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U P D A T E

News of Developments in the Financial Sector and Related Areas

IN THIS ISSUE

Override of Arkansas Usury Law

In an appeal of a test case of the Arkansas usury law, *Johnson v. Bank of Bentonville*, Case No. 01-1128, the United States Court of Appeals for the Eighth Circuit has upheld the constitutionality of Section 731 of the Gramm-Leach-Bliley Financial Modernization Act of 1999 (the "Act"), which overrides the interest rate limitations of the Arkansas State Constitution, based on two prior decisions: (i) *Gregory v. Ashcroft*, 501 U.S. 452 (1991), which holds that Congress may impose its will on the States as long as it is acting with the powers granted it under the Supremacy Clause of the Constitution, and (ii) *U.S. v. Morrison*, 529 U.S. 598 (2000), which holds that Congress, under the Commerce Clause, has the power to regulate those activities having a substantial relationship to interstate commerce. The facts in the test case reflect that Johnson obtained a personal loan from the defendant bank providing for an interest rate of 16.5% per annum and when other fees were added on to the loan, the true annual percentage rate charged by the bank was 17.915%. At the time the loan was made, the maximum legal rate of interest, if calculated pursuant to Article 19, Section 13 of the Arkansas Constitution was 10.5% per annum. The Arkansas Constitution generally provides that the maximum rate of interest on any contract shall not exceed 5% per annum above the Federal Reserve Discount Rate at the time of the contract. As a result of the Court's decision, in-state banks, i.e., banks chartered in Arkansas, are allowed to charge the same rate of interest as the home state of any out-of-state bank that has a branch in Arkansas.

Rules on Insurance Activities of Banks

Final rules establishing consumer protections for depository institution sales of insurance are summarized in the March 2001 issue of UPDATE. Following the announcement of the final rules, the American Bankers Association and the American Bankers Insurance Association wrote a letter to the federal banking agencies requesting guidance on specific questions in connection with the implementation of the final rules. The final rules became effective on October 1, 2001. The federal banking agencies have provided responses to a number of questions on the final rules which are available in OCC Bulletin 2001-43. A nine page supplement to this November issue of UPDATE covering the consumer protection rules on insurance activities of banks is available free of charge from our firm.

Internet Sale of Motor Vehicles

Ford Motor Company v. Texas Department of Transportation, 2001 WL 984676 (5th Cir. (Tex.)) involved Ford Motor Company's attempt to market preowned vehicles in Texas through its internet site known as The Showroom. The Texas Motor Vehicle Commission Code only permits licensed dealers to sell vehicles in Texas, and also prohibits a manufacturer from owning

a dealership or acting in the capacity of a dealer. Through The Showroom web site located at *www.fordpreowned.com*, customers in Houston, Atlanta, Boston, Washington D.C., New York and Newark were able to view an on-line selection of preowned Ford vehicles. The vehicles were originally sold or leased by Ford to such companies as national car rental companies. The Showroom is Ford's attempt to create the most profitable market to re-sell these vehicles. Interested customers, after placing a $300 refundable deposit, could arrange to have a designated vehicle sent to a local dealer in order that they may test-drive it. Following their test-drive, the customer may then accept or decline to purchase the vehicle. Upon payment or financing approval, Ford transfers title to the dealer, who, in turn, transfers title to the customer. Twenty-two dealers in the Houston area were participating in the program. The purpose of the Texas statute which prohibited manufacturers from acting as auto dealers is to prevent manufacturers from utilizing their superior market position to compete against dealers in the retail car market. Ford argued, among other things, that the Texas law violates the Commerce Clause of the Constitution of the United States which provides that Congress shall have the power to regulate commerce among the states. The court upheld the Texas law as not a violation of the Commerce Clause since it did not discriminate among in-state and out-state business. The decision of the court is important because of its implications on the type of business which may be conducted on the Internet.

Overdraft Protection Program

In Interpretive Letter No. 914, the Office of the Comptroller of the Currency ("OCC") held that an overdraft protection program that would be offered to customers of a bank by a third party vendor may violate the disclosures required under Regulation Z for open-end credit, fail to comply with certain requirements of the Federal Trade Commission Act, the program could promote poor fiscal responsibility on the part of consumers and that there was a complete lack of consumer safeguards built into the program. A copy of OCC Interpretive Letter No. 914 is available from our firm.

Cases and Rulings

National Association for Healthcare Communications, Inc. v. Central Arkansas Area Agency on Aging, Inc., 257 F.3d 732 (8th Cir. 2001), is an important case which continues to establish the principle established by the Supreme Court of the United States referred to as the Tea Rose/Rectanus doctrine that the first user of a common law trademark may not oust a later user's good faith use of an infringing mark in a market where the first user's products or services are not sold.

Donovan v. RRL Corp., 26 Cal. 4th 261 (2001) involves a decision by the Supreme Court of California where the prospective buyer of a used vehicle brought suit against the dealership after the dealership refused to sell an advertised vehicle for the price that was listed in the newspaper advertisement and which was $12,000 less than the intended price due to typographical and proofreading errors at the newspaper. The court held that the defendant dealership does not bear the risk of the mistake of the newspaper, and that the Court would not require enforcement of the newspaper offer as accepted by the buyer.

Next Generation, Inc. v. Wal-Mart, Inc., 49 S.W. 3d 860 (Tenn. Ct. App. 2000) involves a breach of contract action brought by Wal-Mart against a supplier. In this case the parties had entered into a commitment letter and a vendor agreement, both of which fail to provide the essential terms of their agreement, such as price, quantity, delivery, and payment. The Court held that since the written terms were not a final expression of the agreement of the parties, that the terms of the agreement between the parties could be proven by oral evidence.