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vealed that mere installation does not constitute physical injury to property. First, Judge Cudahy contended that the words "physical injury" must be given a literal, plain sense meaning. The judge further argued that the purpose of insurance does not extend to risks that were not bargained for ahead of time. In addition, the court noted that the relevant parties for interpreting the language of the contract are Eljer, Liberty, and Travelers, and not the drafters of the CGL standard policy. ❖

— *Sharon Hannaford*

Bank Cannot Terminate Credit Card Agreement with Store Involved in Bankruptcy Proceedings

In *Citizens and Southern National Bank v. Thomas B. Hamilton Co.*, 969 F.2d 1013 (11th Cir. 1992), the United States Court of Appeals for the Eleventh Circuit held that a merchant bank could not terminate a credit card agreement with a merchant who had filed for reorganization under chapter 11 of the Bankruptcy Code. The court affirmed the decisions of the bankruptcy court and the district courts in finding that the agreement in question did not have the primary purpose of providing financial accommodations, and therefore the bank could not terminate it after a bankruptcy filing.

Credit Card Merchant Agreement

Thomas B. Hamilton Co., Inc. ("Hamilton") was a retail merchant which had an ongoing credit card agreement with Citizens and Southern National Bank ("C & S"). This agreement allowed Hamilton to accept the MasterCard or Visa credit cards presented by its customers. C & S, as the merchant bank, would purchase the sales drafts from these retail transactions at a discount agreed to by both parties, which usually amounted to 96 percent of the transaction amount. C & S paid Hamilton within a few days of the purchase by direct deposit into a commercial checking account that Hamilton maintained at C & S. The bank would then present the sales drafts to the card-issuing bank, which would arrange for a transfer of funds from MasterCard or Visa to C & S, and bill the cardholder for the amount of the purchase.

In the event that a valid cardholder disputed an item on his bill, the card-issuing bank would have a right of chargeback against the merchant bank, in this case C & S. The agreement between C & S and Hamilton provided that under certain circumstances C & S would be able to pass this chargeback on to Hamilton. Situations in which C & S would have this right included returned merchandise, illegible sales drafts, and any other situation which may have been caused by Hamilton. The agreement provided three ways for C & S to protect itself from being billed for a chargeback that Hamilton could not or would not cover: it could deduct amounts owed from Hamilton's checking account; it could demand prompt payment for the chargeback amount; or it could hold a portion of the payments it owed Hamilton on reserve to cover future chargebacks.

In June 1989, Hamilton filed for chapter 11 reorganization. C & S required Hamilton to reapply for a credit card merchant agreement and rejected its application because of Hamilton's uncertain financial future.

The Dispute

Section 365(c)(2) of the Bankruptcy Code does not allow a party to an executory contract to terminate that contract solely because of another party's bankruptcy filing, unless the contract is "a contract to make a loan, or extend other debt financing or financial accommodations, to or for the benefit of the debtor, or to issue a security of the debtor." C & S argued that the credit card agreement was an extension of financial accommodations by C & S to Hamilton, and the bank could therefore terminate it upon Hamilton's bankruptcy filing. Hamilton contended that the agreement was not a contract for financial accommodations, and therefore Hamilton's trustee in bankruptcy could assume it.

Not a Contract to Extend Financial Accommodations

The court looked both at precedent and at the legislative history of the Bankruptcy Code in concluding that the agreement between Hamilton and C & S was not a contract to extend financial accommodations. The court determined that the term "financial accommodations" should be narrowly construed to mean "the extension of money or credit to accommodate another." In defining the term this way, the court said a distinction must be made between contracts whose primary purpose was to extend some sort of credit and contracts in which some extension of credit was merely incidental to a larger purpose.

Here, the court found that the agreement between Hamilton and C & S was for the sale of credit card sales drafts. Hamilton could sell its products to credit card customers, and C & S could make a small profit on these sales as the merchant bank. The real credit was extended from the credit card issuing bank to the consumer; the issuing bank bore the risk of nonpayment of a valid charge by a consumer. The terms of the agreement between C & S and Hamilton did not contemplate any extension of credit from C & S to Hamilton. Any credit that may have been extended to Hamilton in this arrangement was incidental to the larger purposes of the agreement.

The court further noted that there was not a significant risk that C & S would be harmed by a continuing relationship with Hamilton. The two parties had enjoyed a good relationship for several years, and Hamilton did not owe C & S any money. The court reminded C & S that the terms of the agreement provided a number of ways for C & S to protect itself against nonpayment of chargebacks by Hamilton. Finally, the court stated that if C & S could demonstrate that remaining a party to the contract with Hamilton would place it at unreasonable risk, then the bankruptcy court could protect C & S from future defaults.

The court based its conclusions on public policy considerations and noted that this type of credit card merchant agreement was very common among all types of retail businesses. Therefore, if these agreements could not be assumed by a trustee in bankruptcy, it would be virtually impossible for a struggling retail store to financially rehabilitate itself. The court thus held that the credit card merchant agreement was not a contract to extend financial accommodations and therefore was not one which the bank could terminate upon a bankruptcy filing. ❖

— Thomas Melody

State Consumer Protection Agency May Regulate Correspondence from Out-of-State Solicitors

In ***Consumer Protection Div. v. Outdoor World Corp.***, 603 A.2d 1376 (Md. Ct. Spec. App. 1992), the Maryland Court of Special Appeals held that the Maryland Consumer Protection Agency could regulate communications sent to state residents that violated the Consumer Protection Act ("Act"). The court held that the Maryland Consumer Protection Agency could not limit or control high pressure sales practices that occurred entirely outside its borders.

Vague Prize Notices and High Pressure Sales Tactics

Outdoor World Corporation ("OWC"), a Pennsylvania Corporation, sold memberships in campgrounds it owned in Pennsylvania and Virginia. Through the mailing of notices to Maryland residents, OWC solicited sales of campground membership. OWC began soliciting Maryland residents in 1984, and in the ten month period from November 1988 to September 1989, mailed approximately six million notices. The notices, however, contained alias corporate names and never mentioned OWC or the campsites. Instead, the notices stated that the recipient had definitely won at least one prize from those listed in the notice and alluded that the recipient could win or already had won a very valuable prize. However, in order to claim the prize, the "winner" had to appear at a particular location, invariably an OWC campground.

When the "winners" arrived at the campgrounds, OWC required them to take a campground tour before receiving the prize. Furthermore, throughout the visit, the OWC salesmen subjected the consumers to a lengthy and aggressive sales pitch designed to induce them to purchase a campground membership. The tour and sales pitch lasted almost a full day. Additionally, when OWC finally awarded the prizes, they were generally of little value and often required payment of a redemption fee.

Approximately 43,000 Marylanders visited OWC sites since 1986 and about 5,000 of them purchased campsite memberships, garnering OWC about $60,000,000.

State Agency Charges Seller

In May 1989, Maryland's Consumer Protection Division ("Division") charged OWC with false and misleading solicitations, and unfair and deceptive sales tactics in violation of the Act. MD. CODE ANN., COM. LAW §13-301 et. seq. (1991).

The first charge concerned the content of the notice sent to Maryland residents. The Division alleged that OWC failed to mention the tour requirement, the redemption fees, the value of the prizes, the odds of winning, and the membership scheme. Furthermore, the Division stated that the use of aliases gave the false impression that OWC had particular sponsors or affiliations.

The second charge concerned OWC's conduct at the campsites. The Division asserted that OWC's statements regarding campground facilities, membership price, and membership contracts were misleading and deceptive. The Division also contended that the length of the tour violated the Act.

The Chief of the Division adopted the hearing officer's conclusion that OWC committed all the violations for which it was charged and entered a final administrative order. The injunctive portion of th order placed restrictions on the tours and high pressure sales tactics exercised at the campgrounds. It also provided that those who paid a redemption fee would get a full refund and that those who had received a redemption certificate, but had not yet paid, were entitled to collect their prizes without payment. Under the order, OWC would provide lists and funding for the Division to notify the consumers of their respective rights and refund the required amounts. Furthermore, the injunctive order required that future correspondence sent to Maryland residents must comply with the Act.

The restitution portion of the order allowed any Maryland resident who purchased a membership after 1984 to rescind the contract and receive a refund. However, to qualify for the refund, the Maryland consumer must have visited a campground in response to a mail solicitation and gone on a tour or listened to a sales presentation to obtain a prize.

OWC appealed the order to the Circuit Court for Baltimore. The circuit court held that the final order exceeded the Division's jurisdiction because the conduct it sought to regulate occurred entirely out-of-state. Despite acknowledging that the notices were mislead-