Commentary: 1995 Banking Law Institute Confronts Challenge to the Industry

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By Alvin C. Harrell*  

The 14th annual Southern Methodist University (SMU) Banking Law Institute was held September 14-15, 1995 in Dallas. The issues and developments discussed at the 1995 Institute reflect the challenges being faced by many banking institutions as we approach the end of the 20th century.

* As with previous reports in this journal: the SMU Banking Law Institute, this article reflects the subjective interpretations of the editor.
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protection in the sense of investment in stock of a corporation? Do the investors understand the distinction made by the use of the word “company” and believe that an LLC is more like a partnership than a corporation or do they believe an LLC to be an entirely new form of business entity?

As a matter of public policy the legislature will have the ultimate say on this issue. The legislature could do as some states have done and add LLC's to the list of defined securities. The LLC Act could be amended to provide that LLC interests are not automatically to be considered securities. For now, the Oklahoma Department of Securities will treat LLC interests similarly to joint ventures or partnerships and apply the Howey test as illuminated by Williamson to determine if such interests are securities. The practitioner must be alert to the situation created by the LLC Act, defaulting management authority to managers rather than members. Where management authority has not been set forth in the Operating Agreement or Articles of Organization, an initial presumption that the interests are investment contracts may be justified.

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As always Professor Joe Norton, James L. Walata Distinguished Faculty Fellow in Financial Institutions and Professor of Banking Law at SMU School of Law and Sir John Lubbock Professor of Banking Law at the Center For Commercial Law Studies, University of London, introduced the program. Professor Norton created the Banking Law Institute a decade and a half ago, and is the Institute’s guiding force. He noted that the banking industry is a crossroad, and is being caught in the throes of great historical changes, and that many of these changes are global. Some of these changes are legal in nature, others are technological and economic.

It was noted that today banks account for only about 25% of U.S. financial assets, and mutual funds alone hold assets equal to the entire banking system. Professor Norton noted a recent European banking conference, entitled “Banking is Dead, Long Live Banking” in recognition of the changing role of banking institutions. These comments set the stage for the 1995 Institute.

The next speaker was Sanford Brown of Bracewell & Patterson. Citing program materials written by James L. Sexton of the same firm, Brown noted that many of the challenges facing banking institutions today bear a resemblance to those facing banks in the late 1920s. He also noted the overall politicization of banking regulation, with the result that “top federal regulatory officials are now in the business of expanding or constricting lending, with much less finesse than the Federal Reserve Board.”

The result has been increased economic volatility, as banking moves from extreme caution to liberalism (and possibly back again) in response to political influences. It was noted that despite periodic pronouncements regarding safety and soundness (perhaps designed for purposes of political cover should things go wrong), “the regulatory establishment assumed a pro-lending stance at about the time Comptroller Ludwig took office.”

These abrupt swings in policy by pervasively powerful federal regulators do not bode well for the long-term health of the industry they regulate. Rather than being a stabilizing influence, the federal regulators have become one more unpredictable variable in a very high risk business.

Gene L. Jamesson of Donohoe, Jamesson & Carroll also addressed regulatory matters, updating a number of regulatory issues. He noted a recent article in The Business Lawyer, co-authored by OCC Chief Counsel Julie L. Williams and Special Assistant to the Chief Counsel Mark P. Jacobson, which takes a very expansive view of the powers of national banks, concluding that the “business of banking is an evolving activity and that the national bank charter should be treated as an organic entity whose powers may now respond over time, within certain parameters, to developments in the financial marketplace and the needs of banks' customers.”

As an example of changing regulatory views, Jamesson recalled a fantastic newspaper column by pundit Art Buchwald, describing the final merger in the U.S., between the U.S. West Corporation (owning everything west of the Mississippi) and U.S. East Corporation (ditto east of the Mississippi). In the column, the Department of Justice and Federal Reserve Board announce that the public benefits of the merger outweigh any anticompetitive effects.

Sherry Whitley of Haynes and Boone, coauthor (with Professor Norton) of the Matthew Bender Banking Law Manual, described the 1995 changes to the Texas Banking Code. These changes resulted from extensive deliberations over a two year period by several dozen banking specialists from both the public and private sector. They represent changes designed to help preserve the dual banking system, and deserve consideration by other

1. See note (Continued from page 238)

2. Including, specifically, pressures on profits, spiraling consumer debt, and political pressures on the Federal Reserve Board. These trends pose obvious dangers for the banking system, and parallels to the late 1920s cannot be avoided uneventfully.


4. 50 B.U. L. Rev. at 744. This reflects a common approach to statutory interpretation, diverging greatly from the current trend toward interpreting the "plain meaning" of statutory language. One is reminded of arguments that the U.S. Constitution is a "living document" to be interpreted so as to fill the political futures of each new era.


120. 18 Okla. Stat. 234(a) (Supp. 1994).