

MEMORANDUM

To: Subscribers to *The Law and Regulation of Financial Institutions*

From: A.S. Pratt & Sons

Subject: Highlights

The enclosed update provides information on a wide range of recent changes in the laws that affect banks and other depository institutions:

- **Capital adequacy regulation.** Major changes are in store for banks as a result of the international banking community's revision of the Basel Accord on regulatory capital. In December 2007 the federal banking agencies issued final regulations implementing the advanced capital adequacy framework of Basel II. The new regulations make important changes in how certain large banks must calculate risk-based capital. This update explains these changes and the concepts on which they are based. ¶ 9.01[9].
- **Securities activities of banking organizations under the Gramm-Leach-Bliley Act.** The SEC and FRB have adopted a final rule, Regulation R, that specifies the securities-related activities in which a bank may engage without being subject to regulation as a broker under federal securities laws. This regulation implements the so-called "push-out" provisions that were part of the GLB Act, eliminating the general exemption from regulation as a "broker" that the federal securities laws gave banks and replacing it with a series of specific exceptions. This regulation is discussed at ¶ 8.07[2][a].
- **Enforcement powers and procedures of federal banking agencies.** A federal court of appeals decided an important case determining when an independent professional accounting firm could be subject to liability in a civil enforcement action by a federal banking agency as an "institution affiliated party" for recklessly conducting an audit of a bank that subsequently failed. This case, *Grant Thornton, LLP v. OCC*, is analyzed at ¶ 10.01[1].
- **Deposit insurance coverage.** *Adagio Investment Holding Ltd v. FDIC* considered whether the FDIC had the power to treat a

checking account as a nondeposit account, not covered by federal deposit insurance, because it was linked through a sweep arrangement to a nondeposit international banking facility account. The case is explained at ¶ 11.03[1].

- **Conservators and receivers of insured depository institutions.** The power of the FDIC to sue a third-party accounting firm of a failed bank was limited in *FDIC v. Ernst & Young LLP*. The case is an important ruling on the extent to which the FDIC can avoid state law defenses otherwise available to the defendant in a suit brought by the FDIC in its capacity as receiver by instead bringing the suit in the FDIC’s “corporate” capacity. ¶ 12.01.
- **Ability of depositors to sue for bank’s failure.** The court in *Courtney v. Halleran* limited the ability of depositors in a failed bank to sue the officers, directors, and accounts of the bank for the bank’s failure. At issue was whether the plaintiffs were entitled to bring an independent action or whether their claims belonged to the FDIC as receiver acting on behalf of the bank. The case is discussed at ¶ 12.01[1].
- **Resolution methods in insolvency and reorganization of depository institutions.** When the FDIC closes a bank, it must determine the amounts in accounts that are covered by deposit insurance to be able to pay insured depositors. Making this determination has become increasingly complicated as banks have far-flung branches and engage in numerous transactions with various cut-off hours for determining the status of the transactions for any given day. This problem and related regulatory issues are discussed at ¶ 12.02[1].
- **Federal preemption of state laws.** Federal preemption continues to be an ongoing source of litigation. Key recent cases are discussed. ¶ 14.03, ¶ 18.01[4].
- **Forged instruments—allocating loss.** Under Article 3, the liability of parties in many instances will be determined based on a concept of comparative fault. The statute does not define how this comparative responsibility should be determined. A federal appeals court considered this question in *Rodrigue v. Olin Employees Credit Union*. The case is explained at ¶ 15.04[3].
- **Funds transfers: bank-customer agreements.** The scope of bank-customer agreements that require a customer to notify the bank of unauthorized electronic funds transfers was the subject of an

important case decided by the highest court in New York. That case, *Regatos v. North Fork Bank*, is analyzed at ¶ 17.06[6][i].

- **Checks with forged or unauthorized signatures.** When does the statute of limitations start to run in a conversion action against a depository bank when there is a continuing series of conversions of checks by the same wrongdoer over an extended period of time? The court in *Rodrigue v. Olin Employees Credit Union* decided to apply the limitations statute separately for each check. The case is discussed at ¶ 18.14.
- **Privacy of nonpublic personal information.** Under the Fair and Accurate Credit Transactions Act, consumers have the right to prevent a person from using information about the consumer from an affiliate to solicit business from the consumer. This marketing restriction is implemented in a new regulation issued by the federal banking agencies. The requirements of this regulation and how this marketing restriction relates to other consumer privacy provisions of the FACT Act and the GLB Act are described in ¶ 18A.02[2][f].
- **Identity theft.** The federal banking agencies and FTC have issued a new rule to implement the identity theft provisions of the FACT Act. ¶ 18A.02[4].
- **Errors in amount encoded.** Allocation of losses when a depository bank encodes a check for less than the amount of the check was litigated in *Douglas Companies, Inc. v. Commercial National Bank*. The case is analyzed at ¶ 19.09[1][a].
- **Security interests in agricultural liens.** Rules under Article 9 of the UCC on the “name of the debtor” to be used in a financing statement seek to bring certainty to a requirement that spawned considerable litigation before the enactment of revised Article 9. Notwithstanding the new provisions, difficulties in determining the proper name to be used still exist. Texas has adopted several non-uniform amendments to the Article 9 rules to try to achieve greater certainty. These amendments are described at ¶ 20.03[5].