

9-1-1978

Banking Law: Survey of Florida Developments*

Scott L. Baena

Janice L. Romanchuck

Follow this and additional works at: <https://repository.law.miami.edu/umlr>

Recommended Citation

Scott L. Baena and Janice L. Romanchuck, *Banking Law: Survey of Florida Developments**, 32 U. Miami L. Rev. 763 (1978)

Available at: <https://repository.law.miami.edu/umlr/vol32/iss4/2>

This Article is brought to you for free and open access by the Journals at University of Miami School of Law Institutional Repository. It has been accepted for inclusion in University of Miami Law Review by an authorized editor of University of Miami School of Law Institutional Repository. For more information, please contact library@law.miami.edu.

university of miami law review

VOLUME 32

SEPTEMBER 1978

NUMBER 4

Banking Law: Survey of Florida Developments*

SCOTT L. BAENA AND JANICE L. ROMANCHUCK**

This article analyzes recent developments in the area of banking law, with special emphasis on the legislative impact. Among the topics dealt with are interest rate parity, international banking law, documentary stamp taxes, branch banking and convenience accounts.

I. INTRODUCTION	763
II. INTEREST RATE PARITY	764
III. INTERNATIONAL BANKING LAW	765
IV. EXEMPTIONS FROM DOCUMENTARY STAMP TAXES	769
V. COMPETITIVE EQUALITY AND SECOND MORTGAGE LENDING	773
VI. BANKING-IN-THE-SUNSHINE	774
VII. BRANCH BANKING REVISITED	776
VIII. ANTI-BOYCOTT	777
IX. CONVENIENCE ACCOUNTS	778
X. PREPAYMENT OF PROMISSORY NOTES	779
XI. ACCRUAL OF CAUSES OF ACTION—DEMAND NOTES	779
XII. DISPOSITION OF UNCLAIMED PROPERTY	780

I. INTRODUCTION

The 1977 developments in Florida banking law reflect, in large part, the political and economic emergence of the state both nationally and internationally.

Master plans for Florida envision a formidable commercial complex founded upon a strong financial center. The proximity of the state to the Caribbean basin makes it particularly attractive to banks desiring to service that market. However, fulfillment of the plan depends, in part, upon legislative responsiveness to the needs of foreign banks.

The backbone of Florida's financial structure will continue to be its domestic financial institutions. While foreign institutions have already caused substantial infusions into the state's economy,

* This survey covers the 1977 Regular Session and First and Second Special Sessions of the Florida Legislature.

** The authors are associated with the law firm of Helliwell, Melrose & DeWolf, Miami, Florida.

domestic institutions continue to service the mainstream. Accordingly, their competitive position must be preserved and also encouraged.

With such grand plans for the future, Florida banking law at the end of calendar year 1976 was virtually embryonic. Development in Florida's banking law during 1977 tended to be predominantly legislative in nature. Indeed, the single notable exception, discussed herein,¹ to the statutory development of Florida's banking law, itself engendered a legislative response.

The tenor of 1977 banking legislation was relatively consistent and evidenced two predominant movements. The legislation was intended to encourage foreign banks to locate in Florida. At the same time, however, the legislation was intended to preserve and, in some cases, to enhance the competitive position of domestic banks.

II. INTEREST RATE PARITY

Without doubt, the most significant development in Florida banking law in 1977 (and perhaps many years prior as well) was the creation of section 687.12 of the Florida Statutes. As adopted, that section provides that *any* lender or creditor licensed or chartered under Florida law,² or located in Florida and licensed or chartered under the laws of the United States, or lending through a mortgage broker is authorized to charge interest at "the maximum rate of interest permitted by law to be charged on similar loans or extensions of credit made by any lender or creditor in the State of Florida."³

As a result, state banks or trust companies, as well as national or Edge Act banks located in Florida, can now charge interest at rates in excess⁴ of those prescribed in the general usury statute.⁵ Consequently, such institutions may charge as much as thirty percent per annum on loans not exceeding \$2,500, since small loan companies are so authorized under the Florida Consumer Finance Act.⁶

The ultimate impact of the interest parity among licensed lenders and creditors, embodied in section 687.12 of the Florida Statutes, may be contradictory. The enactment should serve to encour-

1. *Lewis v. Bank of Pasco County*, 346 So. 2d 53 (Fla. 1977). For a discussion of this case see text accompanying notes 63-70 *supra*.

2. FLA. STAT. ch. 516, 520, 654, 656, 657, or pt. XIV of ch. 627 (1977).

3. *Id.* § 687.12(1) (emphasis added).

4. *Id.* § 687.12(4).

5. *Id.* §§ 687.01-12.

6. *Id.* § 516.031.

age state banks to consider more seriously the small loan market, which has typically been neglected due to the fact that commercial lending has been more profitable.⁷ Thus, the new legislation should generate a better market in terms of availability of funds for the borrower of small amounts. However, prior to the interest parity legislation, state banks had participated in only a relatively small proportion of the small loan business, and at substantially lower interest than the small loan companies by virtue of the general usury laws. As a result of section 687.12, the small borrower will no doubt be paying an appreciably higher rate of interest on small loans. These conflicting consequences suggest the weighty policy decision involved in dealing with the desirability of free competition among monetary institutions balanced against the need for fiscal restraints on the cost of money.

The statute does prescribe two prerequisites to invocation of interest rate parity. First, the lender or creditor must be authorized by the respective laws under which he is licensed or organized to make the particular loan or extension of credit.⁸ Second, in making loans or extensions of credit at a rate of interest that, but for the statute, would not be authorized, lenders or creditors must indicate on the promissory note or other evidence of indebtedness the specific chapter of the Florida Statutes authorizing the interest rate charged.⁹

III. INTERNATIONAL BANKING LAW

As of January 1, 1978,¹⁰ international banking corporations will be permitted for the first time to open an international bank agency or representative office in Florida.¹¹ The purpose of the legislation is to establish and to promote Florida as a center of international commerce and trade.¹² Florida's new invitation to foreign banks is expected to induce significantly increased foreign investment and trade, thus allowing Florida to compete with other states such as New York, Illinois, California, Massachusetts, Washington and Georgia, which have enacted similar legislation in an effort to promote their international banking communities.¹³

7. See *id.* § 687.02.

8. *Id.* § 687.12(2).

9. *Id.* § 687.12(4).

10. *Id.* § 658.08(3).

11. *Id.* § 659.67.

12. STAFF OF HOUSE COMM. ON COMMERCE, REPORT ON INTERNATIONAL BANKING (1977).

13. E. BLOOM, HOUSE COMM. REPORT: LEGISLATIVE INTENT AND ECONOMIC IMPACT (1977).

The proposed International Banking Act of 1977 would, if enacted, preempt existing state

To establish a banking agency or representative office in Florida, an international banking corporation first must obtain a license from the Department of Banking and Finance¹⁴ [hereinafter referred to as "the Department"]. The most significant requirement which must be met prior to issuance of a license is that the international banking corporation must demonstrate that the actual value of its assets is at least twenty-five million dollars in excess of its liabilities.¹⁵ The Department has indicated that it will impose this minimum net worth requirement on applicants seeking to establish only a representative office.¹⁶

A licensed international banking corporation may have only one place of doing business.¹⁷ There has been no determination, however, by the Department as to whether this restriction precludes a licensed foreign bank from establishing a representative office and an agency office at separate locations within the state.

Only banking corporations organized and licensed under the laws of a foreign country may be licensed in Florida.¹⁸ Although the various types of foreign entities that may be deemed "banking corporations" for purposes of obtaining a license are not set forth in the statute, the International Banking Law Rules [hereinafter cited as Proposed Rules] proposed by the Department indicates certain guidelines to be used in determining whether an entity is engaged in banking.¹⁹

Under the Proposed Rules, the Department will review the character and extent of the applicant's involvement in activities such as receiving deposits of money from the public; purchasing, selling, discounting, or negotiating for the public on a regular basis, notes, drafts, checks, bills of exchange, acceptances or other evidences of indebtedness; issuing letters of credit and so forth.²⁰ This broad and generic approach to determining whether a foreign corporation will be considered a banking corporation would presumably

regulations and establish a federal regulatory framework for subsidiaries, branches, and agencies of international corporations.

14. FLA. STAT. § 659.67(5) (1977).

15. *Id.* § 659.67(5)(a). In view of the legislation's obvious purpose to make Florida competitive with other international commercial communities, it is interesting to note that New York, which has permitted international bank agencies as well as branches for several years, only requires that the foreign bank's assets exceed its liabilities by one million dollars. N.Y. BANKING LAW § 201-a (McKinney 1977).

16. Telephone conversation with G. Dolan, Director of Division of Banking, March 23, 1978.

17. FLA. STAT. § 659.67(6)(a) (1977).

18. *Id.* § 659.67(4).

19. Dept. Banking & Fin., *Proposed International Banking Law Rules C-20 & 3C-15* (Nov. 15, 1977).

20. *Id.*

place a greater number of entities under the licensing requirements of the Department and ensure comprehensive regulation of international banking activities in Florida.

Reciprocity is an additional prerequisite for obtaining a license since no international banking corporation may be issued a license "unless it is chartered in a country which permits any bank having its principal place of business in the State of Florida to establish similar facilities therein or exercise similar powers."²¹ This requirement of reciprocity is applicable both to international banking corporations seeking a license to transact a banking business as well as to applicants for a representative office.²² Such a requirement imposes a limitation on the number of foreign banks able to obtain a license to establish a banking agency and, furthermore, may engender certain administrative and constitutional difficulties.

While other states, most notably New York, California, Illinois and Massachusetts, admit foreign banks on the assurance that the foreign nation will allow the banks of those respective states banking privileges in the foreign nation, there is presently an open question on whether the requirement of reciprocity stands on firm constitutional grounds in view of the express delegation to the federal government of control over commerce with foreign nations and over foreign affairs in general.²³ Indeed, serious doubts have been raised regarding the constitutionality of the entire existing state statutory scheme dealing with foreign banking.²⁴

Administrative enforcement could require elaborate proof or extensive investigation as to the existence of the required reciprocity. The Proposed Rules attempt to lessen the burden of proving reciprocity by stating that data as to existing activities of foreign banks in the country in which the applicant is organized or a certificate of the appropriate bank supervisory authority thereof may suffice.²⁵ The Proposed Rules avoid the harshness of a literal interpretation of the reciprocity requirement and allow the Department greater discretion and flexibility.

In determining whether the requisite reciprocity exists, the criteria and terms and conditions of admission to a foreign country shall be considered sufficiently similar if, taken as a whole,

21. FLA. STAT. § 659.67(4)(b) (1977).

22. *Id.*

23. U.S. CONST. art. II, § 8. See also Edwards, *Regulation of Foreign Banking in the United States: International Reciprocity and Federal-State Conflicts*, 13 COLUM. J. TRANSNAT'L L. 239 (1974).

24. *Foreign Banking in the United States*, 6 VAND. J. TRANSNAT'L L. 593 (Spring 1973).

25. Proposed Rules, *supra* notes 13 & 19.

with due regard to local banking practices, they are as favorable as the criteria and terms and conditions existing in Florida.²⁶

There are certain statutory restrictions on the permissible activities of an international banking corporation. The statute provides that representative offices may not conduct any banking business in the state,²⁷ rather they may merely "act in a liaison capacity with existing and potential customers of such international banking corporation and . . . generate new loans and other activities for such international banking corporation which is operating outside of the state."²⁸ The Proposed Rules elaborate on the "other activities" which may be conducted at a representative office by providing that, in addition to loans, letters of credit and deposits may be generated.²⁹

With respect to the permissible activities of international banking agencies, the statute imposes two significant restrictions. First, a banking agency "is authorized to transact only such limited business in [the] state as is clearly related to and is usual in international or foreign business and financing international commerce."³⁰ This restriction on domestic lending activities has been characterized as "more theoretical than real" since it can be overcome by "booking" loans at an office of the international banking corporation outside Florida.³¹

The second limitation on permissible activities of an international banking agency is that "no such international banking corporation shall exercise fiduciary powers or receive deposits, but it may maintain for the account of other credit balances necessarily incidental to, or arising out of, the exercise of its lawful powers."³²

While the concept of credit balance is new to Florida law, the international banking community is familiar with the concept and

26. *Id.* at IV.

27. FLA. STAT. § 659.67(11) (1977).

28. *Id.* § 659.67(1)(d).

29. Proposed Rules, *supra* notes 13 & 19.

30. FLA. STAT. § 659.67(6)(e) (1977). The original bill contained no such limitation, but provided that an international banking corporation having a licensed banking agency would be authorized to conduct a general banking business in like manner as banks existing under the laws of this state. No other states which permit foreign banks to engage in banking activities have a similar legislative restriction.

31. Doss, *Florida's Invitation to the International Banking Community*, 51 FLA. B.J. 449, 451 (1977).

32. FLA. STAT. § 659.67(6)(3) (1977). This provision finds a counterpart in the legislation of such states as Georgia and New York and is typically the substantive basis for the distinction between a branch office and an agency office of a foreign bank. Baines, *The Fine Edge of Prohibition: Interstate and Foreign Banking in the U.S.*, 93 BANKING L.J. 911 (1976).

the law of other states, such as New York³³ and California³⁴ may afford a definitional framework. Credit balances, often called "limited-purpose" deposits, may be maintained by an international banking agency as an incident to an integral part of the agency's involvement with international business and the financing of foreign commerce. Thus, a credit balance will arise as a result of loans to customers where proceeds are not immediately disbursed, from proceeds of collections made for customers' accounts and funds delivered by customers to settle letters of credit accounts with the banking agency prior to settlement date. Quite obviously, international banking agencies, which cannot accept local deposits, are precluded from competing for traditional retail banking business and must look elsewhere for funding sources.

IV. EXEMPTIONS FROM DOCUMENTARY STAMP TAXES

New section 201.23(d) of the Florida Statutes³⁵ provides an exemption from the imposition of Florida's documentary stamp tax upon promissory notes, drafts and other certificates of indebtedness when the maker, drawer or obligor resides outside the United States and certain statutorily prescribed circumstances exist.

Previously, international financing transactions were channeled into other states in an effort to avoid Florida's documentary stamp tax. As with the International Banking Law,³⁶ the legislative purpose in providing the exemption for foreign transactions from the provisions of chapter 201 of the Florida Statutes, is removal of an impediment to the growth of international financing transactions in Florida.³⁷

The provision of broadest applicability, and therefore of greatest probable impact, is found in section 201.23(1)(a) which exempts from the excise taxes imposed by chapter 201, "all promissory notes . . . and other written obligations to pay money . . . if the makers thereof or the obligors thereunder, at the time of the making or execution thereof, are individuals residing outside the United States or business organizations or other persons located outside the United States."³⁸ An important limitation to this exemption renders the section inapplicable if a majority of the equity securities of any

33. N.Y. BANKING LAW § 202-a (McKinney 1970).

34. CAL. FIN. CODE § 1756.1 (West 1968).

35. FLA. STAT. § 201.23(d) (1977).

36. *Id.* § 659.67.

37. STAFF OF SENATE COMM. ON TAX AND CLAIMS, REPORT ON EXCISE TAX EXEMPTION OF FOREIGN NOTES (1977).

38. FLA. STAT. § 201.23(1)(a) (1977).

obligor or beneficiary of the financing is owned by persons residing or organizations located within the United States.³⁹ Clearly this limitation excludes many multinational corporations and foreign subsidiaries of American corporations from the benefits of the exemption, thereby diminishing the intended effect of the legislation.

While it may reasonably be assumed that in referring to individuals, subsection (1)(a) requires that their legal residence be maintained outside the United States, the statute does not provide adequate guidance with respect to the word "located" in reference to a business or other person. A question may arise with respect to whether the intention is to equate the word "located" to the place of "doing business," to the place of incorporation or to the principal place of business.

Applying traditional rules of statutory construction, a purported grant of a tax exemption is strictly construed against a taxpayer and in favor of the taxing authority.⁴⁰ Literal application of this rule, however, would result in a narrow construction of the statute through the adoption of a "doing business" test for purposes of determining whether a corporate obligor is "located" outside the United States. A "doing business" test may present unanticipated difficulties which would hamper full realization of the legislative purpose behind the exemption. Various tests have emerged in determining whether a corporation is "doing business" within a given area which differ according to the purpose for which the inquiry is being made. Thus, increasing degrees of activity by a corporation are required to be shown in order to satisfy a "doing business" test for purposes of in personam jurisdiction, imposition of corporate income or franchise taxes, and regulation by state agencies.⁴¹ In conclusion, the "doing business" test defies mechanical application except in the most obvious cases. To require bankers and institutional lenders to make the subtle distinctions with regard to the degrees of activity undertaken by each foreign corporate borrower at the risk of a statutory penalty would inevitably lead to confusion and uncertainty.

Alternatively, another traditional rule of statutory construction requires that a statute be construed, where possible, so as to carry its legislative purpose into effect.⁴² Denying the exemption afforded under the statute to international corporations found merely to be "doing business" within the United States would severely restrict

39. *Id.* § 201.23(2)(c).

40. *State ex rel. Szabo Food Serv., Inc. v. Dickinson*, 286 So. 2d 529, 530-31 (Fla. 1973).

41. *THE CORPORATION TRUST CO., WHAT CONSTITUTES DOING BUSINESS* 1-4 (1968).

42. *Tyson v. Lanier*, 156 So. 2d 833, 836 (Fla. 1963).

the applicability of the exemption and thwart the legislative effort to promote international banking activity in Florida. Under this analysis, a substantial degree of activity within the United States would be required to place the corporation outside the scope of the exemption.

The place of incorporation test is also unsatisfactory because a place of incorporation can easily be changed to avoid the tax. Accordingly, it is suggested that adoption of a "principal place of business" test by the Department of Revenue would best reduce uncertainty, ensure that the applicability of the statutory exemption is not unduly restricted and prevent the easy evasion of the tax.

A second exemption from the excise taxes imposed by chapter 201 of the Florida Statutes is provided by new subsection (1)(b) of section 201.23 relating to drafts and bills of exchange drawn upon and accepted by a bank having an office in Florida which arise out of certain international trade transactions. At the date of acceptance, the drawer of the draft or bill of exchange, or the persons for whose benefit the financing is conducted, must be individuals residing outside the United States or business organizations or other persons located outside the United States.⁴³

Furthermore, the draft or bill of exchange must "arise out of transactions involving the importation or exportation of goods or the storage of goods abroad, or be drawn by banks or bankers in foreign countries or dependencies or insular possessions of the United States for the purpose of furnishing dollar exchange as required by the usages of trade in the respective countries."⁴⁴

As used in the statute, "importation or exportation of goods" is not defined and, therefore, it is not clear whether the exemption is limited solely to drafts arising out of transactions between the United States and foreign countries. In this regard, reference might be made to former Regulation C⁴⁵ of the Federal Reserve Board since Florida's statute seems to regulate parallel subject matter. Therein, "importation or exportation of goods" was defined as "the shipment of goods between the United States and . . . any of its dependencies or insular possessions, or between dependencies or insular possessions and foreign countries, or between foreign countries . . ."⁴⁶

Since it would be inconsistent with the purpose of promoting international banking to restrict the exemption to transactions involving the importation and exportation between the United States

43. FLA. STAT. § 201.23(1)(b) (1977).

44. *Id.*

45. 12 C.F.R. § 203 (1974)(withdrawn April 1, 1974).

46. *Id.* § 203.1.

and a foreign country and to exclude that of goods solely between foreign countries, it would seem appropriate for Florida to employ a definition similar to the one promulgated by the Federal Reserve Board.

Subsection (2) of section 201.23 sets forth two exceptions to the application of the foregoing exemptions. First, it is broadly stated in subsection (2)(a) that the exemptions do not apply to "all mortgages, trust deeds, security agreements or other evidence of indebtedness relating to the purchase or transfer of real property located in Florida filed and/or recorded in the state which shall be taxable as if they were entered into within this state."⁴⁷

As drafted, it appears that this exception is applicable to all exemptions provided in chapter 201 of the Florida Statutes, and not merely those relating to foreign transactions.⁴⁸ Furthermore, the exception provided in subsection (2) subtly dictates that irrespective of whether such documents are executed outside Florida, the stamp tax *shall be imposed* when such documents relate to real estate purchases or transfers and are filed and/or recorded in Florida, in effect treating them as if they were entered into in Florida. This provision closely parallels and complements the 1977 amendments to sections 201.01⁴⁹ and 201.08⁵⁰ of the Florida Statutes, although those sections are not limited in application to real estate financing transactions. The obvious purpose of these amendments is to prevent circumvention of the excise tax by borrowers and lenders, who may be tempted to play geographical games in order to avoid a showing that an obligation was executed, removed from or shipped into Florida.⁵¹ To further prevent avoidance of the stamp tax, the amendments also require that the documentary stamps, which were formerly affixed to the note or certificate of indebtedness, now be affixed to the mortgage or trust deed at the time of recordation.⁵²

A second exception to the application of the exemptions provided in section 201.23 is contained in subsection (2)(b) which provides that a nonresident maker of a promissory note is disqualified

47. FLA. STAT. § 201.23(2)(a) (1977).

48. Interestingly, the title to the legislation erroneously describes Senate Bill 254 as providing in part "certain *exemptions* with respect to mortgages," 1977 Fla. Laws, ch. 77-463 (emphasis added), which, in conjunction with other discrepancies between the title and section 201.23 as enacted, may render the statute vulnerable to constitutional attack. See FLA. CONST. art. III, § 6.

49. 1977 Fla. Laws, ch. 77-414, § 1 (amending FLA. STAT. § 201.01 (1975)).

50. *Id.* § 2 (amending FLA. STAT. § 201.08 (1975)).

51. [1959-1960] FLA. ATT'Y GEN. BIENNIAL REP. at 570.

52. FLA. STAT. §§ 201.01 & .08(1) (1977).

from exemption if the purpose of the financing is to finance all or any part of the purchase of real estate located in Florida or personal property for use in Florida.⁵³ This exception implements the legislative intent to exclude from the exemption any instrument designed to finance Florida real estate and to provide exemptions only for transactions wholly of international character. It is important to note, however, that this exception does not apply to drafts and bills of exchange involving the importation or exportation of goods.⁵⁴

The obligee under a promissory note or other instrument described in subsection (1)(a) of section 201.23 is entitled to rely on a written certificate by the makers that no part of the proceeds of such financing is intended for the purchase of Florida real estate or personal property for use in Florida.⁵⁵ Similarly, the obligee under a promissory note or the acceptee of a draft is entitled to rely on a written certificate of each maker or obligor certifying that a majority of its equity securities are not owned by residents of the United States or businesses located in the United States.⁵⁶ Presumably, one entitled to rely on such certificates may still be liable for payment of the excise tax if it is later determined that the transaction was taxable. Such reliance, however, if reasonable, would preclude imposition of the statutory penalty levied for failure to pay excise taxes imposed under chapter 201.⁵⁷

V. COMPETITIVE EQUALITY AND SECOND MORTGAGE LENDING

On July 1, 1976, section 658.051, of the Florida Statutes became effective. Essentially, that section provides that, with the approval of the Department, any state bank may exercise any power it could exercise under federal statutes or regulation as if it were a federal bank, except for any power in conflict with state law relating to establishment of branch banks.⁵⁸ The concept, of course, is to allow the Department the flexibility to expand state bank powers to equal those of national banks with the resultant effect of equalizing competition.

The most significant utilization of this section came in 1977 with the ad hoc repeal of the limitations on second mortgage lending

53. *Id.* § 201.23(2)(b).

54. *Id.* § 201.23(1)(b).

55. *Id.* § 201.23(2)(b).

56. *Id.* § 201.23(2)(c).

57. The penalty for failure to pay the excise taxes due on a document was also amended during the 1977 legislative session to provide an automatic penalty equal to twenty-five percent of the purchase price of the stamps not affixed unless it is determined that the failure to pay the tax is due to fraud, in which case a penalty in the amount of one hundred percent of the deficiency is prescribed. *Id.* § 201.17.

58. *Id.* § 658.051.

as prescribed by section 659.17(3)(d) of the Florida Statutes.⁵⁹ Notwithstanding the legislative restriction on second mortgage lending, the Department has sanctioned by rule such loans subject only to the limitations that: the property is residential; the combined value of the first and second mortgages does not exceed seventy-five percent of the property's appraised value; the mortgage is neither of the purchase money nor balloon varieties; and the term of the mortgage does not exceed ten years.⁶⁰

Thus, the Department has dulled the competitive edge that national banks have traditionally wielded in Florida by permitting state banks to vie for a more substantial portion of the overall second mortgage loan portfolio.⁶¹ The impact of this expansion should be easily measurable in dollars and cents. It may, however, signal the manner in which unbridled executive discretion could undermine a legislative choice in the name of competition. The expansive power delegated to the Department pursuant to section 658.051 may constitute an unconstitutional delegation of power because it contains only vague limitations on this broad grant of power to an executive body.⁶²

VI. BANKING-IN-THE-SUNSHINE

Prior to the 1977 legislative revisions, section 658.10(1) of the Florida Statutes provided, *inter alia*, that while bank or trust company applications, investigation reports and related information are confidential communications, the same may be made public "with the consent of the department."⁶³ With this apparent authority the Comptroller expressed his intention to demand, and secure, from banking corporations lists of all their stockholders and to release such lists to the news media or otherwise open them for inspection by the public.

To thwart such disclosure, a number of banks, as well as directors and stockholders of such banks, sought and prevailed to have the section declared unconstitutional.⁶⁴ The circuit court found that the Department's authority to release information was an unconstitutional delegation of power by the legislature because there were no standards, guidelines or restrictions to limit or to regulate the action of the Department in granting or withholding consent to

59. *Id.* § 659.17(3)(d) (1977).

60. 1 DEPT. BANKING & FIN. 3C-11.17.

61. See generally 12 U.S.C. § 371(a)(1) (1970).

62. *E.g.*, Lewis v. Bank of Pasco County, 346 So. 2d 53 (Fla. 1977).

63. FLA. STAT. § 658.10(1) (1975).

64. Lewis v. Bank of Pasco County, 346 So. 2d 53, 54 (Fla. 1977).

make confidential information public.

The decision was appealed to the Supreme Court of Florida which affirmed. A petition for rehearing was filed, but was denied. A petition for clarification of the supreme court's opinion was filed and was granted. In clarification, the supreme court restated the circuit court opinion and emphasized "that statutes granting power to administrative agencies must clearly announce adequate standards to guide the agencies in the execution of the powers delegated."⁶⁵

In reaction to the supreme court's decision, the Comptroller complained that the effect of the opinion was to prohibit the Department from carrying out its statutory duties in several respects.⁶⁶ First, the Department would be prohibited from providing information to state and federal law enforcement agencies regarding criminal activity on the part of officers and directors of state banks. Second, the Department would be prohibited from effectively participating in public hearings before the Division of Administrative Hearings.⁶⁷

Having successfully aroused the support of the Florida Bankers Association and the Florida Legislature, the Comptroller was able to gain passage of a replacement for section 658.10. The enactment has been categorized as a "technical clean-up of a [s]tatute due to [s]upreme [c]ourt action."⁶⁸ Pursuant to the new section, all bank or trust company applications filed with the Department, including all related information, are to be open to the public pursuant to chapter 119 of the Florida Statutes and Departmental rules. However, certain information such as personal financial statements, reports of examinations and, under certain circumstances, investigatory records for civil or criminal law enforcement purposes are confidential. Confidential information may be disclosed only pursuant to a court order, legislative subpoena, or the order of a hearing officer.

The new section also amends section 659.25 of the Florida Statutes, which prohibits any bank or trust company from permitting any stockholder access to any books or records of the bank or trust company other than its general statement book.⁶⁹ The new section provides that banks and trust companies must keep a current list of their stockholders at their principal office. Furthermore, these

65. *Id.* at 54.

66. STAFF OF HOUSE COMM. ON COMMERCE, REPORT ON CONFIDENTIALITY OF BANK RECORDS (1977) [hereinafter cited as STAFF REPORT].

67. FLA. STAT. §§ 120.50-73 (1975).

68. STAFF REPORT, *supra* note 66.

69. FLA. STAT. § 659.25 (1975), *repealed by* 1976 Fla. Laws, ch. 76-168 § 3(2)(t) (effective July 1, 1980).

lists are now subject to the inspection of all stockholders of the bank or trust company as well as the Department examiners, provided that the Department shall not disclose or make public such lists.⁷⁰

VII. BRANCH BANKING REVISITED

In an effort to clarify the branch banking statutes, the 1977 Legislature enacted several additional revisions to section 659.06 of the Florida Statutes.

First, subsection (1)(a) was revised to eliminate the outdated requirement that the Department complete consideration of pending bank applications before action upon a branch application.⁷¹ Second, subsection (2)(a) was amended to provide that main banking room service facilities may be located on the property of or contiguous to branch banks as well as that of the parent banks. Third, subsection (2)(b) relating to drive-in and walkup facilities was repealed.⁷² As a transitional measure, a grandfather clause was enacted whereby such facilities existing immediately prior to the date of repeal (June 27, 1977) were converted into branches and automatically entitled to be licensed as such, although not included or counted as one of the two branches which could be established by the parent bank during 1977.⁷³

Finally, section 674.106 was added to the Uniform Commercial Code chapter dealing with bank deposits and collections.⁷⁴ This section interfaces the branching concept of separateness of branches and parent banks with the Code concept of notice by providing that a branch is a separate bank for the purpose of computing the time in which and determining the place at which action may be taken or notices or orders given under chapters 673 and 674 of the Florida Statutes. This provision was, in fact, suggested by the American Law Institute in the 1962 Code.⁷⁵

In addition, the legislature added nonuniform language to section 674.106 by further providing that receipt of any notice or order by, or the knowledge of, one branch of a bank is not actual or constructive notice to or knowledge of any other branch of the same bank and does not impair the right of such other branch to be a holder in due course of an item.

70. As originally proposed, subsection 5 would have permitted public disclosure of shareholders' lists of state banks.

71. FLA. STAT. § 659.06(1)(a)(1) (1977).

72. *Id.* § 659.06(2)(b) (repealing FLA. STAT. § 659.06(2)(b) (1975)).

73. *Id.* § 659.06(1)(a)(1).

74. *Id.* § 674.106.

75. U.C.C. § 4-106 (1962 version).

As already mentioned, this provision is another instance of non-uniformity of Florida's Code. The concept, however, is supported by the Official Comments to the 1962 version of the Code, which also suggest the legal effect of the additional language.⁷⁶ As stated therein:

[w]hether a branch has notice sufficient to affect its status as a holder in due course of an item taken by it should depend upon what notice that branch has received with respect to the item. Similarly the receipt of a stop payment order at one branch should not be notice to another branch so as to impair the right of the second branch to be a holder in due course of the item, *although in circumstances in which ordinary care requires the communication of a notice or order to the proper branch of a bank, such notice would be effective at such proper branch from the time it was received or should have been received.*⁷⁷

VIII. ANTI-BOYCOTT

By recent statute, the legislature has sought to limit the extent to which domestic and foreign corporations doing business in Florida can engage in discriminatory practices to further, comply with, or support a foreign boycott. The statute applies to business entities which accept letters of credit or other documents evidencing credit transfers, as well as those which contract for the exchange or purchase of commodities, if such documents contain a discriminatory provision. Such clauses, as proscribed, would typically require discrimination against, or refusal to engage in commerce with, third persons or groups on the basis of sex, race, religion or national origin. Such activity on the part of corporations doing business in Florida will be deemed an unlawful combination in restraint of trade.⁷⁸

In addition to prohibiting express contractual provisions, the statute condemns as an unlawful restraint of trade certain conduct such as requesting or furnishing "information with regard to or reflective of the place where commodities were not manufactured or did not originate for the use of a foreign country, its nationals, or residents in order to comply with, further or support a foreign boycott."⁷⁹ Despite the tortuous language, the obvious purpose of the statute is to proscribe private restrictions on international trade.

Proof of intent to comply with or support a foreign boycott is

76. *Id.* § 4-106, comment 4 (1962 version).

77. *Id.* (emphasis added).

78. FLA. STAT. § 542.13.

79. *Id.* § 542.13(1)(d).

not explicitly required, although it is arguable that such proof would be necessary in order to show, for example, that a bank refused to accept a letter of credit "on the ground that it does not contain such a discriminatory provision or certification in order to comply with, further or support a foreign boycott."⁸⁰

The statutory penalties for unlawful restraint of trade are harsh. They include forfeiture of a domestic corporation's charter,⁸¹ denial of a foreign corporation's right to do business within this state,⁸² and criminal liability.⁸³

In view of recent amendments to the federal Export Administration Act,⁸⁴ the Florida Legislature's constitutional power to enact laws intended to proscribe foreign boycotts may be seriously questioned. The history and purpose of the Export Administration Act reveals that it is the policy of the federal government to oppose restrictive state practices or boycotts sponsored or imposed against other countries friendly to the United States.⁸⁵ It would appear, therefore, that Congress has preempted this subject matter under its express power to regulate commerce with foreign nations.⁸⁶ Furthermore, given the potential of the Florida anti-boycott statute to obstruct or embarrass federal foreign policy, this new legislation may well be vulnerable to constitutional challenge under traditional principles of federalism.⁸⁷

IX. CONVENIENCE ACCOUNTS

Section 659.292 of the Florida Statutes, as enacted by the 1977 legislature, creates a new species of bank accounts: the convenience account.⁸⁸ As defined therein, a convenience account is a demand deposit in the name of one individual (principal) in which one or more other individuals have been designated as agent with the right only to withdraw funds from or draw checks on such account.⁸⁹

Section 659.292 provides that the agency relationship created under the convenience account is not affected by the subsequent

80. *Id.* § 542.13(1)(b).

81. *Id.* § 542.02.

82. *Id.* § 542.04.

83. *Id.* § 542.05.

84. 50 U.S.C.A. § 2401 (Supp. 1977).

85. *Antco Shipping Co. v. Siderman S.p.A.*, 417 F. Supp. 207 (S.D.N.Y. 1976), *aff'd mem.*, 553 F.2d 93 (2d Cir. 1977).

86. U.S. CONST. art. II, § 8, cl. 3.

87. *Zschernig v. Miller*, 389 U.S. 492 (1968); *Bethlehem Steel Corp. v. Board of Comm'rs*, 276 Cal. App. 2d 221, 80 Cal. Rptr. 800 (1969).

88. FLA. STAT. § 659.292 (1977).

89. *Id.*

death or incompetence of the principal. This concept goes even further to abolish the common law rule that the death of a principal is considered as an instantaneous and absolute revocation of the authority of his agent, except when the agent's power is coupled with an interest.⁹⁰ While the new statute preserves the agency relationship beyond the principal's death or incompetency, it does *not* vest the agent with survivorship rights in the account as, for example, in the case of a joint account.⁹¹ Presumably, the agent's rights in the account are for the benefit of the principal or his heirs or legatees. Indeed, a bank's right of setoff against the account is limited to the indebtedness of the principal to the bank.⁹² What the statute does, however, is insulate the bank from claims resulting from withdrawals by the agent which are misapplied or outside the scope of the agency.⁹³

X. PREPAYMENT OF PROMISSORY NOTES

As a general rule of common law, the payee of an instrument is under no obligation to accept payment thereon prior to maturity.⁹⁴ The 1977 legislature, however, has created section 697.06 of the Florida Statutes. This section provides that any note which is silent as to the right of the payor to make prepayment may be prepaid in full without penalty. Since the legislature indicated that a note "may be prepaid in full," rules of strict statutory construction would suggest, therefore, that common law principles endure as to partial prepayment, the same being outside the scope of the section.

XI. ACCRUAL OF CAUSES OF ACTION—DEMAND NOTES

Prior to the 1977 revisions to sections 95.031(1) and 673.122(1)(b), there existed a conflict as to when a cause of action accrued on a demand instrument and when the statute of limitations tolled on such action. Specifically, section 95.031(1) provided that a cause of action on a demand note accrued on the first written demand for payment, whereas section 673.122(1)(b) provided that such a cause of action accrued upon the date of the note or, if no date were stated, on the date of issue.

90. FLA. STAT. § 709.01 (1975) was the first encroachment on this common law principle. That section validates the acts of an agent done after the death of the principal in the absence of knowledge of the death by a third party dealing with the agent. See Comment, *Revocation of Agency by Death of Principal*, 1 MIAMI L.Q. 107 (1947).

91. FLA. STAT. § 659.291 (1975), *repealed* by 1976 Fla. Laws, ch. 76-168 § 3 (effective July 1, 1980).

92. FLA. STAT. § 659.292(5) (1977).

93. *Id.* § 659.292(4).

94. 10 C.J.S. *Bills & Notes* § 462 (1955).

By virtue of the revisions, in the case of a demand instrument, other than a note payable on demand, a cause of action accrues against the maker or an acceptor upon its date or, if no date is stated, on the date of issue. In the case of a note payable on demand, a cause of action accrues against the maker, any endorser or guarantor upon the first written demand for payment.

XII. DISPOSITION OF UNCLAIMED PROPERTY

The 1977 revisions to the Unclaimed Property Act⁹⁵ as it pertains to banking organizations were relatively minor. First, the term "banking organization" was redefined to explicitly include national as well as state banks.⁹⁶ Second, the period of dormancy was reduced from fifteen years to ten years, except in the case of traveler's checks.⁹⁷

95. FLA. STAT. §§ 717.01-.30 (1977).

96. *Id.* § 717.02(1).

97. *Id.* § 717.03.