Securities Administrators Association has recently announced a website known as *Investment Adviser Public Disclosure* that will allow investors to electronically access information about money managers, financial planners and other investment advisers. The website provides instant access to registration documents filed by more than 9,000 registered investment advisers. The documents, filed electronically with the Securities and Exchange Commission or state securities administrators, provide information about an adviser's business, advisory services and fees. The registration documents also disclose any disciplinary problems an adviser or its employees may have had during the last ten years. The website may be accessed at *http://www.adviserinfo.sec.gov*.

Cases and Rulings

Cavalier Mfg., Inc. v. Jackson, 2001 WL 1177028 (2001) is a decision by the Supreme Court of Alabama involving an agreement which contained an arbitration clause that in the event of a dispute between the parties "the arbitrator shall have no power toward punitive damages." The Court held that an arbitration clause that forbids an arbitrator from awarding punitive damages is contrary to public policy in Alabama and, thus, is void and is enforceable only if federal law requires that it be enforced. It was not within the province of the parties to a predispute arbitration agreement to waive a punitive damages award.

Jaraki v. Cardiology Assocs. of N.E. Ark., P.A., 75 Ark. App. 198 (2001) involves a ruling by the Court of Appeals of Arkansas holding that a covenant not to compete in an employment contract entered into with a physician was unenforceable because there was no valid interest existing in need of protection for the employer and the geographic limitations were too broad. The Court noted for a covenant not to compete to be enforceable, three requirements must be met: (i) the covenantee must have a valid interest to protect; (ii) the geographical restriction must not be overly broad; and (iii) a reasonable time limit must be imposed. The Court noted also that covenants not to compete in employment contracts are subject to stricter scrutiny than those connected with a sell of a business.

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