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U P D A T E

News of Developments in the Financial Sector and Related Areas

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Employee or Independent Contractor

Arkansas Transit Homes, Inc. v. Aetna Life & Casualty, 341 Ark. 317 (2000) involved a common carrier in the business of transporting mobile homes in interstate commerce that retained drivers as independent contractors. Arkansas Transit Homes, Inc. ("Arkansas Transit") applied for workers' compensation insurance coverage for its employees. The issue before the court was whether certain truck drivers retained by Arkansas Transit were employees or independent contractors for purposes of workers' compensation insurance coverage. In determining whether one is an employee or independent contractor, the Court utilized factors as follows:

- the extent of control which, by the agreement, the master may exercise over the details of the work;
- whether or not the one employed is engaged in a distinct occupation or business;
- the kind of occupation, with reference to whether in the locality, the work is usually done under the direction of the employer or by a specialist without supervision;
- the skill required in the particular occupation;
- whether the employer or the workman supplies the instrumentalities, tools, and the place of work for the person doing the work;
- the length of time for which the person is employed;
- the method of payment, whether by the time or by the job;
- whether or not the work is a part of the regular business of the employer;
- whether or not the parties believe they are creating the relation of master and servant; and
- whether the principal is or is not in business.

The Court indicated that of the foregoing factors, the right to control is the principle factor in determining whether one is an employee or an independent contractor. Under the contract with drivers utilized by Arkansas Transit, the drivers agreed to use their trucks exclusively in the business and service of Arkansas Transit and could not otherwise use their trucks without its express consent. The Court also noted, among other things, that the drivers had to paint their trucks in accordance with Arkansas Transit's specifications and to affix its insignia of identification on the trucks. Based on the facts in this case, the Court concluded that the drivers were employees and subject to workers' compensation coverage.

Truth in Lending Disclosures

In *Jones et al v. Bill Heard Chevrolet, Inc.,* No. 98-6786 (June 2, 2000), the United States Court of Appeals for the Eleventh Circuit held that an automobile dealer's failure to separate in its disclosure documents the portion of an extended warranty charge which it kept from the part that it paid to the warranty provider on behalf of the consumer was a violation of the Truth in Lending Act and Regulation Z. Under the model form of disclosure provided by Regulation Z, the dealer was required to itemize each of the amounts paid to others on behalf of the consumer. The dealer charged the customer $2,495.00 for an extended service contract and listed that sum as a payment to the third party, General Motors, when in fact, only $290.00 was paid to General Motors with the dealer retaining the difference as a markup. The Court concluded that the inaccurate disclosure violated both the Truth in Lending Act and Regulation Z. The case is reprinted in [Current Binder] Fed. Banking L. Rep. (CCH) ¶ No. 100-456.

Liability of Nonfiduciary to Employee Benefit Plan

The United States Supreme Court recently ruled that brokers and others may be sued under federal law over questionable dealings with employee benefit plans. The lawsuit involved the Employee Retirement Income Security Act of 1974 (the "Act") barring a fiduciary of an employee benefit plan from causing the plan to engage in certain transactions with a "party in interest" that a fiduciary may be inclined to favor at the expense of the beneficiaries of the plan. The issue in the case was whether a plan could sue a nonfiduciary "party in interest" in connection with prohibited transactions. Section 406(a) of the Act provides, among other things, that a fiduciary with respect to a plan shall not cause the plan to engage in any transaction, if the fiduciary knows or should know that such a transaction constitutes a direct or indirect sale or exchange of any property between the plan and a "party in interest." Under the Act, the term "party in interest" includes a person providing services to the plan. The Court held that a nonfiduciary "party in interest" may be held liable and reinstated a lawsuit by a plan on behalf of its beneficiaries accusing Salomon Smith Barney, Inc. of making substantial profits from the sale of securities to the plan that turned out to be almost worthless. [*Harris Trust & Savings Bank v. Salomon Smith Barney, Inc.,* 120 S. Ct. 2180 (2000)]

Insurance Activities of Banks

Updated explanations of insurance activities of banks and insurance regulation of banks both before and following the passage of the Gramm-Leach-Bliley Act titled "Introduction to Insurance and Insurance Regulation" is contained at Fed. Banking L. Rep. (CCH) ¶ No. 61-101.

ATM Fees

Bank of America, Wells Fargo and the California Bankers Association filed a lawsuit seeking to enjoin the enactment of two municipal ordinances that prohibited the charging of automated teller machine ("ATM") fees on non-accountholder users of the ATM by financial institutions which operate the ATM. The court held that local government ordinances that attempted to prohibit financial institutions from charging a fee to noncustomers were preempted by the Home Owners Loan Act and the National Bank Act. [*Bank of America v. City and County of San Francisco Bank*, U.S.D.C., N.D. Cal., No. C-99-4817-VRW (2000)]